DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 13-354
Title: Sylvia Burwell, Secretary of Health and Human Services, et al., Petitioners
v.
Hobby Lobby Stores, Inc., et al.
Docketed: September 19, 2013
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (12-6294)
Decision Date: June 27, 2013
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 19 2013	Petition for a writ of certiorari filed. (Response due October 21, 2013)
Oct 21 2013	Brief of respondents Hobby Lobby Stores, Inc., et al. filed.
Oct 21 2013	Brief amicus curiae of Association of Gospel Rescue Missions, et al filed. VIDED.
Oct 21 2013	Brief amicus curiae of Ovarian Cancer National Alliance filed.
Oct 21 2013	Brief amicus curiae of Constitutional Accountability Center filed.
Oct 21 2013	Brief amici curiae of Physicians for Reproductive Health, et al. filed.
Oct 21 2013	Brief amici curiae of California, et al. filed.
Oct 21 2013	Brief amicus curiae of American Jewish Committee (AJC) filed. VIDED.
Nov 4 2013	DISTRIBUTED for Conference of November 26, 2013.
Nov 5 2013	Reply of petitioners Kathleen Sebelius, Secretary of Health and Human Services, et al. filed. (Distributed)
Nov 14 2013	Letter and attachment of petitioners Kathleen Sebelius, Secretary of Health and Human Services, et al. filed. (Distributed)
Nov 26 2013	Petition GRANTED. The petition for a writ of certiorari in No. 13-356 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Dec 3 2013	Letter from counsel for respondents Hobby Lobby Stores, Inc., et al. regarding briefing. VIDED
Dec 3 2013	Letter from counsel for Sebelius, Sec. of H&HS, et al. regarding briefing filed. VIDED
Dec 3 2013	Letter from counsel for petitioner Conestoga Wood Specialties Corp., et al. regarding briefing filed. VIDED
Dec 5 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners

Dec 6 2013	All briefs for an amicus curiae must be filed on or before Tuesday, January 28, 2014. An amicus curiae brief in support of the Government or in support of neither party shall bear a light green cover, and an amicus curiae brief in support of a non-Government party shall bear a dark green cover. An amicus curiae may file only a single brief in case Nos. 13-354 and 13-356. VIDED
Jan 8 2014	SET FOR ARGUMENT ON Tuesday, March 25, 2014. VIDED
Jan 10 2014	Joint appendix filed.
Jan 10 2014	Brief of petitioner Kathleen Sebelius, Secretary of Health and Human Services, et al. filed.
Jan 14 2014	Record received from U.S.C.A. 10th Circuit is electronic and located on PACER, along with one envelope containing the pleadings in this case.
Jan 23 2014	Brief amici curiae of Pacific Legal Foundation,, et al. in support of non-Government parties filed. VIDED.
Jan 24 2014	Brief amici curiae of Azusa Pacific University, et al. in support of neither party. VIDED.
Jan 24 2014	Brief amici curiae of Center for Constitutional Jurisprudence, et al. in support of non-Government parties filed. VIDED.
Jan 24 2014	Brief amici curiae of Reproductive Research Audit in support of non-Government parties filed. VIDED.
Jan 27 2014	Brief amicus curiae of National Religious Broadcasters in support of non-Governent parties filed.
Jan 27 2014	Brief amici curiae of Senators Orrin G. Hatch, et al. in support of non-Government parties filed. VIDED.
Jan 27 2014	Brief amici curiae of Democrats for Life of America and Bart Stupak in support of non-Government parties filed. VIDED.
Jan 27 2014	Brief amici curiae of Michigan, Ohio, and 18 Other States in support of non-Government parties filed. VIDED.
Jan 27 2014	Brief amici curiae of Drury Development Corp., et al. in support of non-Government parties filed. VIDED.
Jan 27 2014	Brief amicus curiae of National Association of Evangelicals in support of non-Government parties filed. VIDED.
Jan 27 2014	Brief amicus curiae of American Freedom Law Center in support of non-Government parties filed. VIDED.
Jan 27 2014	Brief amicus curiae of Texas Black Americans for Life, et al. in support of non-Government parties filed. VIDED.
Jan 27 2014	Brief amicus curiae of Hon. Daniel H. Branch in support of non-Government parties filed. VIDED.
Jan 27 2014	Brief amici curiae of Church-State Scholars Frederick Mark Gedicks, et al. in support of the Government filed. VIDED.
Jan 27 2014	Brief amici curiae of Freedom From Religion Foundation, et al. in support of the Government filed.
Jan 27 2014	Brief amicus curiae of State of Oklahoma in support of non-Government parties filed.
Jan 27 2014	Brief amici curiae of Liberty, Life, and Law Foundation, et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Beverly Lahaye Institute and Janice Shaw Crouse, Ph.D. in support of non-Government parties filed. VIDED.

Jan 28 2014	Brief amici curiae of 67 Catholic Theologians and Ethicists in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Women Speak for Themselves in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of United States Conference of Catholic Bishops in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Cato Institute in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Knights of Columbus in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of U.S. Women's Chamber of Commerce, et al. in support of the Government filed. VIDED.
Jan 28 2014	Brief amici curiae of Guttmacher Institute and Professor Sara Rosenbaum in support of the Government filed. VIDED.
Jan 28 2014	Brief amici curiae of American Jewish Committee, et al. in support of the Government filed. VIDED.
Jan 28 2014	Brief amici curiae of Religious Organizations in support of the Government filed. VIDED.
Jan 28 2014	Brief amici curiae of National Women's Law Center, et al. in support of the Government filed. VIDED.
Jan 28 2014	Brief amici curiae of 91 Members of the United States House of Representatives in support of the Government filed. VIDED.
Jan 28 2014	Brief amici curiae of American College of Obstetricians and Gynecologists, et al. in support of the Government filed. VIDED.
Jan 28 2014	Brief amici curiae of Foreign and Comparative Law Experts Lawrence O. Gostin, et al. in support of the Government filed. VIDED.
Jan 28 2014	Brief amici curiae of Corporate and Criminal Law Professors in support of the Government filed. VIDED.
Jan 28 2014	Brief amici curiae of California, et al. in support of the Government filed. VIDED.
Jan 28 2014	Brief amici curiae of National League of Cities, et al. in support of the Government filed. VIDED.
Jan 28 2014	Brief amici curiae of Ovarian Cancer National Alliance, et al. in support of the Government filed. VIDED.
Jan 28 2014	Brief amici curiae of Lambda Legal Defense and Education Fund, Inc., et al. in support of the Government filed. VIDED.
Jan 28 2014	Brief amicus curiae of Family Research Council in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Liberty Institute in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Breast Cancer Prevention Institute, et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of 9 Academic Institutions, et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of C12 Group, LLC in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of National Jewish Commission on Law and Public Affairs

	("COPLA"), et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Liberty University and Liberty Counsel in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Brennan Center for Justice at N.Y.U. School of Law in support of the Government filed. VIDED.
Jan 28 2014	Brief amicus curiae of Constitutional Accountability Center filed. VIDED.
Jan 28 2014	Brief amici curiae of United States Senators Murray, et al. in support of the Government filed. VIDED.
Jan 28 2014	Brief amicus curiae of Catholic Medical Association in support of non-Government parties filed.
Jan 28 2014	Brief amicus curiae of American Civil Rights Union in support of non-Government parties filed.
Jan 28 2014	Brief amici curiae of Massachusetts Citizens for Life, Inc., et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Council for Christian Colleges & Universities, et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Christian Booksellers Association, et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Eagle Forum Education & Legal Defense Fund, Inc., et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Foundation for Moral Law in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Association of American Physicians and Surgeons, Inc., et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Rutherford Institute in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Ethics and Public Policy Center in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of U.S. Senators Ted Cruz, et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Church of the Lukumi Babalu Aye, Inc., et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Judicial Watch in support of non-Government parties filed.
Jan 28 2014	Brief amici curiae of 38 Protestant Theologians, et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Electric Mirror, LLC, et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of American Center for Law & Justice, et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Thomas More Law Center in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of John A. Ryan Institute for Catholic Social Thought in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Judicial Education Project in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Constitutional Law Scholars in support of non-Government

	parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Westminster Theological Seminary in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amicus curiae of Jewish Social Policy Action Network in support of the Government filed. VIDED.
Jan 28 2014	Brief amicus curiae of Independent Women's Forum in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Historians and Legal Scholars in support of neither party filed. VIDED.
Jan 28 2014	Brief amici curiae of National Health Law Program, et al. in support of the Government filed. VIDED.
Jan 28 2014	Brief amici curiae of Professor Emeritus of Law Charles E. Rice, et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Freedom X, et al. in support of the non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of J.E. Dunn Construction Group, Inc., et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of The Center for Inquiry, et al. in support of the Government filed. VIDED.
Jan 28 2014	Brief amicus curiae of David Boyle in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Christian Legal Society, et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of 88 Members of Congress in support of non-Government parties filed.
Jan 28 2014	Brief amici curiae of Julian Bond, et al. filed. VIDED.
Jan 28 2014	Brief amicus curiae of The International Conference of Evangelical Chaplain Endorsers in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Women's Public Policy Groups, et al. in support of non-Government parties filed. VIDED.
Jan 28 2014	Brief amici curiae of Honorable Joseph B. Scarnati III, et al. in support of non-Government parties filed. VIDED.
Feb 3 2014	CIRCULATED.
Feb 10 2014	Brief of respondents Hobby Lobby Stores, Inc., et al. filed. (Distributed)
Mar 12 2014	Reply of petitioners Kathleen Sebelius, Secretary of Health and Human Services, et al. filed. (Distributed)
Mar 20 2014	A total of 90 minutes is allotted for oral argument and the time is to be divided equally. VIDED
Mar 25 2014	Argued. For private parties: Paul D. Clement, Washington, D. C. For the federal government: Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C. VIDED.
Mar 25 2014	Letter from counsel for respondents filed. (Distributed)

PETITION
FOR
WRIT OF
CERTIORARI

13- 354

Supreme Court, U.S.
FILED
SEP 19 2013
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1(a) and (b). The question presented is whether RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners.

PARTIES TO THE PROCEEDINGS

Petitioners are Kathleen Sebelius, Secretary of Health and Human Services; the Department of Health and Human Services; Thomas E. Perez, Secretary of Labor; the Department of Labor; Jacob J. Lew, Secretary of the Treasury; and the Department of the Treasury.

Respondents are Hobby Lobby Stores, Inc.; Mardel, Inc.; David Green; Barbara Green; Mart Green; Steve Green; and Darsee Lett.

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In the Supreme Court of the United States

No.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Kathleen Sebelius, the Secretary of Health and Human Services, *et al.*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-166a) is reported at 723 F.3d 1114. The opinion of the district court (App., *infra*, 167a-199a) is reported at 870 F. Supp. 2d 1278. A prior decision of the court of appeals denying an injunction pending appeal is unreported but is available at 2012 WL 6930302. Justice Sotomayor's in-chambers opinion denying an injunction pending appeal is reported at 133 S. Ct. 641.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in the appendix to this petition. App., *infra*, 200a-206a.

STATEMENT

1. Most Americans with private health coverage obtain it through an employment-based group health insurance plan. Congressional Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 4 & Tbl. 1-1 (2008). The cost of such employment-based health coverage is typically covered by a combination of employer and employee contributions. *Id.* at 4.

The federal government heavily subsidizes group health plans[1] and has also established certain minimum coverage standards for them. For example, in 1996, Congress required such plans to cover certain benefits for mothers and newborns. 42 U.S.C. 300gg-4 (Supp. II 1996); 26 U.S.C. 9811 (Supp. III 1997); 29 U.S.C. 1185 (Supp. II 1996). In 1998, Congress required coverage of reconstructive surgery after covered mastectomies. 42 U.S.C. 300gg-6 (Supp. IV 1998); 29 U.S.C. 1185b (Supp. IV 1998).

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[1] While employees pay income and payroll taxes on their cash wages, they typically do not pay taxes on their employer's contributions to their health coverage. 26 U.S.C. 106 (2006 & Supp. V 2011). The aggregate federal tax subsidy for employment-based health coverage was $242 billion in 2009. Office of Mgmt. & Budget, *Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2011*, Tbl. 16:1 (2010).

2. In the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable Care Act or Act),[2] Congress provided for additional minimum standards for group health plans (and health insurers offering coverage in both the group and individual markets).

a. As relevant here, the Act requires non-grandfathered group health plans to cover certain preventive-health services without cost sharing—that is, without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. 300gg-13 (Supp. V 2011) (preventive-services coverage requirement).[3] "Prevention is a well-recognized, effective tool in improving health and well-being and has been shown to be cost-effective in addressing many conditions early." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 16 (2011) (IOM Report). Nonetheless, the American health-care system has "fallen short in the provision of such services" and has "relied more on responding to acute problems and the urgent needs of patients than on prevention." *Id.* at 16-17. To address this problem, the Act requires coverage of preventive services without cost sharing in four categories.

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[2] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[3] This preventive-services coverage requirement applies to, among other types of health coverage, employment-based group health plans covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, and, with respect to such plans, is subject to ERISA's enforcement mechanisms. 29 U.S.C. 1185d (Supp. V 2011). It is also enforceable through imposition of tax penalties on the employers that sponsor such plans. 26 U.S.C. 4980D; see 26 U.S.C. 9815(a)(1), 9834 (Supp. V 2011). With respect to health insurers in the individual and group markets, States may enforce the Act's insurance market reforms, including the preventive-services coverage requirement. 42 U.S.C. 300gg-22(a)(1) (Supp. V 2011). If the Secretary of Health and Human Services determines that a State "has failed to substantially enforce" one of the insurance market reforms with respect to such insurers, she conducts such enforcement herself and may impose civil penalties. 42 U.S.C. 300gg-22(a)(2) (Supp. V 2011); see 42 U.S.C. 300gg-22(b)(1)(A) (Supp. V 2011); 42 U.S.C. 300gg-22(b)(2). The Act's grandfathering provision has the effect of allowing certain existing plans to transition to providing coverage for recommended preventive services and to complying with some of the Act's other requirements. See p. 30, *infra*.

First, group health plans must cover items or services that have an "A" or "B" rating from the U.S. Preventive Services Task Force (Task Force). 42 U.S.C. 300gg-13(a)(1) (Supp. V 2011). The Task Force is composed of independent health-care professionals who "review the scientific evidence related to the effectiveness, appropriateness, and cost-effectiveness of clinical preventive services for the purpose of developing recommendations for the health care community." 42 U.S.C. 299b-4(a) (Supp. V 2011). Services rated "A" or "B" are those for which the Task Force has the greatest certainty of a net benefit for patients. 75 Fed. Reg. 41,733 (July 19, 2010). The Task Force has awarded those ratings to more than 40 preventive services, including cholesterol screening, colorectal cancer screening, and diabetes screening for those with high blood pressure. *Id.* at 41,741-41,744.

Second, the Act requires coverage of immunizations recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention. 42 U.S.C. 300gg-13(a)(2)

(Supp. V. 2011). The Committee has recommended routine vaccination to prevent a variety of vaccine-preventable diseases that occur in children and adults. 75 Fed. Reg. at 41,740, 41,745-41,752.

Third, the Act requires coverage of "evidence-informed preventive care and screenings" for infants, children, and adolescents as provided for in guidelines supported by the Health Resources and Services Administration (HRSA), which is a component of the Department of Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(3) (Supp. V 2011). The relevant HRSA guidelines were developed "by multidisciplinary professionals in the relevant fields to provide a framework for improving children's health and reducing morbidity and mortality based on a review of the relevant evidence." 75 Fed. Reg. at 41,733. They include a schedule of examinations and screenings. *Id.* at 41,753-41,755.

Fourth, and as particularly relevant here, the Act requires coverage "with respect to women, [of] such additional preventive care and screenings" (not covered by the Task Force's recommendations) "as provided for in comprehensive guidelines supported" by HRSA. 42 U.S.C. 300gg-13(a)(4) (Supp. V 2011). Congress included this provision in response to a legislative record showing that "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); see IOM Report 18. In particular, "[w]omen of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein). And women often find that copayments and other cost sharing for important preventive services "are so high that they avoid getting [the services] in the first place." *Id.* at 29,302 (statement of Sen. Mikulski); see IOM Report 19-20.

Because HRSA did not have relevant guidelines at the time of the Act's enactment, HHS requested that the Institute of Medicine (Institute or IOM) develop recommendations for it. 77 Fed. Reg. 8726 (Feb. 15, 2012); IOM Report 1. The Institute is part of the National Academy of Sciences, a "semi-private" organization Congress established "for the explicit purpose of furnishing advice to the Government." *Public Citizen* v. *Department of Justice*, 491 U.S. 440, 460 & n.11 (1989) (citation omitted); see IOM Report iv.

To formulate recommendations, the Institute convened a group of experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines." IOM Report 2. The Institute defined preventive services as measures "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." *Id.* at 3. Based on the Institute's review of the evidence, it then recommended a number of preventive services for women, such as screening for gestational diabetes for pregnant women, screening and counseling for domestic violence, and at least one well-woman preventive care visit a year. *Id.* at 8-12.

The Institute also recommended coverage for the "full range" of "contraceptive methods" approved by the Food and Drug Administration (FDA), as well as "sterilization procedures" and "patient education and counseling for all women with reproductive capacity." IOM Report 10; see *id.* at 102-110. FDA-approved contraceptive methods include oral contraceptive pills, diaphragms, injections and implants, emergency contraceptive drugs, and intrauterine devices (IUDs). FDA, *Birth Control: Medicines To Help You*, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last visited Sept. 18, 2013) (*Birth Control Guide*).

In making that recommendation, the Institute noted that nearly half of all pregnancies in the United States are unintended and that unintended pregnancies have adverse health consequences for both mothers and children. IOM Report 102-103 (discussing consequences, including inadequate prenatal care, higher incidence of depression during pregnancy, and increased likelihood of preterm birth and low birth weight). In addition, the Institute observed, use of contraceptives leads to longer intervals between pregnancies, which "is important because of the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103. The Institute also noted that greater use of contraceptives lowers abortion rates. *Id.* at 105. Finally, the Institute explained that "contraception is highly cost-effective," as the "direct medical cost of unintended pregnancy in the United States was estimated to be nearly $5 billion in 2002." *Id.* at 107.

HRSA adopted guidelines consistent with the Institute's recommendations, including a coverage requirement for all FDA-approved "contraceptive methods [and] sterilization procedures," as well as "patient education and counseling for all women with reproductive capacity," as prescribed by a health-care provider. HRSA, HHS, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines/ (last visited Sept. 18, 2013). The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require coverage of, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R. 147.130(a)(1)(iv) (HHS); 29 C.F.R. 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (Treasury) (collectively referred to in this brief as the contraceptive-coverage requirement).

b. The implementing regulations authorize an exemption from the contraceptive-coverage requirement for the group health plan of an organization that qualifies as a "religious employer." 45 C.F.R. 147.131(a). A religious employer is defined as a non-profit organization described in the Internal Revenue Code provision that refers to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *Ibid.* (cross-referencing 26 U.S.C. 6033(a)(3)(A)(i) and (iii)).

The implementing regulations also establish certain religion-related accommodations for group health plans established or maintained by "eligible organization[s]." 45 C.F.R. 147.131(b). An accommodation is available to a non-profit religious organization that has religious objections to providing coverage for some or all contraceptive services. *Ibid.* If a non-profit religious organization is eligible for such an accommodation, the women who participate in its plan will have access to contraceptive coverage without cost sharing though an alternative mechanism established by the regulations. 78 Fed. Reg. 39,870, 39,872, 39,874-39,886 (July 2, 2013).

"Consistent with religious accommodations in related areas of federal law, such as the exemption for religious organizations under Title VII of the Civil Rights Act of 1964," the definition of an organization eligible for an accommodation "does not extend to for-profit organizations." 78 Fed. Reg. at 39,875. The Departments that issued the preventive-services coverage regulations explained that they were "unaware of any court granting a religious exemption to a for-profit organization, and decline[d] to expand the definition of eligible organization to include for-profit organizations." *Ibid.*

3. Respondents are two for-profit corporations—Hobby Lobby Stores, Inc., and Mardel, Inc.—and the corporations' owners, who are five family members (collectively referred to here as the Greens).[4] Hobby Lobby is a chain of more than 500 arts-and-crafts stores that has approximately 13,000 full-time employees throughout the country. App., *infra*, 7a. Mardel is a chain of 35 stores selling books and educational supplies and specializing in Christian materials. *Id.* at 171a. Mardel has 372 employees. *Ibid.* The corporations do not hire employees on the basis of their religion, and the employees are not required to share the religious beliefs of the Greens. *Id.* at 197a (Hobby Lobby "welcome[s] employees of all faiths or no faith."). Employees of both corporations obtain

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[4] The Greens are trustees of a management trust that owns and operates Hobby Lobby and Mardel. App., *infra*, 8a; see *id.* at 125a (Briscoe, C.J., concurring in part and dissenting in part). They refer to themselves as the corporations' owners, Resp. C.A. Br. 2, and the court of appeals did the same, *e.g.*, App., *infra*, 7a. Justice Sotomayor analogized them to "controlling shareholders." 133 S. Ct. at 643.

health coverage through the Hobby Lobby self-insured group health plan. *Id.* at 14a.

"[T]he Greens believe that human life begins at conception," that is, "when sperm fertilizes an egg," and they therefore oppose certain contraceptives on the ground that they prevent implantation of a fertilized egg. App., *infra*, 9a, 14a. After learning about the contraceptive-coverage requirement, Hobby Lobby "re-examined its insurance policies," discovered that they already covered certain FDA-approved contraceptives to which the Greens objected, and proceeded to exclude those contraceptives from the Hobby Lobby plan. C.A. App. 26a-27a (Verified Compl. para. 55).

Respondents also initiated this suit, contending that the requirement that the Hobby Lobby group health plan cover all forms of FDA-approved contraceptives violates the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1(a) and (b). Specifically, respondents contend that RFRA entitles the Hobby Lobby plan to an exemption from the contraceptive-coverage requirement because the Greens object to "facilitating" coverage of certain contraceptives (two types of IUDs, Plan B, and Ella). App., *infra*, 14a.[5] Respondents also contend that the contraceptive-coverage requirement violates the Free Exercise Clause of the First Amendment. *Id.* at 15a.

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[5] An IUD is a device inserted into the uterus by a physician that "prevents sperm from reaching the egg, from fertilizing the egg, and may prevent the egg from attaching (implanting) in the womb (uterus)." *Birth Control Guide*. Plan B, an emergency contraceptive, is a pill that "works mainly by stopping the release of an egg

The district court denied respondents' motion for a preliminary injunction, holding that neither the corporations nor the Greens had established a likelihood of success on the merits of their claims. App., *infra*, 167a-199a.

4. Respondents appealed the denial of the preliminary injunction, and the court of appeals denied their motion for an injunction pending appeal. 2012 WL 6930302. Respondents then applied to this Court for emergency relief, which Justice Sotomayor denied. 133 S. Ct. 641 (2012).

Respondents subsequently moved in the court of appeals for initial en banc consideration of their appeal, citing the "exceptional importance of the questions presented." App., *infra*, 16a. The court of appeals granted that motion. *Ibid.* The court also expedited its consideration of the appeal because the Hobby Lobby plan was due to become subject to the contraceptive-coverage requirement when the new plan year began on July 1, 2013. *Ibid.*

a. In a divided decision, the eight-member en banc court reversed the judgment of the district court. App., *infra*, 1a-166a. As a threshold matter, the court held that the corporations (Hobby Lobby and Mardel) have Article III standing and that the Anti-Injunction Act, 26 U.S.C. 7421, does not bar this suit. *Id.* at 5a,

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from the ovary" but "may also work by preventing fertilization of an egg * * * or by preventing attachment (implantation) to the womb (uterus)." *Ibid.* Ella, another emergency contraceptive, is a pill that "works mainly by stopping or delaying the ovaries from releasing an egg" but "may also work by changing the lining of the womb (uterus) that may prevent attachment (implantation)." *Ibid.*

17a-21a; see *id.* at 18a (noting the government's agreement that the Anti-Injunction Act does not apply); see also Gov't Supp. C.A. Br. 3 (agreeing that respondent corporations have Article III standing). The court found it unnecessary to decide whether the Greens had standing in their own right as the owners of the corporations being regulated. App., *infra*, 18a n.4.

Addressing the merits, a five-judge majority held that the corporate respondents are likely to succeed on the merits of their RFRA claims. App., *infra*, 6a, 23a-61a. The court first held that "for-profit corporations, such as Hobby Lobby and Mardel, are persons exercising religion for purposes of RFRA." *Id.* at 23a; see *id.* at 23a-43a. The court further held that "the contraceptive-coverage requirement constitutes a substantial burden on Hobby Lobby and Mardel's exercise of religion." *Id.* at 44a; see *id.* at 44a-56a.

The court then determined that the contraceptive-coverage requirement is invalid as applied to Hobby Lobby and Mardel because that requirement is not "the least restrictive means of advancing a compelling interest." App., *infra*, 57a (citation omitted); see *id.* at 56a-61a. The court held that the interests protected by the requirement (public health and gender equality) cannot be compelling because certain plans are not required to cover recommended preventive-health services (while those plans retain grandfathered status), and because plans sponsored by churches or other non-profit religious organizations are not required to cover contraceptives. *Id.* at 58a.

The court of appeals noted the government's argument that respondents "are, in effect, imposing their religious views on their employees," but disagreed on the ground that the corporations "do not prevent employees from using their own money to purchase the four contraceptives at issue here." App., *infra*, 60a. The court acknowledged that this would impose a unique economic burden on those employees, but found that result justified on the ground that "[a]ccommodations for religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere." *Id.* at 60a-61a.[6]

Turning to the other factors relevant to whether a preliminary injunction should be granted, the majority held that the corporations would experience irreparable harm if the contraceptive-coverage requirement were not enjoined. App., *infra*, 64a-65a. Four members of the majority would have resolved the two remaining factors (balance of equities and public interest) in the corporations' favor, but the court lacked a majority to do so and instead remanded to the district court to consider those two factors. *Id.* at 6a.

b. Chief Judge Briscoe, joined by Judge Lucero, dissented. App., *infra*, 103a-138a. They concluded that neither the corporations nor their owners could establish a prima facie case under RFRA. *Id.* at 107a-130a. The dissenters noted that RFRA was intended to restore this Court's jurisprudence that preceded *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1993), and explained that, in interpreting RFRA, the "relevant context" is "the body of free exercise case law that existed at the time of RFRA's passage." App., *infra*, 112a. The dissent observed that, "during the 200-year span between the adoption of the First Amendment and RFRA's passage, the Supreme Court consistently treated free exercise rights as confined to individuals and non-profit religious organizations." *Id.* at 115a.

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[6] The court of appeals majority did not address respondents' claim under the Free Exercise Clause of the First Amendment. App., *infra*, 7a n.2.

This limitation, the dissenters continued, "is reinforced by examining the legislative history of RFRA," which includes many references to individuals and religious institutions but makes no reference to for-profit corporations. App., *infra*, 115a; see *id.* at 115a-117a. Accordingly, the dissenters found "no plausible basis for inferring that Congress intended or could have anticipated that for-profit corporations would be covered by RFRA." *Id.* at 118a (internal quotation marks and citation omitted).

Chief Judge Briscoe's dissent further explained that the majority's substantial-burden analysis conflated the corporations in this case with their owners, "even though doing so violates basic principles of corporation law." App., *infra*, 130a-131a. In addition, the dissenters noted that the decision to utilize health coverage for particular contraceptives is made by plan participants and beneficiaries, in consultation with their doctors, and not by respondents. *Id.* at 137a. The dissenters concluded that the claimed burden of merely being associated with a group health plan that provides comprehensive health coverage is not a substantial burden within the meaning of RFRA. *Id.* at 136a-138a.[7]

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[7] Judge Matheson wrote separately to explain that he would have rejected the corporations' RFRA claims but remanded for further consideration of the Greens' RFRA claims. App., *infra*, 138a-164a (Matheson, J., concurring in part and dissenting in part). Judges Hartz, Gorsuch, and Bacharach filed concurring opinions. *Id.* at 66a-77a, 77a-94a, 94a-103a.

5. On remand, the district court entered a preliminary injunction and stayed further proceedings pending the government's determination whether to seek this Court's review of the court of appeals' en banc decision. 2013 WL 3869832, at *2 (July 19, 2013).[8]

REASONS FOR GRANTING THE PETITION

In a divided decision, the en banc court of appeals held that the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*, allows respondent for-profit corporations to deny employees the health coverage to which they are otherwise entitled by federal law, based on the religious objections of the individuals who own a controlling stake in the corporations. That unprecedented ruling warrants review by this Court. The court did not cite (and the government is not aware of) any other decision of this Court or a court of appeals that has ever accepted a claim that RFRA enables a for-profit corporate employer to exempt itself from generally applicable employment regulations. See 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers) ("This Court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders alleging that the mandatory provision of certain employee benefits substantially burdens their exercise of religion.").

The question presented is one of exceptional importance, as the court of appeals recognized in initially hearing the case en banc. App., *infra*, 16a. Moreover, the Third and Sixth Circuits have expressly disagreed with the decision below, *Conestoga Wood Specialties Corp.* v. *HHS*, No. 13-1144, 2013 WL 3845365 (3d Cir. July 26, 2013) (*Conestoga Wood*); *Autocam Corp.* v. *Sebelius*, No. 12-2673, 2013 WL 5182544 (6th Cir. Sept. 17, 2013) (*Autocam*), creating an acknowledged conflict in the courts of appeals that is likely to deepen soon as more circuits address the question in the many pending cases presenting it. Finally, the court of appeals' decision is incorrect and would transform RFRA from a shield for individuals and religious institutions into a sword used to deny employees of for-profit commercial enterprises the benefits and protections of generally applicable laws. The petition for a writ of certiorari should be granted.

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[8] On September 17, the government filed a notice of appeal from the district court's entry of a preliminary injunction. The government intends to ask the court of appeals to hold the appeal in abeyance pending this Court's consideration of this petition for a writ of certiorari and, in the event the petition is granted, the Court's decision in the case.

A. RFRA Does Not Allow A For-Profit Corporation To Deny Its Employees The Benefits To Which They Are Otherwise Entitled By Federal Law

RFRA provides that the federal government "shall not substantially burden a person's exercise of religion" unless application of that burden is "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. 2000bb-1(a) and (b). Respondents' challenge to the contraceptive-coverage requirement fails to satisfy this statutory standard in multiple respects. First, the for-profit corporate respondents are not "person[s] exercis[ing] religion" within the meaning of RFRA, 42 U.S.C. 2000bb-1(a). Second, there is no indication that Congress, in enacting RFRA, intended to disregard fundamental tenets of corporate law that distinguish between the rights and responsibilities of a corporation and those of its owners. Third, the particular burden of which respondents complain is too attenuated to be "substantial[]." *Ibid.* Finally, even if respondents could surmount those threshold obstacles, their claim would fail because the contraceptive-coverage requirement is the least restrictive means of advancing compelling governmental interests. 42 U.S.C. 2000bb-1(b).

1. The court of appeals erred by deeming the respondent corporations to be "persons" engaged in the "exercise of religion" within the meaning of RFRA.

a. Congress enacted RFRA to codify this Court's free-exercise jurisprudence as it stood before *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990). See *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (*O Centro*). Entirely absent from that pre-*Smith* jurisprudence is any case affording free-exercise rights to for-profit corporations.

Under the pre-*Smith* case law, individuals could seek exemptions in certain circumstances from generally applicable regulations that interfered with their exercise of religion. The two cases cited in RFRA itself are illustrative. 42 U.S.C. 2000bb(b)(1) (citing *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)). In *Sherbert*, the Court held that a state government could not deny unemployment compensation to an individual who lost her job because her religious beliefs prevented her from working on a Saturday. 374 U.S. at 399-410. And, in *Yoder*, the Court held that a state government could not compel Amish parents to send their children to high school. 406 U.S. at 234-235.

The pre-RFRA case law also allowed churches to assert free-exercise claims on behalf of their members. For example, in *Church of the Lukumi Babalu*

Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993), a church successfully challenged a local ordinance that made it unlawful for its members to perform the ritual animal sacrifice that is part of the Santeria religion. *Id.* at 531-540, 542-547. Accordingly, when this Court later applied RFRA in *O Centro*, *supra*, it likewise held that RFRA allowed a religious sect to obtain an exemption on behalf of its members from a federal law (the Controlled Substances Act, 21 U.S.C. 801 *et seq.*) that prevented them from receiving communion in the form of a sacramental tea. 546 U.S. at 427-439.

In contrast, no pre-*Smith* case held—or even suggested—that a for-profit corporation could obtain exemptions from corporate regulation on the basis of religion. The two cases on which the court of appeals relied for the contrary proposition, App., *infra*, 35a-36a (citing *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), and *United States* v. *Lee*, 455 U.S. 252 (1982)), *rejected* free-exercise claims raised by *individuals*. They are therefore doubly unsupportive of the proposition the court of appeals sought to advance.

In *Braunfeld*, the Court rejected the free-exercise claim asserted by Orthodox Jewish individuals who faced criminal prosecution if they sold their goods on Sundays, even though the Sunday closing law placed substantial pressure on them "to give up their [Saturday] Sabbath observance, a basic tenet of the Orthodox Jewish faith." 366 U.S. at 602 (plurality opinion). In *Lee*, the Court rejected an Amish farmer's claim that he had a free-exercise right to be exempted from the requirement to pay Social Security taxes on behalf of his employees. 455 U.S. at 256-261.

Lee in fact undermines, rather than supports, the court of appeals' analysis. The Court in *Lee* emphasized that exempting the employer from the obligation to pay Social Security taxes "operates to impose the employer's religious faith on the employees," 455 U.S. at 261, who would be denied the benefits to which they were entitled by federal law if their employer were exempted. Even with respect to the *individual* employer at issue in *Lee*, this Court held: "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Ibid.*

b. Accordingly, when Congress enacted RFRA to codify pre-*Smith* free-exercise jurisprudence, it would have understood that for-profit corporations could not rely on RFRA to escape generally applicable regulation. The "limitation of RFRA's applicability to individuals and non-profit religious organizations is reinforced by examining the legislative history of RFRA." App., *infra*, 115a (Briscoe, C.J., concurring in part and dissenting in part). The committee reports, hearings, and debates are replete with references to individuals and religious institutions, but "[e]ntirely absent from the legislative history * * * is any reference to for-profit corporations." *Id.* at 116a.

The court of appeals understood the relevant statutory inquiry to be whether a for-profit corporation could be a "person" for purposes of RFRA. App., *infra*, 24a. The majority resolved that question by reference to the Dictionary Act, which states that the term "person" in a federal statute includes corporations unless "the context indicates otherwise." *Ibid.* (quoting 1 U.S.C. 1). But here, for the reasons just stated, the context of RFRA does in fact indicate otherwise with respect to for-profit corporations. Even more to the point, the question presented by this case is whether for-profit corporations are persons *engaged in the "exercise of religion"* (42 U.S.C. 2000bb-1(a)) within the meaning of RFRA. The Dictionary Act does not answer that question.

Given RFRA's expressly stated purpose to codify this Court's pre-*Smith* jurisprudence, the proper statutory inquiry here must be guided by decisions issued during the "200-year span between the adoption of the First Amendment and RFRA's passage." App., *infra*, 115a (Briscoe, C.J., concurring in part and dissenting in part). During that long period, the Court "consistently treated free exercise rights as confined to individuals and non-profit religious organizations." *Ibid.* Accordingly, there is no "plausible basis for inferring that Congress intended or could have anticipated that for-profit corporations would be covered by RFRA." *Id.* at 118a (internal quotation marks and citation omitted); accord *Autocam*, 2013 WL 5182544, at *7-*9.

c. The court of appeals held that the religious beliefs of the Greens (which the court imputed to the corporations) trump the rights of the corporations' 13,000 full-time employees and their family members to receive the health coverage to which they are entitled by federal law. The majority found it unremarkable that, under its interpretation of RFRA, for-profit corporations could obtain religious exemptions that come "at the expense of their employees." App., *infra*, 61a. The majority dismissed that concern by declaring that "[a]ccommodations for religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere." *Id.* at 60a-

61a. Indeed, the majority opined that such burden-shifting "is RFRA's basic purpose." *Id.* at 61a.

This Court, by contrast, has cautioned that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005). That principle informed this Court's pre-RFRA interpretation of religious accommodations in the context of employment. For example, in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), the Court held that Title VII of the Civil Rights Act of 1964 (Title VII), Pub. L. No. 88-352, 78 Stat. 253, does not allow an employee to obtain a religious accommodation that would come "at the expense of" other employees or result in "more than a *de minimis* cost" to the employer. 432 U.S. at 81, 84.

The court of appeals noted that some civil rights statutes have "exemptions for religious employers." App., *infra*, 26a. But such accommodations have never been extended to for-profit corporations. For example, Title VII exempts from its prohibition against discrimination based on religion "a *religious corporation, association, educational institution, or society* with respect to the employment of individuals of a particular religion to perform work connected with the carrying on * * * of its activities." 42 U.S.C. 2000e-1(a) (emphasis added); see 42 U.S.C. 12113(d)(1) (Supp. V 2011) (parallel exemption in Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*). A "religious corporation" is a "special class of *nonprofit* corporation[]" that is "designed to provide the congregants with an orderly procedural framework in order for them to freely exercise their religion." 1A *Fletcher Cyclopedia of the Law of Corporations* § 80, at 61 (perm. ed., rev. vol. 2010) (emphasis added); see *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619 (9th Cir. 1988) ("hav[ing] no difficulty" in concluding that "for profit" manufacturer of mining equipment was ineligible for Title VII exemption notwithstanding its owners' religious beliefs), cert. denied, 489 U.S. 1077 (1989).

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327 (1987), the Court rejected the claim that Title VII's religious-employer exemption impermissibly advances religion in violation of the Establishment Clause. *Id.* at 334-339. The Court reasoned that, by expanding the Title VII exemption to reach all of a religious organization's non-profit activities, rather than just its specifically religious activities, Congress avoided entangling governmental inquiries into whether particular activities should be categorized as religious or secular. *Id.* at 336. The Court explained that "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." *Ibid.*

The *Amos* Court emphasized, however, that the case before it concerned only "the *nonprofit* activities of religious employers," 483 U.S. at 339 (emphasis added), and the concurring opinions stressed the same point.[9] Moreover, the *Amos* Court's reasoning, by its terms, does not extend to for-profit corporations. "As the *Amos* Court noted, it is hard to draw a line between the secular and religious activities of a religious organization." *University of Great Falls* v. *NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002). By contrast, "it is relatively straight-forward to distinguish between a non-profit and a for-profit entity." *Ibid.*; accord *Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 734 (9th Cir.) (O'Scannlain, J., concurring), cert. denied, 132 S. Ct. 96 (2011). Under RFRA, as under pre-existing federal employment statutes, a corporation's non-profit or for-profit status provides an objective means of differentiation that does not require "trolling through a person's or institution's religious beliefs." *University of Great Falls*, 278 F.3d at 1341-1342 (quoting *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)).

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[9] *Amos*, 483 U.S. at 340 (Brennan, J., concurring) ("I write separately to emphasize that my concurrence in the judgment rests on the fact that these cases involve a challenge to the application of § 702's categorical exemption to the activities of a *nonprofit* organization."); *id.* at 349 (O'Connor, J., concurring) ("Because there is a probability that a nonprofit activity of a religious organization will

For these reasons, the court of appeals erred in concluding that the respondent "for-profit businesses focused on selling merchandise to consumers," App., *infra*, 108a (Briscoe, C.J., concurring in part and dissenting in part), are "persons" engaged in the "exercise of religion" within the meaning of RFRA, 42 U.S.C. 2000bb-1(a).

2. The court of appeals also cited no evidence that Congress in enacting RFRA would have contemplated claims that disregard fundamental tenets of American corporate law. Yet the court of appeals permitted just such a claim in this case when it attributed the religious beliefs of the Greens—the individuals who own

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itself be involved in the organization's religious mission, in my view the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.").

the corporations—to the corporate entities themselves. In particular, the court of appeals declared that "[t]he corporate plaintiffs believe life begins at conception," App., *infra*, 50a, but supported that pronouncement by citing only the *Greens'* belief that "human life begins when sperm fertilizes an egg." *Id.* at 9a; see *id.* at 14a. The court of appeals thus conflated the corporations with their owners.

As the Third Circuit explained in its decision rejecting a for-profit corporation's RFRA claim, "[i]t is a fundamental principle that 'incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created' the corporation." *Conestoga Wood*, 2013 WL 3845365, at *7 (quoting *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001) (*Cedric Kushner*)); see *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003). And it is equally clear that "[o]ne who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946).

The court of appeals found it significant that the corporations in this case are "closely held" and that their owners are "unanimous" in their religious beliefs. App., *infra*, 42a. But, as this Court's *Cedric Kushner* decision illustrates, the tenet that a corporation is distinct from its shareholders applies even when the corporation has only a single shareholder. That case "focuse[d] upon a person who [was] the president and sole shareholder of a closely held corporation" and rested its holding on the fact that he was "distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Cedric Kushner*, 533 U.S. at 160, 163.

Federal law does not require the Greens personally to provide health coverage of any kind to Hobby Lobby employees, or to satisfy other legal obligations of the corporations. *Autocam*, 2013 WL 5182544, at *5. The Greens are likewise not personally liable for paying the employees' salaries. See generally *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 477 (2006) ("[I]t is fundamental corporation and agency law—indeed, it can be said to be the whole purpose of corporation and agency law—that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts."). Those obligations lie with Hobby Lobby itself. It is Hobby Lobby that acts as the employing party; it is Hobby Lobby that sponsors a group health plan for the more than 13,000 full-time employees of Hobby Lobby and Mardel (and their family members); and "it is that health plan which is now obligated by the Affordable Care Act and resulting regulations to provide contraceptive coverage." *Grote* v. *Sebelius*, 708 F.3d 850, 857 (7th Cir. 2013) (Rovner, J., dissenting from grant of injunction pending appeal).

The Greens "chose to incorporate and conduct business through [corporations], thereby obtaining both the advantages and disadvantages of the corporate form." *Conestoga Wood*, 2013 WL 3845365, at *8. They cannot "move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Ibid.* (internal quotation marks and citation omitted). Indeed, "the circuits are consistent in holding that 'an action to redress injuries to a corporation . . . cannot be maintained by a stockholder in his own name.'" *Canderm Pharmacal, Ltd.* v. *Elder Pharm., Inc.*, 862 F.2d 597, 602-603 (6th Cir. 1988) (citation omitted); see *Autocam*, 2013 WL 5182544, at *4-*5.[10] The court of appeals offered no persuasive support for its view that Congress intended to disregard this long-settled body of law and permit RFRA claims involving for-profit corporations based on the religious beliefs of the corporations' owners.

3. Respondents' RFRA claim also fails because the particular burden about which they complain is too attenuated to qualify as "substantial" within the meaning of the statute. 42 U.S.C. 2000bb-1(a); see App., *infra*, 194a. A group health plan "covers many medical services, not just contraception." *Grote*, 708 F.3d at 865 (Rovner, J., dissenting). The decision as to which specific "services will be used is left to the employee and her doctor." *Ibid.* "No individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip re-

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[10] See also *Diva's Inc.* v. *City of Bangor*, 411 F.3d 30, 35, 42 (1st Cir. 2005) (dismissing sole shareholder's First Amendment claim for lack of standing); *The Guides, Ltd.* v. *Yarmouth Grp. Prop. Mgmt., Inc.*, 295 F.3d 1065, 1070, 1071-1073 (10th Cir. 2002) (race discrimination claim); *Smith Setzer & Sons, Inc.* v. *South Carolina Procurement Review Panel*, 20 F.3d 1311, 1317 (4th Cir. 1994) (Privileges and Immunities Clause claim); *Erlich* v. *Glasner*, 418 F.2d 226, 228 (9th Cir. 1969) (finding "nothing in the Civil Rights Act" that would permit a plaintiff-stockholder to circumvent the rule that, "even though a stockholder owns all, or practically all, of the stock in a corporation, such a fact of itself does not authorize him to sue as an individual").

placed—is in any meaningful sense [her employer's] decision or action." *Ibid.*

The connection to the corporate owners is more attenuated still. The Greens are, "in both law and fact, separated by multiple steps from both the coverage that the company health plan provides and from the decisions that individual employees make in consultation with their physicians as to what covered services they will use." *Grote*, 708 F.3d at 858 (Rovner, J., dissenting). "RFRA does not protect against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *O'Brien* v. *HHS*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012), appeal docketed, No. 12-3357 (8th Cir. Oct. 1, 2012).

4. There would be no basis for exempting the respondent corporations from the contraceptive-coverage requirement even if that requirement were subject to heightened scrutiny under RFRA. 42 U.S.C. 2000bb-1(b). The requirement is justified by compelling governmental interests and is the least restrictive means to achieve them.

a. The promotion of public health is unquestionably a compelling governmental interest. *E.g.*, *Mead* v. *Holder*, 766 F. Supp. 2d 16, 43 (D.D.C.), aff'd *sub nom. Seven-Sky* v. *Holder*, 661 F.3d 1 (D.C. Cir. 2011), cert. denied, 133 S. Ct. 63 (2012). The preventive-services requirement furthers that compelling interest by "expanding access to and utilization of recommended preventive services for women." 78 Fed. Reg. at 39,887. The primary benefit of the preventive-services coverage requirement as a general matter is that such services improve health by "decreas[ing] the likelihood or delay[ing] the onset of a targeted disease or condition." IOM Report 3; see 75 Fed. Reg. at 41,733. Increased access to FDA-approved contraceptive services in particular is a key component of the measures intended to produce those predicted health outcomes, as a lack of contraceptive use has proven in many cases to have negative health consequences for both women and children. 78 Fed. Reg. at 39,872; see p.7, *supra* (discussing IOM's findings on health benefits of access to contraception).

Closely tied to that interest is the separate compelling interest in assuring that women have equal access to health-care services. 78 Fed. Reg. at 39,872, 39,887. As the Court explained in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984), there is a fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Id.* at 626. Thus, "[a]ssuring women equal access to * * * goods, privileges, and advantages clearly furthers compelling state interests." *Ibid.* By including the women's preventive-services coverage requirement in the Affordable Care Act, Congress ensured that the goals and benefits of effective preventive health care would apply equally to women, who might otherwise be excluded from such benefits if their unique health-care needs were not taken into account. See pp. 5-6, *supra* (discussing record before Congress).

The court of appeals gave short shrift to the interests of the women who would bear the burden of accommodating the Greens' personal religious beliefs. The majority declared that "Hobby Lobby and Mardel do not prevent employees from using their own money to purchase the four contraceptives at issue here." App., *infra*, 60a. But Congress enacted the women's preventive-services coverage requirement because it found that women already spend significantly more on out-of-pocket health-care costs than do men. See pp. 5-6, *supra*. And Congress specified that recommended preventive services be covered without cost sharing, in light of evidence showing that such expenses discouraged use of the services. See *ibid.* The court of appeals' preference for women to pay out of pocket for these services is directly contrary to Congress's views on the matter.

The Act and its preventive-services coverage provision also advance the compelling interest in ensuring a "comprehensive insurance system with a variety of benefits available to all participants." *Lee*, 455 U.S. at 258. A system that is comprehensive in its coverage of recommended preventive-health services, yet subject to ad hoc opt-outs by employers outside of clearly drawn categories, "would be almost a contradiction in terms" and extremely difficult to administer. *Ibid.* Indeed, controlling shareholders might have religious objections to other preventive services (such as immunizations), and the court of appeals' decision opens the door for them to attempt to exempt their corporations from other aspects of the preventive-services coverage requirement as well. App., *infra*, 128a n.8 (Briscoe, C.J., concurring in part and dissenting in part); *Grote*, 708 F.3d at 866 (Rovner, J., dissenting).

b. The court of appeals stated that the interests advanced by the preventive-services coverage requirement cannot be compelling because the requirement does not apply to all plans. App., *infra*, 58a. The court's reasoning is incorrect. First, the court noted that grandfathered plans are not subject to the Act's preventive-services coverage requirement. *Ibid.* The Act's grandfathering provision, 42 U.S.C. 18011 (Supp. V 2011); see 45 C.F.R. 147.140, however, does not effect a permanent exemption; instead, it is transitional in effect (applying to a variety of Act provisions, not just the preventive-services coverage requirement) and is intended to minimize disruption to existing coverage as the Affordable Care Act is implemented. The compelling nature of an interest is not diminished merely because the government declines to make a regulation advancing that interest immediately effective in order to avoid the disruption doing so might cause. Cf. *Heckler* v. *Mathews*, 465 U.S. 728, 746-748 (1984) (noting that "protection of reasonable reliance interests is * * * a legitimate governmental objective" that Congress may permissibly advance through phased implementation of regulatory requirements).

Second, the court of appeals erred as a factual matter in stating that plans sponsored by employers with fewer than 50 full-time employees are exempt from the preventive-services coverage requirement. App., *infra*, 58a. That requirement applies without regard to the size of the employer, 42 U.S.C. 300gg-13 (Supp. V 2011), as the majority appeared to recognize elsewhere in its opinion, App., *infra*, 13a. Accordingly, if a small employer offers health coverage, its plan must comply with the preventive-services coverage requirement. (Businesses with fewer than 50 full-time-equivalent employees are not subject to a *different* provision, 26 U.S.C. 4980H (Supp. V 2011), that imposes tax liability on certain large employers that fail to offer full-time employees (and their dependents) adequate health coverage. 26 U.S.C. 4980H(c)(2)(A) (Supp. V 2011).)

Third, the fact that the government has provided an exemption and accommodations to certain nonprofit religious entities, see p. 8, *supra*, does not diminish its interests in enforcing the contraceptive-coverage requirement outside those carefully defined categories. Cf. App., *infra*, 58a. It would be perverse to hold that providing a targeted religious exemption eliminates the government's compelling interest in the underlying regulation, thus effectively extending the same exemption, through RFRA, to anyone else who wants it. Such a reading of RFRA would *discourage* the government from accommodating religion, the exact opposite of what Congress intended in enacting RFRA.

It is thus not surprising that the Court in *Lee* rejected the accommodation claim there on the ground that it would undermine the comprehensive and mandatory nature of Social Security, 455 U.S. at 258, even as it emphasized that Congress *had* provided religion-based exemptions for self-employed individuals, *id.* at 260-261. "Confining [the exemption] to the self-employed provided for a narrow category which was readily identifiable," *ibid.*, and Congress's inclusion of such an exemption did not undermine the government's interest in enforcing the law outside the exemption's confines.

c. The court of appeals concluded that, "[e]ven if the government had stated a compelling interest in public health or gender equality," the contraceptive-coverage requirement was not the least restrictive means of achieving it. App., *infra*, 59a. The court rested this conclusion exclusively on the ground that "Hobby Lobby and Mardel ask only to be excused from covering four contraceptive methods out of twenty, not to be excused from covering contraception altogether." *Id.* at 60a.

Contrary to the majority's belief, the various forms of FDA-approved contraceptives are not fungible. Pharmaceutical companies go through the time and expense of obtaining FDA approval because different types of contraceptives serve different needs. And some forms of contraception are contraindicated for women with certain medical conditions and risk factors. IOM Report 105. The Institute thus recommended coverage of *all* FDA-approved contraceptive methods. *Id.* at 10, 104-110. Such comprehensive coverage ensures that a woman and her physician—not her employer—will decide which form of contraception is most appropriate for her.

B. The Court Of Appeals' En Banc Decision Presents A Question Of Exceptional Importance And Directly Conflicts With Decisions Of Other Circuits

The court of appeals' decision presents a question of exceptional importance concerning asserted RFRA rights of for-profit corporations, as it recognized in hearing the case initially en banc. App., *infra*, 16a. Although the decision addressed a preliminary injunction, the court definitively decided the legal questions at the heart of the case, making it unnecessary to await further proceedings before granting review. In addition, the decision below directly conflicts with subsequent decisions by the Third and Sixth Circuits, both of which expressly rejected the court of appeals' reasoning in this case. *Conestoga Wood*, 2013 WL

3845365, at *5 n.7; *Autocam*, 2013 WL 5182544, at *1 & n.1, *7.

In *Conestoga Wood*, a for-profit corporation and its controlling shareholders sought to exclude from the corporation's group health plan coverage of those forms of FDA-approved contraceptives that they believe may prevent the implantation of a fertilized egg in a woman's uterus. 2013 WL 3845365 at *2. Over a dissent, the Third Circuit rejected the corporation's claims under RFRA and the Free Exercise Clause, explaining that the court was "not aware of any case preceding the commencement of litigation about the [contraceptive-coverage requirement], in which a for-profit, secular corporation was itself found to have free exercise rights." *Id.* at *5.

The Third Circuit also rejected the plaintiffs' invitation to disregard the corporate form and to treat the closely held corporation as if it were indistinguishable from its controlling shareholders (the Hahns). The court explained that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created" the corporation. *Conestoga Wood*, 2013 WL 3845365, at *7 (quoting *Cedric Kushner*, 533 U.S. at 163). The Third Circuit thus held that, "[a]s the Hahns have decided to utilize the corporate form, they cannot 'move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms.'" *Id.* at *8 (citation omitted).

The Sixth Circuit's unanimous decision in *Autocam* involved a challenge to the contraceptive-coverage requirement by "for-profit, secular corporations engaged in high-volume manufacturing for the automotive and medical industries," and the corporations' owners. 2013 WL 5182544, at *1. The Sixth Circuit held that the corporations there were not "person[s]' capable of 'religious exercise' as intended by RFRA." *Id.* at *7. The court explained that Congress's purpose in enacting RFRA was "to restore Free Exercise Clause claims of the sort articulated in *Sherbert* and *Yoder*, claims which were fundamentally personal" and was not "to expand the scope of the Free Exercise Clause." *Id.* at *8. The court reasoned that "[r]eading the term 'person' in the manner suggested by Autocam would lead to a significant expansion of the scope of the rights the Free Exercise Clause protected prior to *Smith*" because the pre-*Smith* Court had "never recognized [free-exercise] rights on behalf of corporations pursuing secular ends for profit." *Ibid.* (citing App., *infra*, 115a (Briscoe, C.J., concurring in part and dissenting in part) and *Conestoga Wood*, 2013 WL 3845365, at *5)).

The Sixth Circuit also dismissed the RFRA claims of Autocam's owners for lack of standing. *Autocam*, 2013 WL 5182544, *3-*5. The court explained that "[i]ncorporation's basic purpose is to create a distinct legal entity," and that all of the actions the individual owners of Autocam take with respect to the company "are not actions taken in an individual capacity, but as officers and directors of the corporation." *Id.* at *5 (citation omitted). Any harm to the owners "cannot fairly be classified as a harm distinct from the one suffered by Autocam." *Ibid.* Accordingly, under the longstanding rule generally barring claims by shareholders "intended to redress injuries to a corporation," the individual owners could not challenge the contraceptive-coverage requirement. *Id.* at *3-*5.

The decision below was issued by the en banc court, and the Third Circuit declined to hear *Conestoga Wood* en banc,[11] so this conflict in the circuits will not resolve itself. Moreover, comparable RFRA claims are pending in many other courts, including the Seventh, Eighth, Eleventh, and D.C. Circuits.[12] The Seventh Circuit heard oral argument in May, and the D.C. Circuit has scheduled argument for later in September. See note 12, *supra*. It is thus likely that the division in the circuits on the question presented will deepen in the near future. This Court's review is warranted.

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[11] Sur Pet. for Reh'g, *Conestoga Wood Specialties Corp.* v. *Secretary*, No. 13-1144 (Aug. 14, 2013).

[12] *E.g.*, *Korte* v. *Sebelius*, No. 12-3841, and *Grote* v. *Sebelius*, No. 13-1077 (7th Cir. argued May 22, 2013); *O'Brien* v. *HHS*, appeal docketed, No. 12-3357 (8th Cir. Oct 4, 2012); *Beckwith Elec. Co., Inc.* v. *Secretary of HHS*, appeal docketed, No. 13-13879 (11th Cir. Aug. 28, 2013); *Gilardi* v. *HHS*, No. 13-5069 (D.C. Cir.) (argument scheduled for Sept. 24, 2013).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 12-6294

HOBBY LOBBY STORES, INC.; MARDEL, INC.; DAVID GREEN; BARBARA GREEN; MART GREEN; STEVE GREEN; DARSEE LETT, PLAINTIFFS-APPELLANTS

v.

KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA SOLIS, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR; UNITED STATES DEPARTMENT OF LABOR; TIMOTHY GEITHNER, SECRETARY OF THE UNITED STATES
DEPARTMENT OF TREASURY; UNITED STATES DEPARTMENT OF THE TREASURY, DEFENDANTS-APPELLEES

EMERITUS PROFESSOR OF LAW CHARLES E. RICE; PROFESSOR OF LAW BRADLEY P. JACOB; TEXAS CENTER FOR DEFENSE OF LIFE; NATIONAL LEGAL FOUNDATION; LIBERTY, LIFE AND LAW FOUNDATION; AMERICAN CENTER FOR LAW AND JUSTICE; BREAST CANCER PREVENTION INSTITUTE; BIOETHICS DEFENSE FUND; LIFE LEGAL DEFENSE FOUNDATION; THE RIGHT REVEREND W. THOMAS FRERKING, OSB; MISSOURI ROUNDTABLE FOR LIFE; ARCHDIOCESE OF OKLAHOMA CITY; EAGLE FORUM; SANFORD C. COATS; SENATOR DANIEL COATS; SENATOR THAD COCHRAN; SENATOR MIKE CRAPO; SENATOR CHARLES GRASSLEY; SENATOR ORRIN G. HATCH, SENATOR; SENATOR JAMES M. INHOFE; SENATOR MITCH MCCONNELL; SENATOR PAT ROBERTS;

Senator Richard Shelby; Congressman Lamar Smith; Association of Gospel Rescue Missions; Prison Fellowship Ministries; Association of Christian Schools International; National Association of Evangelicals; Ethics & Religious Liberty Commission of the Southern Baptist Convention; Institutional Religious Freedom Alliance; Christian Legal Society; Association of American Physicians & Surgeons; American Association of Pro-Life Obstetricians and Gynecologists; Christian Medical Association; Catholic Medical Association; National Catholic Bioethics Center; Physicians for Life; National Association of Pro Life Nurses; United States Justice Foundation; Congressman Frank Wolf; State of Oklahoma; Wywatch Family Action, Inc.; The C12 Group; Physicians for Reproductive Health; The American College of Obstetricians and Gynecologists; The American Society for Emergency Contraception; Association of Reproductive Health Professionals; American Society for Reproductive Medicine; Society for Adolescent Health and Medicine; American Medical Women's Association; National Association of Nurse Practitioners in Women's Health; James Trussell; Susan F. Wood; Don Downing; Kathleen Besinque; Americans United for Separation of Church and State; Union for Reform Judaism; Central Conference of American Rabbis; Women of Reform Judaism; Hindu American Foundation; National Women's Law Center; American Association of University Women; American Federation of State, County and Municipal Employees (AFSCME); Black Women's Health Imperative; Boulder Now; Colorado Organization for Latina Opportunity and Reproductive Rights (COLOR); Gender Impacts Policy, a project of the Center of Southwest Culture;

IBIS REPRODUCTIVE HEALTH; LAW STUDENTS FOR REPRODUCTIVE JUSTICE; MERGERWATCH; NARAL PRO-CHOICE AMERICA; NARAL PRO-CHOICE COLORADO; NARAL PRO-CHOICE WYOMING; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION; NATIONAL ORGANIZATION FOR WOMEN-SANTA FE CHAPTER (SANTA FE NOW); NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NEW MEXICO-NATIONAL ORGANIZATION FOR WOMEN (NMNOW); PLANNED PARENTHOOD OF ARKANSAS & EASTERN OKLAHOMA, INC., D/B/A PLANNED PARENTHOOD OF HEARTLAND-OKLAHOMA; PLANNED PARENTHOOD ASSOCIATION OF UTAH; PLANNED PARENTHOOD OF KANSAS & MID-MISSOURI; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC.; POPULATION CONNECTION; RAISING WOMEN'S VOICES FOR THE HEALTH CARE WE NEED; SERVICE EMPLOYEES INTERNATIONAL UNION; SOUTHWEST WOMEN'S LAW CENTER; UTAH HEALTH POLICY PROJECT; CENTER FOR REPRODUCTIVE RIGHTS; AMERICAN PUBLIC HEALTH ASSOCIATION; GUTTMACHER INSTITUTE; NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; NATIONAL WOMEN'S HEALTH NETWORK; R. ALTA CHARO, PROFESSOR; REPRODUCTIVE HEALTH TECHNOLOGIES PROJECT; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA; ANTI-DEFAMATION LEAGUE; CATHOLICS FOR CHOICE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; INTERFAITH ALLIANCE FOUNDATION; NATIONAL COALITION OF AMERICAN NUNS; NATIONAL COUNCIL OF JEWISH WOMEN; RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE; UNITARIAN UNIVERSALIST ASSOCIATION; UNITARIAN UNIVERSALIST WOMEN'S FEDERATION; NATIONAL HEALTH LAW PROGRAM; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.; ASIAN PACIFIC AMERICAN LEGAL CENTER; FORWARD TOGETHER; NATIONAL HISPANIC MEDICAL ASSOCIATION;

IPAS; SEXUALITY INFORMATION AND EDUCATIONAL COUNCIL OF THE U.S.; CAMPAIGN TO END AIDS; HIV LAW PROJECT; NATIONAL WOMEN AND AIDS COLLECTIVE; HOUSING WORKS, AMICI CURIAE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(D.C. No. 5:12-CV-01000-HE)

[Filed: June 27, 2013]

* * * * *

Before: BRISCOE, Chief Judge, KELLY, LUCERO, HARTZ, TYMKOVICH, GORSUCH, MATHESON, and BACHARACH, Circuit Judges.[*]

TYMKOVICH, Circuit Judge.

This case requires us to determine whether the Religious Freedom Restoration Act and the Free Exercise Clause protect the plaintiffs—two companies and their owners who run their businesses to reflect their religious values. The companies are Hobby Lobby, a craft store chain, and Mardel, a Christian bookstore chain. Their owners, the Greens, run both companies as closely held family businesses and operate them according to a set of Christian principles. They contend regulations implementing the 2010 Patient Pro-

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[*] The Honorable Jerome A. Holmes is recused in this matter.

tection and Affordable Care Act force them to violate their sincerely held religious beliefs. In particular, the plaintiffs brought an action challenging a regulation that requires them, beginning July 1, 2013, to provide certain contraceptive services as a part of their employer-sponsored health care plan. Among these services are drugs and devices that the plaintiffs believe to be abortifacients, the use of which is contrary to their faith.

We hold that Hobby Lobby and Mardel are entitled to bring claims under RFRA, have established a likelihood of success that their rights under this statute are substantially burdened by the contraceptive-coverage requirement, and have established an irreparable harm. But we remand the case to the district court for further proceedings on two of the remaining factors governing the grant or denial of a preliminary injunction.

More specifically, the court rules as follows:

As to jurisdictional matters, the court unanimously holds that Hobby Lobby and Mardel have Article III standing to sue and that the Anti-Injunction Act does not apply to this case. Three judges (Kelly, Tymkovich, and Gorsuch, JJ.) would also find that the Anti-Injunction Act is not jurisdictional and the government has forfeited reliance on this statute. These three judges would also hold that the Greens have standing to bring RFRA and Free Exercise claims and that a preliminary injunction should be granted on their RFRA claim. A fourth judge (Matheson, J.) would hold that the Greens have standing and would remand for further consideration of their request for a preliminary injunction on their RFRA claim.

Concerning the merits, a majority of five judges (Kelly, Hartz, Tymkovich, Gorsuch, and Bacharach, JJ.) holds that the district court erred in concluding Hobby Lobby and Mardel had not demonstrated a likelihood of success on their RFRA claim. Three judges (Briscoe, C.J., and Lucero and Matheson, JJ.) disagree and would affirm the district court on this question.

A majority of five judges (Kelly, Hartz, Tymkovich, Gorsuch, and Bacharach, JJ.) further holds that Hobby Lobby and Mardel satisfy the irreparable harm prong of the preliminary injunction standard. A four-judge plurality (Kelly, Hartz, Tymkovich, Gorsuch, JJ.) would resolve the other two preliminary injunction factors (balance of equities and public interest) in Hobby Lobby and Mardel's favor and remand with instructions to enter a preliminary injunction, but the court lacks a majority to do so. Instead, the court remands to the district court for further evaluation of the two remaining preliminary injunction factors.[1]

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[1] The en banc court joins as follows:*

(1) All judges join Part III; (2) Judges Kelly, Hartz, Tymkovich, Gorsuch, and Bacharach join Parts I, II, III, IV, and V; (3) Judges Kelly, Hartz, Tymkovich, and Gorsuch join Part VI in full, and Judge Bacharach joins as to Section VI(B)(1) only; (4) Judge Hartz separately concurs; (5) Judge Gorsuch separately concurs, joined by Judges Kelly and Tymkovich; (6) Judge Bacharach concurs in part; (7) Chief Judge Briscoe concurs and dissents in part, joined

One judge (Matheson, J.) reaches the merits of the plaintiffs' constitutional claim under the Free Exercise Clause, concluding that it does not entitle the plaintiffs to preliminary injunctive relief.[2]

Accordingly, for the reasons set forth below and exercising jurisdiction under 28 U.S.C. § 1292(a)(1), we reverse the district court's denial of the plaintiffs' motion for a preliminary injunction and remand with instructions that the district court address the remaining two preliminary injunction factors and then assess whether to grant or deny the plaintiffs' motion.

I. Background & Procedural History

A. The Plaintiffs

The plaintiffs in this case are David and Barbara Green, their three children (Steve Green, Mart Green, and Darsee Lett), and the businesses they collectively own and operate: Hobby Lobby Stores, Inc. and Mardel, Inc. David Green is the founder of Hobby Lobby, an arts and crafts chain with over 500 stores and about 13,000 full-time employees. Hobby Lobby is a closely held family business organized as an

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by Judge Lucero; and (8) Judge Matheson concurs and dissents in part.

[2] Because the district court will be reviewing the RFRA claim, the majority declines at this stage to reach the constitutional question of whether Hobby Lobby and Mardel are likely to succeed on their Free Exercise claim. *See, e.g., Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

S-corp. Steve Green is president of Hobby Lobby, and his siblings occupy various positions on the Hobby Lobby board. Mart Green is the founder and CEO of Mardel, an affiliated chain of thirty-five Christian bookstores with just under 400 employees, also run on a for-profit basis.

As owners and operators of both Hobby Lobby and Mardel, the Greens have organized their businesses with express religious principles in mind. For example, Hobby Lobby's statement of purpose recites the Greens' commitment to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." JA 22-23a. Similarly, Mardel, which sells exclusively Christian books and materials, describes itself as "a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support." JA 25a.

Furthermore, the Greens allow their faith to guide business decisions for both companies. For example, Hobby Lobby and Mardel stores are not open on Sundays; Hobby Lobby buys hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior," JA 24a; and Hobby Lobby refuses to engage in business activities that facilitate or promote alcohol use.

The Greens operate Hobby Lobby and Mardel through a management trust (of which each Green is a trustee), and that trust is likewise governed by religious principles. The trust exists "to honor God with all that has been entrusted" to the Greens and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries." JA 21a. The trustees must sign "a Trust Commitment," which among other things requires them to affirm the Green family statement of faith and to "regularly seek to maintain a close intimate walk with the Lord Jesus Christ by regularly investing time in His Word and prayer." *Id.*

As is particularly relevant to this case, one aspect of the Greens' religious commitment is a belief that human life begins when sperm fertilizes an egg. In addition, the Greens believe it is immoral for them to facilitate any act that causes the death of a human embryo.

B. The Contraceptive-Coverage Requirement

Under the Patient Protection and Affordable Care Act (ACA), employment-based group health plans covered by the Employee Retirement Income Security Act (ERISA) must provide certain types of preventive health services. *See* 42 U.S.C. § 300gg-13; 29 U.S.C. § 1185d. One provision mandates coverage, without cost-sharing by plan participants or beneficiaries, of "preventive care and screenings" for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [HRSA]." 42 U.S.C. § 300gg-13(a)(4). HRSA is an agency within the Department of Health and Human Services (HHS).

When the ACA was enacted, there were no HRSA guidelines related to preventive care and screening for women. As a result, HHS asked the Institute of

Medicine (an arm of the National Academy of Sciences) to develop recommendations to help implement these requirements. In response, the Institute issued a report recommending, among other things, that the guidelines require coverage for "'[a]ll Food and Drug Administration [FDA] approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed by a provider." 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

HRSA and HHS adopted this recommendation, meaning that employment-based group health plans covered by ERISA now must include FDA-approved contraceptive methods. The FDA has approved twenty such methods, ranging from oral contraceptives to surgical sterilization. Four of the twenty approved methods—two types of intrauterine devices (IUDs) and the emergency contraceptives commonly known as Plan B and Ella—can function by preventing the implantation of a fertilized egg. The remaining methods function by preventing fertilization.[3]

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[3] There is an ongoing medical debate as to whether some of the contraceptive methods relevant to this case act by preventing *implantation* or *fertilization*. *Compare, e.g.*, Physicians for Reproductive Health et al. Amicus Br. at 12-13, *with* Ass'n of Am. Physicians & Surgeons et al. Amicus Br. at 12 & n.21. This is relevant because Hobby Lobby and Mardel object to forms of contraception that prevent uterine implantation, but they do not object to those that prevent conception. For purposes of this appeal, however, there is no material dispute. Both the government and the medical amici supporting the government concede that at least some of the contraceptive methods to which the plaintiffs object have the

C. Exemptions from the Contraceptive-Coverage Requirement

A number of entities are partially or fully exempted from the contraceptive-coverage requirement.

First, HHS "may establish exemptions" for "group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services . . . ." 45 C.F.R. § 147.130(a)(1)(iv)(A).

HHS regulations currently define a "religious employer" as an organization that: (1) has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a non-profit organization described in a provision of the Internal Revenue Code that refers to

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potential to prevent uterine implantation. *See, e.g.*, Aple. Br. at 9 n.6 (noting that one of the three ways emergency contraceptive pills function is by "inhibiting implantation" (quoting 62 Fed. Reg. 8610, 8611 (Feb. 25, 1997))); Physicians for Reproductive Health et al. Amicus Br. at 16 (noting that some studies suggest the copper present in IUDs "can also alter molecules present in the endometrial lining," which causes "alteration of the endometrial lining [that] *prevents* . . . implantation" (emphasis added)). Some of our colleagues suggest this debate extends only to intrauterine devices, not Plan B and Ella. *See* Briscoe Op. at 3. Whatever the merits of this argument, we need not wade into scientific waters here, given the above-noted agreement that some of the challenged devices function in a manner that Hobby Lobby and Mardel find morally problematic.

churches, their integrated auxiliaries, conventions or associations of churches, and to the exclusively religious activities of any religious order. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B).

This definition of religious employer might change, however, as the federal agencies responsible for implementing the preventive services portion of the ACA have proposed a new rule that would eliminate the first three requirements above and clarify that the exemption is available to all non-profit organizations falling within the scope of a certain Internal Revenue Code provision. *See* 78 Fed. Reg. 8456, 8461 (Feb. 6, 2013).

Second, the government has proposed an accommodation for certain other non-profit organizations, including religious institutions of higher education, that have maintained religious objections to contraceptive coverage yet will not fall within the amended definition of a religious employer. Many of these organizations are currently subject to a temporary "safe harbor" provision that temporarily exempts them from having to cover contraceptive services. The government has proposed to route the contraceptive coverage for these organizations through a middleman insurer or insurance plan administrator, allowing the organizations to avoid directly providing contraceptive coverage. *See id.* at 8458-68.

Third, if a business does not make certain significant changes to its health plans after the ACA's effective date, those plans are considered "grandfathered" and are exempt from the contraceptive-coverage requirement. *See* 42 U.S.C. § 18011(a)(2). Grandfathered plans may remain so indefinitely.

Fourth, businesses with fewer than fifty employees are not required to participate in employer-sponsored health plans. *See, e.g.*, 26 U.S.C. § 4980H. To the extent these businesses do not offer a health plan, they do not have to comply with any aspect of the shared responsibility health coverage requirements, including the contraceptive-coverage requirement. At the same time, the government asserts that if an otherwise exempt small business offers a health plan, it must comply with the contraceptive-coverage requirement. *See* Aple. Br. at 39 (citing 42 U.S.C. § 300gg-13).

Relying on information released by the White House and HHS, the plaintiffs estimate that at least 50 million people, and perhaps over a 100 million, are covered by exempt health plans. JA 80a. The government argues that the number of grandfathered health plans will decline over time, that grandfathered plans may already cover the objected-to contraceptives, and that financial incentives exist to push small businesses into the health insurance market, in which case they would have to comply with the contraceptive-coverage requirement. At the same time, the government has not offered contrary estimates of individuals covered by exempt health plans.

No exemption, proposed or otherwise, would extend to for-profit organizations like Hobby Lobby or Mardel. And the various government agencies responsible for implementing the exceptions to the contraceptive-coverage requirement have announced that no proposed exemption will extend to for-profit entities under any circumstances because of what the government considers an important distinction, discussed further below, between for-profit and non-profit status.

D. The Expected Effect of the Contraceptive-Coverage Requirement

The Greens run the Hobby Lobby health plan, a self-insured plan, which provides insurance to both Hobby Lobby and Mardel employees. Hobby Lobby and Mardel cannot qualify for the "grandfathered" status exemption because they elected not to maintain grandfathered status prior to the date that the contraceptive-coverage requirement was proposed.

Nevertheless, the Greens object to providing coverage for any FDA-approved contraceptives that would prevent implantation of a fertilized egg. Because the Greens believe that human life begins at conception, they also believe that they would be facilitating harms against human beings if the Hobby Lobby health plan provided coverage for the four FDA-approved contraceptive methods that prevent uterine implantation (Ella, Plan B, and the two IUDs). The government does not dispute the sincerity of this belief.

The Greens present no objection to providing coverage for the sixteen remaining contraceptive methods. In other words, the Greens are willing to cover, without cost-sharing, the majority of FDA-approved contraceptive methods, from the original birth control pill to surgical sterilization. But if Hobby Lobby or

Mardel employees wish to obtain Ella, Plan B, or IUDs, the Greens object to being forced to provide such coverage.

According to the plaintiffs, the corporations' deadline to comply with the contraceptive-coverage requirement is July 1, 2013. If the Hobby Lobby health plan does not cover all twenty contraceptive methods by that date, the businesses will be exposed to immediate tax penalties, potential regulatory action, and possible private lawsuits. *See, e.g.*, 26 U.S.C. §§ 4980D, 4980H; 29 U.S.C. §§ 1132, 1185d.

The most immediate consequence for Hobby Lobby and Mardel would come in the form of regulatory taxes: $100 per day for each "individual to whom such failure relates." 26 U.S.C. § 4980D(b)(1). The plaintiffs assert that because more than 13,000 individuals are insured under the Hobby Lobby plan (which includes Mardel), this fine would total at least $1.3 million per day, or almost $475 million per year. This assumes that "individual" means each individual insured under Hobby Lobby's plan. If the corporations instead drop employee health insurance altogether, they will face penalties of $26 million per year. *See id.* § 4980H.

E. Procedural History

The plaintiffs filed suit on September 12, 2012, challenging the contraceptive-coverage requirement under RFRA, the Free Exercise Clause of the First Amendment, and the Administrative Procedure Act. The plaintiffs simultaneously moved for a preliminary injunction on the basis of their RFRA and Free Exercise claims. The district court denied that motion. *See Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012).

The plaintiffs then appealed the denial of the preliminary injunction and moved for injunctive relief pending appeal. A two-judge panel denied relief pending appeal, adopting substantially the same reasoning as the district court. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012). The plaintiffs then sought emergency relief under the All Writs Act from the Supreme Court, which also denied relief. *See Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641 (2012) (Sotomayor, J., in chambers).

The plaintiffs subsequently moved for initial en banc consideration of this appeal, citing the exceptional importance of the questions presented. We granted that motion. And given Hobby Lobby and Mardel's July 1 deadline for complying with the contraceptive-coverage requirement, we granted the plaintiffs' motion to expedite consideration of this appeal.

II. The Religious Freedom Restoration Act

Hobby Lobby and Mardel's central claims here arise under the Religious Freedom Restoration Act. A plaintiff makes a prima facie case under RFRA by showing that the government substantially burdens a sincere religious exercise. *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001). The burden then shifts to the government to show that the "compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 420 (2006) (quoting 42 U.S.C. § 2000bb-1(b)). This burden-shifting approach applies even at the preliminary injunction stage. *Id.* at 429.

The principal questions we must resolve here include: (1) whether Hobby Lobby and Mardel are "persons" exercising religion for purposes of RFRA; (2) if so, whether the corporations' religious exercise is substantially burdened; and (3) if there is a substantial burden, whether the government can demonstrate a narrowly tailored compelling government interest.

III. Subject-Matter Jurisdiction

Before turning to the preliminary injunction standard, we must resolve two issues that bear on our subject-matter jurisdiction—standing and the Anti-Injunction Act.

A. Standing

We begin by examining whether Hobby Lobby and Mardel have standing to sue in federal court. Article III of the Constitution limits federal judicial power to "Cases" and "Controversies." A party that cannot present a case or controversy within the meaning of Article III does not have standing to sue in federal court. And whenever standing is unclear, we must consider it *sua sponte* to ensure there is an Article III case or controversy before us. *See New Eng.*

Health Care Emp. Pension Fund v. Woodruff, 512 F.3d 1283, 1288 (10th Cir. 2008).

Under the familiar three-part test for establishing Article III standing, a plaintiff must show an injury that is "[1] concrete, particularized, and actual or imminent; [2] fairly traceable to the challenged action; and [3] redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (internal quotation marks omitted).

We conclude that Hobby Lobby and Mardel have Article III standing. Both companies face an imminent loss of money, traceable to the contraceptive-coverage requirement. Both would receive redress if a court holds the contraceptive-coverage requirement unenforceable as to them. Both therefore have Article III standing.[4]

B. The Anti-Injunction Act

A second possible impediment to our subject-matter jurisdiction is the Anti-Injunction Act (AIA). *See* 26 U.S.C. § 7421. Although the plaintiffs and the government agree that the AIA does not apply here,

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[4] The plaintiffs also contend that the Greens, as owners of Hobby Lobby and Mardel, have standing in their own right to bring the claims at issue here. But there is no dispute that relief as to Hobby Lobby and Mardel would satisfy the Greens. Because we conclude RFRA protects Hobby Lobby and Mardel, the majority opinion does not reach whether the Greens may likewise bring RFRA claims based on regulations applying to the companies they own. Four judges would nonetheless conclude the Greens have standing and write separately on this question. *See* Gorsuch Op. (joined by Kelly and Tymkovich, JJ.), *infra*; Matheson Op., *infra*.

"subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (internal quotation marks omitted). We therefore have an independent duty to determine whether the AIA strips us of subject-matter jurisdiction. *Id.*

The AIA dictates, with statutory exceptions inapplicable to this case, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). As the Supreme Court recently noted, the AIA "protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2582 (2012).

In this case, the corporations' challenge relates to the government's authority under 26 U.S.C. § 4980D, which imposes a "tax" on any employer that does not meet the ACA's health insurance requirements, including the contraceptive-coverage requirement. *Id.* § 4980D(a). As noted above, the "tax" is set at $100 "for each day in the noncompliance period with respect to each individual to whom such failure relates." *Id.* § 4980D(b)(1). If an employer fails to provide health insurance, the employer is subject to a tax under § 4980H. And, as the Supreme Court recently instructed, when Congress uses the term "tax," it is a strong indication that Congress intends the AIA to apply. *NFIB*, 132 S. Ct. at 2582 (2012).

Still, the AIA does not apply to every lawsuit "tangentially related to taxes," *Cohen v. United States*, 650 F.3d 717, 727 (D.C. Cir. 2011) (en banc), and the corporations' suit is not challenging the IRS's ability to collect taxes. Rather, they seek to enjoin the enforcement of one HHS regulation, 45 C.F.R. § 147.130, which requires Hobby Lobby and Mardel to provide their employees with health plans that include "preventive care . . . provided for in [the] . . . [HRSA] guidelines," *id.* § 147.130(a)(1)(iv), which in turn "require coverage, without cost sharing, for '[a]ll [FDA-]approved contraceptive methods,'" 77 Fed. Reg. at 8726 (Feb. 15, 2012). In other words, Hobby Lobby and Mardel are not seeking to enjoin the collection of taxes or the execution of any IRS regulation; they are seeking to enjoin the enforcement, by whatever method, of one HHS regulation that they claim violates their RFRA rights.

Indeed, a regulatory tax is just one of many collateral consequences that can result from a failure to comply with the contraceptive-coverage requirement. *See, e.g.*, 29 U.S.C. § 1132(a)(5) (authorizing the Secretary of Labor to enforce the contraceptive-coverage requirement against non-compliant insurers); 42 U.S.C. § 300gg-22(a)(2) (authorizing the Secretary of HHS to exact penalties against non-compliant insurers in states where the state government does not enforce the health insurance requirements).

And just as the AIA does not apply to any suit against the individual mandate, which is enforced by the IRS, *see NFIB*, 132 S. Ct. at 2584, so too does the

AIA not apply to any suit against the contraceptive-coverage requirement, even though it also may be enforced by the IRS. The statutory scheme makes clear that the tax at issue here is no more than a penalty for violating regulations related to health care and employer-provided insurance, *see, e.g.,* 42 U.S.C. § 300gg-22(b)(2)(C)(i) (calculating the maximum "penalty" that the Secretary of HHS can impose on non-compliant insurers in the same way that 26 U.S.C. § 4980D(b)(1) calculates the "tax" for non-compliant employers, namely "$100 for each day for each individual with respect to which such a failure occurs"), and the AIA does not apply to "the exaction of a purely regulatory tax," *Robertson v. United States,* 582 F.2d 1126, 1127 (7th Cir. 1978).

Both sides agree that the AIA should not apply for essentially these same reasons. We are convinced by this reasoning and proceed to resolve the merits of the RFRA claim.

IV. Preliminary Injunction Standard

As noted above, the district court denied Hobby Lobby and Mardel's request for preliminary injunctive relief. We review the denial of a preliminary injunction for abuse of discretion. *Little v. Jones,* 607 F.3d 1245, 1250 (10th Cir. 2010). A district court abuses its discretion by denying a preliminary injunction based on an error of law. *Westar Energy, Inc. v. Lake,* 552 F.3d 1215, 1224 (10th Cir. 2009).

Under the traditional four-prong test for a preliminary injunction, the party moving for an injunction must show: (1) a likelihood of success on the merits;

(2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest. *See, e.g., Winter v. NRDC,* 555 U.S. 7, 20 (2008).

Hobby Lobby and Mardel urge that we apply a relaxed standard under which it can meet its burden for a preliminary injunction by showing the second, third, and fourth factors "tip strongly in [its] favor," and then satisfy the first factor "by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Okla. ex rel. Okla. Tax Comm'n v. Int'l Registration Plan, Inc.,* 455 F.3d 1107, 1113 (10th Cir. 2006). But we need not resolve whether this relaxed standard would apply here, given that a majority of the court holds that Hobby Lobby and Mardel have satisfied the likelihood-of-success prong under the traditional standard.

The district court ruled that the corporations failed the likelihood-of-success element because even closely held family businesses like Hobby Lobby and Mardel are not protected by RFRA.

We disagree with this conclusion and determine that the contraceptive-coverage requirement substantially burdens Hobby Lobby and Mardel's rights under RFRA. And at this stage, the government has not shown a narrowly tailored compelling interest to justify this burden.

V. Merits

A. Hobby Lobby and Mardel Are "Persons Exercising Religion" Under RFRA

RFRA provides, as a general rule, that the "Government shall not substantially burden a *person's* exercise of religion." 42 U.S.C. § 2000bb-1(a) (emphasis added). The parties dispute whether for-profit corporations, such as Hobby Lobby and Mardel, are persons exercising religion for purposes of RFRA. We thus turn to the question of whether Hobby Lobby, as a family owned business furthering its religious mission, and Mardel, as a Christian bookstore, can take advantage of RFRA's protections.

The government makes two arguments for why this is not the case. First, it cites to civil rights statutes and labor laws that create an exemption for religious organizations. It then references case law suggesting that non-profit status is an objective criterion for determining whether an entity is a religious organization for purposes of these civil rights statutes and labor laws. The government therefore argues that, as a matter of statutory interpretation, RFRA should be read to carry forward the supposedly preexisting distinction between non-profit, religious corporations and for-profit, secular corporations. Second, the government asserts that the for-profit/non-profit distinction is rooted in the Free Exercise Clause. It suggests Congress did not intend RFRA to expand the scope of the Free Exercise Clause. The government therefore concludes RFRA does not extend to for-profit corporations.

We reject both of these arguments. First, we hold as a matter of statutory interpretation that Congress did not exclude for-profit corporations from RFRA's protections. Such corporations can be "persons" exercising religion for purposes of the statute.[5] Second, as a matter of constitutional law, Free Exercise rights may extend to some for-profit organizations.

1. Statutory Interpretation

a. The Dictionary Act

We begin with the statutory text. RFRA contains no special definition of "person." Thus, our first resource in determining what Congress meant by "person" in RFRA is the Dictionary Act, which instructs: "In determining the meaning of any Act of Congress, unless the context indicates otherwise * * * the word[ ] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Thus, we could end the matter here since the plain language of the text encompasses "corporations," including ones like Hobby Lobby and Mardel.

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[5] We recognize there is at least tentative disagreement among the courts of appeal on this question. *Compare, e.g., Grote v. Sebelius,* 708 F.3d 850, 855-56 (7th Cir. 2013) (corporation is a "person" for purposes of RFRA), *with Conestoga Wood Specialities Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.,* No. 13-1144, 2013 WL 1277419, at *2 (3d Cir. Feb. 8, 2013) (corporation is not a "person" under RFRA).

In addition, the Supreme Court has affirmed the RFRA rights of corporate claimants, notwithstanding the claimants' decision to use the corporate form. *See O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 973 (10th Cir. 2004) (en banc) (affirming a RFRA claim brought by "a New Mexico corporation on its own behalf"), *aff'd*, 546 U.S. 418 (2006).[6]

b. Other Statutes

Given that no one disputes at least some types of corporate entities can bring RFRA claims, the next question is whether Congress intended to exclude for-profit corporations, as opposed to non-profit corporations, from RFRA's scope. Notably, neither the Dictionary Act nor RFRA explicitly distinguishes between for-profit and non-profit corporations; the Dictionary

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[6] We further note that RFRA defines religious exercise by cross-reference to the Religious Land Use and Institutionalized Persons Act (RLUIPA). *See* 42 U.S.C. § 2000bb-2(4) ("the term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title"). According to the relevant portion of RLUIPA, "'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A). RLUIPA further notes that both "person[s]" and "entit[ies]" can exercise the religious rights it grants. *Id.* § 2000cc-5(7)(B). RLUIPA therefore provides further support that RFRA, to which it is linked, encompasses both natural persons and anything that qualifies as an "entity"—which of course would encompass corporations. And this definition likewise does not distinguish between for-profit and non-profit status or between religious and secular entities.

Act merely instructs that the term "persons" includes corporations.

At the same time, we acknowledge the Dictionary Act definition does not apply if "the context indicates otherwise." 1 U.S.C. § 1. Generally, "context" here "means the text of the Act of Congress surrounding the word at issue, or the text of other related congressional Acts." *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 199 (1993). The government contends that RFRA's "context" points to exemptions for religious employers in other statutes, and in particular it directs us to the religious exemptions contained in Title VII, the Americans with Disabilities Act (ADA), and the National Labor Relations Act (NLRA). But rather than providing contextual support for excluding for-profit corporations from RFRA, we think these exemptions show that Congress knows how to craft a corporate religious exemption, but chose not to do so in RFRA.

Under Title VII, for example, the prohibition on discrimination on the basis of religion does not apply to an employer that is "a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a). The ADA contains similar language. *See id.* § 12113(d)(1), (2). The government also notes that the Supreme Court has construed the NLRA to remove the National Labor Relations Board's jurisdiction over schools operated by churches. *See NLRB v. Catholic Bishop*, 440 U.S. 490 (1979).[7]

The government argues that in enacting RFRA against the backdrop of these statutes, Congress "carried forward [a] distinction between non-profit, religious organizations and for-profit, secular companies.'" Aple. Br. at 16. In short, the government believes Congress used "person" in RFRA as extreme shorthand for something like "natural person or 'religious organization' as that term was used in exemptions for religious organizations as set forth in Title VII, the ADA, and the NLRA."

This reading strikes us as strained. Indeed, the exemptions present in Title VII, the ADA, and the NLRA suggest the opposite inference from what the government draws. Rather than implying that similar narrowing constructions should be imported into statutes that do not contain such language, they imply Congress is quite capable of narrowing the scope of a statutory entitlement or affording a type of statutory exemption when it wants to. The corollary to this rule, of course, is that when the exemptions are not present, it is not that they are "carried forward" but rather that they do not apply. *Cf. Chickasaw Nation v. United States*, 208 F.3d 871, 880 (10th Cir. 2000) (holding, in light of the fact that Congress had created a number of other tax exemptions for Indian tribes, "[i]f Congress wishes to exempt Indian tribes from excise taxes that otherwise might be reasonably construed as applying to them, it should do so explicitly"), *aff'd*, 534 U.S. 84 (2001).

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[7] *Catholic Bishop* turned on constitutional avoidance, not on statutory text or congressional intent. *See id.* at 507 ("in the absence of a clear expression of Congress'[s] intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses"). But for present purposes we will accept the government's characterization of *Catholic Bishop* as "context" for RFRA.

In addition, Congress knows how to ensure that a prior-enacted statute restricts the meaning of a later-enacted statute. RFRA is just such a statute, restricting later-enacted federal statutes unless those statutes specifically exempt themselves. *See* 42 U.S.C. § 2000bb-3(b). Congress put nothing similar in Title VII, the ADA, or the NLRA.

c. Case Law

The government nonetheless points to *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), for the idea that the for-profit/non-profit distinction was well-established in Congress's mind before it enacted RFRA. We disagree with the government's interpretation of *Amos*.

Amos involved employees of non-profit and arguably non-religious businesses run by the Mormon Church. These businesses had fired certain Mormon employees who did not follow church behavioral standards, and the employees sued under Title VII. The Church moved to dismiss based on Title VII's exemption for "religious corporation[s]," 42 U.S.C.

§ 2000e-1(a)—the same exemption on which the government bases its argument that Congress intended to limit RFRA to non-profit entities.

The plaintiffs countered "that if construed to allow religious employers to discriminate on religious grounds in hiring for *nonreligious* jobs, [the exemption] violates the Establishment Clause." *Amos*, 483 U.S. at 331 (emphasis added). The district court agreed, reasoning in part that Title VII's exemption unlawfully advanced religion because it could "permit churches with financial resources impermissibly to extend their influence and propagate their faith by entering the commercial, profit-making world." *Id.* at 337.

The Supreme Court reversed. It concluded this particular part of the district court's reasoning was incorrect because it assumed the existence of for-profit activities yet none of the Mormon businesses at issue operated on a for-profit basis. The Court never reached the question of how for-profit activity might have changed its analysis. *Id.*

Two *Amos* concurrences raised concerns about religion-sponsored for-profit activity more explicitly. But both concurrences were careful not to categorically exclude such activity from Title VII's exemption. *See id.* at 345 n.6 (Brennan, J., concurring) (emphasizing that the non-profit distinction was important but also noting "[i]t is . . . conceivable that some for-profit activities could have a religious character"); *id.* at 349 (O'Connor, J., concurring) (noting that the question "remains open" whether "activities conducted by religious organizations solely as profit-making enterprises" would qualify as religious).

From these references to non-profit status in *Amos*, the government concludes that the for-profit/non-profit distinction matters a great deal. But we do not see what the government sees in *Amos*. *Amos* was about whether Title VII's religious exemption violates the Establishment Clause. The *Amos* majority rendered no opinion on how for-profit activity might affect that question. At best, then, *Amos* leaves open the question of whether for-profit status matters for Title VII's religious employer exemption. We do not see how it provides the "context" that would render the Dictionary Act's definition of "person" inappropriate in RFRA.

Nor do the other post-RFRA circuit cases on which the government relies provide more guidance. The government cites *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2010) (per curiam), and *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). The question in *Spencer* was whether a faith-based humanitarian organization could receive the same Title VII exemption at issue in *Amos*. In a fractured opinion, the court concluded the organization was eligible, in part because it did not engage in for-profit business activity. But *Spencer* established no categorical rule regarding for-profit entities. Judge O'Scannlain, in explaining why he agreed to make non-profit status a relevant consideration, nonetheless noted that *Amos* left open the potential effect of for-profit status. *Id.* at 734 & n.13 (O'Scannlain, J., concurring).

The D.C. Circuit's *Great Falls* decision comes to essentially the same place, concluding that for-profit status can be one relevant factor among others when it comes to certain religious exemptions. In that case, the University of Great Falls contended that it was exempt from NLRB jurisdiction under both *Catholic Bishop* and RFRA. The D.C. Circuit adopted a three-factor test for the NLRB to use "to determine whether it has jurisdiction [over a school claiming the *Catholic Bishop* exemption] without delving into matters of religious doctrine or motive, and without coercing an educational institution into altering its religious mission to meet regulatory demands." *Great Falls*, 278 F.3d at 1345. Among the three factors was whether the institution "is organized as a nonprofit." *Id.* at 1343 (internal quotation marks omitted).

But *Great Falls* did not say that *only* non-profits can qualify for the *Catholic Bishop* exemption. *See id.* ("non-profit institutions have a more compelling claim to a *Catholic Bishop* exemption than for-profit businesses"). Moreover, the opinion made clear that its analysis did not settle anything as to RFRA: "a ruling that an entity is not exempt from [NLRB] jurisdiction under *Catholic Bishop* may not foreclose a [RFRA] claim that requiring that entity to engage in collective bargaining would 'substantially burden' its 'exercise of religion.'" *Id.* at 1347.

To the extent the government believes *Spencer* and *Great Falls* form part of what "Congress carried forward" when enacting RFRA, Aple. Br. at 16, *Spencer* and *Great Falls*, of course, post-date RFRA. Congress therefore could not have carried them forward into RFRA. And to the extent the government sees *Spencer* and *Great Falls* as following principles laid down in *Amos*—which pre-dates RFRA—we disagree. *Amos* decides nothing about for-profit entities' religious rights. In short, none of these cases say anything about what Congress intended in RFRA.[8]

In conclusion, the government has given us no persuasive reason to think that Congress meant "person" in RFRA to mean anything other than its default meaning in the Dictionary Act—which includes corporations regardless of their profit-making status.[9]

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[8] We also note that even the dissent in *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013), would not establish a categorical rule against for-profit religious exercise. *Grote* involved a car parts business, but the dissent opined that "there do exist some corporate entities which are organized expressly to pursue religious ends, and I think it fair to assume that such entities may have cognizable religious liberties independent of the people who animate them, even if they are profit-seeking." *Id.* at 856 (Rovner, J., dissenting).

[9] The dissents suggest we have improperly placed the burden of persuasion on the government rather than the plaintiffs in our assessment of whether Hobby Lobby and Mardel are persons exercising religion for purposes of RFRA. *See* Briscoe Op. at 10-11 & n.3; Matheson Op. at 4-11. The question of the allocation of a burden for satisfying the preliminary injunction factors—which we agree rests with the plaintiffs—and the force of the legal arguments advanced by both sides are two different things. The default presumption is that the Dictionary Act applies. *Rowland*, 506 U.S. at 200. Regardless of who bears the overall burden of

2. *Free Exercise*

The government further argues that the "[t]he distinction between non-profit, religious organizations and for-profit, secular companies is rooted in the text of the First Amendment," Aple. Br. at 12 (internal quotation marks omitted). It claims this understanding of the First Amendment informed what Congress intended by "person" in RFRA. Undoubtedly, Congress's understanding of the First Amendment informed its drafting of RFRA, but we see no basis for concluding that such an understanding included a for-profit/non-profit distinction.

a. *RFRA's Purpose*

RFRA was Congress's attempt to legislatively overrule *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* had abrogated much of the Supreme Court's earlier jurisprudence regarding whether a neutral law of general application nonetheless impermissibly burdened a person's Free Exercise rights. The pre-*Smith* test exempted such a person from the law's constraints unless the government could show a compelling need to apply the law to the person. *Id.* at 882-84. *Smith* eliminated that test on the theory that the Constitution permits burdening Free Exercise if

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persuasion, we do not think it is the plaintiffs' duty to prove a negative—*i.e.*, to offer up all possible "context[s]" that might "indicate otherwise," 1 U.S.C. § 1—and then refute them. In our adversarial system, arguments for otherwise-indicating context naturally come from the party opposing the Dictionary Act's definition. The government's arguments in this regard do not convince us.

that burden results from a neutral law of general application. *Id.* at 878-80.

Congress responded to *Smith* by enacting RFRA, which re-imposed a stricter standard on both the states and the federal government. The Supreme Court held that Congress could not constitutionally apply RFRA to the states, *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997), but RFRA still constrains the federal government, *Kikumura*, 242 F.3d at 959.

Congress, through RFRA, intended to bring Free Exercise jurisprudence back to the test established before *Smith*. There is no indication Congress meant to alter any other aspect of pre-*Smith* jurisprudence—including jurisprudence regarding who can bring Free Exercise claims. We therefore turn to that jurisprudence.

b. Corporate and For-Profit Free Exercise Rights

It is beyond question that associations—not just individuals—have Free Exercise rights: "An individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added). Therefore, courts have "recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and *the exercise of religion*. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." *Id.* at 618 (emphasis added); *see also Citizens United v. FEC*, 558 U.S. 310, 342-43 (2010) ("First Amendment protection extends to corporations . . . [, and the Court] has thus rejected the argument that . . . corporations or other associations should be treated differently under the First Amendment simply because such associations are not natural persons." (internal quotation marks omitted)).

Accordingly, the Free Exercise Clause is *not* a "'purely personal' guarantee[ ] . . . unavailable to corporations and other organizations because the 'historic function' of the particular [constitutional] guarantee has been limited to the protection of individuals." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978). As should be obvious, the Free Exercise Clause at least extends to associations like churches— including those that incorporate. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) (holding that a "not-for-profit corporation organized under Florida law" prevailed on its Free Exercise claim); *see also Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815) (Story, J.) ("[The] legislature may . . . enable all sects to accomplish the great objects of religion by giving them corporate rights for the manag[e]ment of their property, and the regulation of their temporal as well as spiritual concerns.").

In addition, the Supreme Court has settled that *individuals* have Free Exercise rights with respect to their *for-profit businesses.* *See, e.g., United States v. Lee,* 455 U.S. 252 (1982) (considering a Free Exercise claim of an Amish employer); *Braunfeld v. Brown,* 366 U.S. 599 (1961) (plurality opinion) (considering a Free Exercise claim by Jewish merchants operating for-profit).

In short, individuals may incorporate for religious purposes and keep their Free Exercise rights, and unincorporated individuals may pursue profit while keeping their Free Exercise rights. With these propositions, the government does not seem to disagree. The problem for the government, it appears, is when individuals incorporate *and* fail to satisfy Internal Revenue Code § 501(c)(3). At that point, Free Exercise rights somehow disappear.

This position is not "rooted in the text of the First Amendment," Aple. Br. at 12, and therefore could not have informed Congress's intent when enacting RFRA. As an initial matter, the debates in Congress surrounding the adoption of the First Amendment demonstrate an intent to protect a range of conduct broader than the mere right to believe whatever one chooses. Indeed, at the time of the amendment's inception in Congress, a competing formulation for the "free exercise of religion" was "rights of conscience." *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 Harv. L. Rev. 1409, 1488 (1990) [hereinafter McConnell, *The Origins*]; *see also Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 132 S. Ct. 694, 702 (2012) (citing McConnell, *The Origins,* *supra*). As compared to *exercise*, which "strongly connoted action" in the language of the day, "conscience" suggested mere thoughts, opinions, or internal convictions. McConnell, *The Origins, supra* at 1489. Congress chose *exercise*, indicating that, as the Supreme Court has frequently held, the protections of the Religion Clauses extend beyond the walls of a church, synagogue, or mosque to religiously motivated *conduct*, as well as religious belief. *Id.* at 1488-89.

The distinction gains force here because religious conduct includes religious expression, which can be communicated by individuals and for-profit corporations alike. *See Smith*, 494 U.S. at 877-78 (1990); *see also* Lee Strang, *The Meaning of "Religion" in the First Amendment*, 40 Duq. L. Rev. 181, 234 (2002) (stating that the shift from "conscience" to "religion" "connote[d] a 'community of believers' and allow[ed] for protection of the 'corporate or institutional aspect of religious belief'" (footnote omitted)); McConnell, *The Origins, supra* at 1490 (stating that an "important difference between the terms 'conscience' and 'religion' is that 'conscience' emphasizes individual judgment, while 'religion' also encompasses the corporate or institutional aspects of religious belief" (footnote omitted)). For example, the Supreme Court has stated that the exercise of religion includes "proselytizing." *Smith*, 494 U.S. at 877. And, as discussed above, Hobby Lobby and Mardel—two for-profit corporations—proselytize by purchasing hundreds of newspaper ads to "know Jesus as Lord and Savior." JA 24a. Because Hobby Lobby and Mardel express themselves for religious purposes, the First Amendment logic of *Citizens United*, 558 U.S. at 342-55, where the Supreme Court has recognized a First Amendment right of for-profit corporations to express themselves for political purposes, applies as well. We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression.

We also believe that a constitutional distinction would conflict with the Supreme Court's Free Exercise precedent. First, we cannot see why an individual operating for-profit retains Free Exercise protections but an individual who incorporates—even as the sole shareholder—does not, even though he engages in the exact same activities as before. This cannot be about the protections of the corporate form, such as limited liability and tax rates. Religious associations can incorporate, gain those protections, and nonetheless retain their Free Exercise rights.

Moreover, when the Supreme Court squarely addressed for-profit individuals' Free Exercise rights in *Lee* and *Braunfeld*, its analysis did not turn on the individuals' unincorporated status. Nor did the Court suggest that the Free Exercise right would have disappeared, using a more modern formulation, in a general or limited partnership, sole professional corporation, LLC, S-corp, or closely held family business like we have here.[10]

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[10] To the extent the government believes the for-profit/non-profit distinction derives from the nature of business versus religion, we note that the varieties of corporate form do not mirror such a

In addition, sincerely religious persons could find a connection between the exercise of religion and the pursuit of profit. Would an incorporated kosher butcher really have no claim to challenge a regulation mandating non-kosher butchering practices? The kosher butcher, of course, might directly serve a religious community—as Mardel, a Christian bookstore, does here. But we see no reason why one must orient one's business toward a religious community to preserve Free Exercise protections. A religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values. As a court, we do not see how we can distinguish this form of evangelism from any other.

We are also troubled—as we believe Congress would be—by the notion that Free Exercise rights turn on Congress's definition of "non-profit." What if Congress eliminates the for-profit/non-profit distinction in tax law? Do for-profit corporations then *gain* Free Exercise rights? Or do non-profits *lose* Free Exercise rights? Or what if Congress, believing that large organizations are less likely to have a true non-profit motive, declares that non-profit entities may not have more than 1,000 employees? Would a church with more than 1,000 employees lose its Free Exercise rights? Or consider a church that, for whatever rea-

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bright-line rule. *See, e.g.*, Cal. Corp. Code §§ 14600-31 (establishing "benefit corporations" that may pursue profits while balancing social welfare goals).

son, loses its 501(c)(3) status. Does it thereby lose Free Exercise rights?

To hypotheticals like these, the government cites to the Supreme Court's recent *Hosanna-Tabor* decision, where the Court recognized a ministerial exception that foreclosed review of the propriety of the decision of a "church" (understood in a broad sense that includes all religions) to hire or retain a "minister" (with the same broad meaning). In recognizing this ministerial exception, the Court found the exception precluded a claim brought under the Americans with Disabilities Act by a former employee of a school run by a denomination of the Lutheran church. The Court reiterated the uncontroversial proposition that "the text of the First Amendment . . . gives special solicitude to the rights of religious organizations." *Hosanna-Tabor*, 132 S. Ct. at 706. From this language, the government draws a narrow application of the Free Exercise Clause.

We do not share this interpretation. The main point of the Court was that the Religion Clauses add to the mix when considering freedom of association. *See also id.* at 712-13 (Alito, J., concurring) ("As the Court notes, the First Amendment 'gives special solicitude to the rights of religious organizations,' *but our expressive-association cases are nevertheless useful* in pointing out what . . . essential rights are [held by religious organizations]." (emphasis added)). But it does not follow that because religious organizations obtain protections through the Religion Clauses, all entities not included in the definition of religious organization are accorded *no* rights.

And, by relying on this language from *Hosanna-Tabor*, the government appears to concede that the for-profit/non-profit distinction is actually immaterial even under its own theory of the case. Under the government's position, only "religious organizations" receive Free Exercise rights. Any other organization, non-profit or for-profit, could not receive such protection. But *Hosanna-Tabor* was not deciding for-profit corporations' Free Exercise rights, and it does not follow that the Congress which enacted RFRA would have understood the First Amendment to contain such a bright-line rule.

The district court, nonetheless, saw incongruence between Free Exercise rights and the corporate form: "General business corporations . . . do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." *Hobby Lobby*, 870 F. Supp. 2d at 1291. But this is equally true of churches or other entities that exercise religion. The Church of Lukumi Babalu Aye, Inc., for example, did not *itself* pray, worship, or observe sacraments—nor did the sect in *O Centro*. But both certainly have Free Exercise rights. *See O Centro*, 546 U.S. at 423; *Lukumi*, 508 U.S. at 525.[11]

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[11] This is not a special case of associational standing. Associational standing requires, among other things, that all members of the association "would otherwise have standing to sue in their own

The government nonetheless raises the specter of future cases in which, for example, a large publicly traded corporation tries to assert religious rights under RFRA. That would certainly seem to raise difficult questions of how to determine the corporation's sincerity of belief. But that is not an issue here. Hobby Lobby and Mardel are not publicly traded corporations; they are closely held family businesses with an explicit Christian mission as defined in their governing principles. The Greens, moreover, have associated through Hobby Lobby and Mardel with the intent to provide goods and services while adhering to Christian standards as they see them, and they have made business decisions according to those standards. And the Greens are unanimous in their belief that the contraceptive-coverage requirement violates the religious values they attempt to follow in operating Hobby Lobby and Mardel. It is hard to compare them to a large, publicly traded corporation, and the difference seems obvious. Thus, we do not share any concerns that our holding would prevent courts from distin-

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right." *S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1246 (10th Cir. 2010). Although this may often be true for religious organizations, we are aware of no case in which it has been set forth as a requirement. When a religious organization sues in its own right, we do not ask, for example, whether every member of the religious group shares the same belief and therefore faces the same infringement on his or her belief. We accept the entity for what it claims to represent, regardless of unity among the individuals that associate through that entity.

guishing businesses that are not eligible for RFRA's protections.

We need not decide today whether any of these factors is necessary, but we conclude that their collective presence here is sufficient for Hobby Lobby and Mardel to qualify as "persons" under RFRA.[12]

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[12] The dissenters refer to this analysis as a departure from First Amendment law. *See* Briscoe Op. at 16; Matheson Op. at 10-11. Not so. Where did Hobby Lobby and Mardel lose their Free Exercise rights? Was it when they incorporated? This alone cannot be the relevant trigger because religions may incorporate as well. Was it when they began operating for-profit? Again, this alone cannot be the relevant event because the Supreme Court in *Lee* and *Braunfeld* recognized Free Exercise rights in a for-profit context. Is it because Hobby Lobby and Mardel do not have an explicitly religious purpose, like a church? Once again, this alone cannot be the relevant distinction. *Lee* and *Braunfeld* demonstrate that activities without an explicitly religious purpose still implicate Free Exercise rights.

In noting that the claim presented by Hobby Lobby and Mardel may differ from that of a publicly traded company, Chief Judge Briscoe also implies that we have created some sort of problematic multi-factor test for future RFRA claims. *See* Briscoe Op. at 18-22. But our holding simply reflects the facts presented here and explains their relevance to the statutory analysis.

B. Substantial Burden

The next question is whether the contraceptive-coverage requirement constitutes a substantial burden on Hobby Lobby and Mardel's exercise of religion.

The government urges that there can be no substantial burden here because "[a]n employee's decision to use her health coverage to pay for a particular item or service cannot properly be attributed to her employer." Aple. Br. at 13. There are variations on this same theme in many of the amicus briefs supporting the government's position, all of which stand for essentially the same proposition: one does not have a RFRA claim if the act of alleged government coercion somehow depends on the independent actions of third parties.

This position is fundamentally flawed because it advances an understanding of "substantial burden" that presumes "substantial" requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs. In isolation, the term "substantial burden" could encompass either definition, but for the reasons explained below, the latter interpretation prevails. Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief.

No one disputes in this case the sincerity of Hobby Lobby and Mardel's religious beliefs. And because the contraceptive-coverage requirement places substantial pressure on Hobby Lobby and Mardel to violate their sincere religious beliefs, their exercise of religion is substantially burdened within the meaning of RFRA.

1. The Substantial Burden Test

Our most developed case discussing the substantial burden test is *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010). In *Abdulhaseeb*, we were required to resolve a RFRA claim brought by Madyun Abdulhaseeb, a Muslim prisoner who raised a religious objection to the prison's failure to provide him a halal diet. Abdulhaseeb alleged that the prison cafeteria's failure to serve halal food violated his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA), a statute that adopts RFRA's "substantial burden" standard.[13]

In analyzing Abdulhaseeb's claim, we held that a government act imposes a "substantial burden" on religious exercise if it: (1) "requires participation in an activity prohibited by a sincerely held religious belief," (2) "prevents participation in conduct motivated by a sincerely held religious belief," or (3) "places substantial pressure on an adherent . . . to engage in conduct contrary to a sincerely held religious belief." *Id.* at 1315. Our analysis in *Abdulhaseeb* only concerned the third prong of this test, related to "substantial pressure." As we will explain below, the same is true here.

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[13] Congress intended the substantial burden tests in RFRA and RLUIPA to be interpreted uniformly. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 661 (10th Cir. 2006).

The substantial pressure prong rests firmly on Supreme Court precedent, in particular: *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), and *United States v. Lee*, 455 U.S. 252 (1982).

The plaintiff in *Thomas* was a Jehovah's Witness who had worked for a company that owned both a foundry and factory. The foundry processed sheet steel for a variety of industrial purposes. The factory manufactured turrets for military tanks. The plaintiff started working at the foundry but was transferred to the factory. Although he had no objection to working in the foundry, he raised a religious objection to his factory job, claiming that "he could not work on weapons without violating the principles of his religion." *Thomas*, 450 U.S. at 710. He quit his job and was eventually denied unemployment benefits. He then challenged this decision as improperly burdening his right to exercise his religion, a claim which ultimately reached the Supreme Court.

In considering the Free Exercise claim, the Court noted that the plaintiff could not clearly articulate the basis for the difference between processing steel that might be used in tanks and manufacturing the turrets themselves. *Id.* at 715. But that was not relevant to resolving the plaintiff's claim. Rather, the Court observed, "the judicial process is singularly ill equipped to resolve such differences in relation to the Religion Clauses." *Id.* Further, "[p]articularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner . . . correctly perceived the commands of [his] faith. Courts are not arbiters of scriptural interpretation." *Id.* at 716 (internal quotation marks omitted).

As to the distinction between factory and foundry work, the Court reasoned that "[the plaintiff's] statements reveal no more than that he found work in the . . . foundry sufficiently insulated from producing weapons of war. We see, therefore, that [the plaintiff] drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715. In other words, the distinction that the plaintiff drew was not as important as the fact that he made it based upon his religious beliefs. Once the plaintiff drew this line, it did not matter whether the line was "acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id.* at 714.

Accepting the plaintiff's religious beliefs as sincere, the Court then examined "the coercive impact" upon him of being "put to a choice between fidelity to religious belief or cessation of work." *Id.* at 717. On that score, the Court found a substantial burden:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting *substantial pressure* on an adherent to modify his behavior and to violate his beliefs, a *burden upon religion exists.* While the compulsion may be *indi-*

> *rect*, the infringement upon free exercise is *nonetheless substantial*.

Id. at 717-18 (emphasis added).

United States v. Lee similarly demonstrates that the burden analysis does not turn on whether the government mandate operates directly or indirectly, but on the coercion the claimant feels to violate his beliefs. The question in *Lee* was "whether the payment of social security taxes and the receipt of benefits interferes with the free exercise rights of the Amish." 455 U.S. at 256-57. The Court first identified the religious belief at issue, namely, that "it [is] sinful [for the Amish] not to provide for their own elderly and needy," and it is concomitantly sinful to pay into the social security system and thereby enable other Amish to shirk their duties toward the elderly and needy. *Id.* at 255 & n.3. Thus, the belief at issue in *Lee* turned in part on a concern of facilitating others' wrongdoing.

In responding to Lee's claims, the government did not question the sincerity of the plaintiff's belief, but it did raise a direct/indirect argument, *i.e.*, "that payment of social security taxes will not threaten the integrity of the Amish religious belief or observance." *Id.* at 257. As in *Thomas*, the Court in *Lee* would not indulge the government on this point, reasoning simply that "[i]t is not within the judicial function and judicial competence . . . to determine whether" a plaintiff "has the proper interpretation of [his] faith." *Id.* (internal quotation marks omitted).

The Court in *Lee* found "a conflict between the Amish faith and the obligations imposed by the social security system." *Id.* But, it said, "[n]ot all burdens on religion are unconstitutional." *Id.* The Court concluded, under the circumstances, that the burden was justified by "the Government's interest in assuring mandatory and continuous participation in and contribution to the social security system"—an interest which the Court described as "very high." *Id.* at 258-59. The Court determined that this interest justified the acknowledged burden on religious belief. *Id.*[14] But again, the analysis did not turn on whether the Amish faced direct or indirect coercion or whether the supposed violations of their faith turned on actions of independent third parties. The Court recognized the belief for what it was, accepted that the government was imposing a burden, and then analyzed the strength of the government's interest.

Given the foregoing, our first step in *Abdulhaseeb* was to identify the belief in question—the immorality of a non-halal diet—and to determine if the belief was sincerely held. Finding it was, we stated that "the issue is not whether the lack of a halal diet that includes meats substantially burdens the religious exercise of any Muslim practitioner, but whether it substantially burdens *Mr. Abdulhaseeb's* own exercise of his sincerely held religious beliefs." 600 F.3d at 1314 (emphasis in original). We concluded that the prison cafeteria's "failure to provide a halal diet either prevents Mr. Abdulhaseeb's religious exercise, or, at the least, places substantial pressure on Mr. Abdulhaseeb not to engage in his religious exercise by presenting him with a Hobson's choice—either he eats a non-halal diet in violation of his sincerely held beliefs, or he does not eat." *Id.* at 1317. Thus, the plaintiff faced a substantial burden.

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[14] The Free Exercise interest in *Lee* would today be described in the RFRA context as a "substantial burden on religious exercise," albeit one justified by a compelling government interest. *See O Centro,* 546 U.S. at 421. Further, the government agreed at oral argument that it is correct to view *Lee* as a case in which the Court found a "substantial burden" for purposes of the framework in RFRA.

2. *Applying the Substantial Burden Test*

The claims of Hobby Lobby and Mardel are similar to those raised in *Thomas*, *Lee*, and *Abdulhaseeb*, and the framework provided in those cases guides our analysis.

First, we must identify the religious belief in this case. The corporate plaintiffs believe life begins at conception. Thus, they have what they describe as "a sincere religious objection to providing coverage for Plan B and Ella since they believe those drugs could prevent a human embryo . . . from implanting in the wall of the uterus, causing the death of the embryo." JA 35a. And they allege a "sincere religious objection to providing coverage for certain contraceptive [IUDs] since they believe those devices could prevent a human embryo from implanting in the wall of the uterus, causing the death of the embryo." *Id.* Further, Hobby Lobby and Mardel object to "participating in, providing access to, paying for, training others to engage in, or otherwise supporting" the devices and drugs that yield these effects. Aplt. Br. at 27 (citing JA 14a).

Second, we must determine whether this belief is sincere. The government does not dispute the corporations' sincerity, and we see no reason to question it either.[15]

Third, we turn to the question of whether the government places substantial pressure on the religious believer. Here, it is difficult to characterize the pressure as anything but substantial. To the extent Hobby Lobby and Mardel provide a health plan, they would be fined $100 per employee, per day the plan does not meet the contraceptive-coverage requirement. 26 U.S.C. § 4980D(b)(1). With over 13,000 employees, that comes to more than $1.3 million per day, or close to $475 million per year. And if Hobby Lobby and Mardel simply stop offering a health plan—dropping health insurance for more than 13,000 employees—then the companies must pay about $26 million per year, *see id.* § 4980H(c)(1) (fining employer $2,000 per employee per year), and put themselves "at a competitive disadvantage in [their] efforts to recruit and retain employees," JA 40a.

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[15] "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here . . . ." *Thomas*, 450 U.S. at 715. The assertion that life begins at conception is familiar in modern religious discourse, although of course not universally held. Moral culpability for enabling a third party's supposedly immoral act is likewise familiar.

With this dilemma created by the statute, we believe that Hobby Lobby and Mardel have made a threshold showing regarding a substantial burden. Ordinarily, the question of substantial burden would involve subsidiary factual issues. *See Kikumura*, 242 F.3d at 961; *id.* at 966 (Holloway, J., concurring in part and dissenting in part); *id.* at 966-67 (Ebel, J., concurring). But in the district court, the government did not question the significance of the financial burden. And, the government has not done so in this appeal. Thus, the district court record leaves only one possible scenario: Hobby Lobby and Mardel incurred a substantial burden on their ability to exercise their religion because the law requires Hobby Lobby and Mardel to:

- compromise their religious beliefs,
- pay close to $475 million more in taxes every year, or
- pay roughly $26 million more in annual taxes and drop health-insurance benefits for all employees.

This is precisely the sort of Hobson's choice described in *Abdulhaseeb*, and Hobby Lobby and Mardel have established a substantial burden as a matter of law.

3. The Government's Arguments

The government resists this conclusion, contending the regulations place no burden on Hobby Lobby or Mardel. It insists the insurance coverage at issue is just another form of non-wage compensation—

supposedly the equivalent of money—and therefore should not present problems under RFRA.

Such reasoning cannot be squared with the Supreme Court's holding in *Thomas*. The Supreme Court emphasized that when the plaintiff drew a moral line between foundry and factory work, it was not the Court's prerogative to determine whether the line he drew "was an unreasonable one." *Thomas*, 450 U.S. at 715.

Just so here: Hobby Lobby and Mardel have drawn a line at providing coverage for drugs or devices they consider to induce abortions, and it is not for us to question whether the line is reasonable. This is especially so given that Hobby Lobby and Mardel stand in essentially the same position as the Amish carpenter in *Lee*, who objected to being forced to pay into a system that enables someone else to behave in a manner he considered immoral. That is precisely the objection of Hobby Lobby and Mardel. It is not the employees' health care decisions that burden the corporations' religious beliefs, but the government's demand that Hobby Lobby and Mardel enable access to contraceptives that Hobby Lobby and Mardel deem morally problematic. As the Supreme Court accepted the religious belief in *Lee*, so we must accept Hobby Lobby and Mardel's beliefs.[16]

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[16] At oral argument, the concern was raised whether our ruling here would permit Hobby Lobby and Mardel to withhold wages on religious grounds if they knew the wages would be used to purchase the objected-to contraceptives. This argument ignores the fact that the government can justify a substantial burden on reli-

For similar reasons, the government's reliance on *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Board of Regents v. Southworth*, 529 U.S. 217 (2000), is misplaced. First, in *Zelman*, the Supreme Court addressed an Establishment Clause challenge to a school voucher program where an overwhelming majority of the students were using vouchers to enroll at religious schools. 536 U.S. at 647. The Court concluded that such a program did not violate the Establishment Clause in part because "the perceived endorsement of a religious message[] is reasonably attributable to the individual recipient, not to the government," *id.* at 652, and in part because "*no reasonable observer* would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement," *id.* at 655 (emphasis added).

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gious exercise by demonstrating a compelling interest, and uniform enforcement of labor laws such as the Fair Labor Standards Act, which governs the payment of wages, would give rise to such an interest. *See, e.g., Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1397-99 (4th Cir. 1990). In a similar vein, Chief Judge Briscoe's dissent suggests that this opinion has "opened the floodgates to RFRA litigation challenging any number of federal statutes that govern corporate affairs." Briscoe Op. at 25; *see also* Matheson Op. at 6 n.3. This argument similarly fails to acknowledge both RFRA's allowance that a narrowly tailored compelling interest can justify a substantial burden and RFRA's requirement that the belief be sincere. *Cf. United States v. Quaintance*, 608 F.3d 717 (10th Cir. 2010) (rejecting an argument that RFRA barred the prosecution of members of a marijuana distribution conspiracy who claimed that use of the drug was central to their religious beliefs).

Southworth involved a similar claim brought by university students who challenged a mandatory fee that would be used in part to fund other student groups that produced speech the plaintiffs found objectionable. 529 U.S. at 230. The Court concluded that because funds for student activities were distributed to student groups on a viewpoint-neutral basis, this system prevented "any mistaken impression that the student [groups] speak for the University" or for the plaintiffs. *Id.* at 233 (internal quotation marks omitted).

The government attempts to analogize these Free Speech and Establishment Clause cases to the question here. The government suggests that because it was not possible to attribute the offensive speech to the students in *Southworth* and the support for religious schools to the state in *Zelman*, it is also impossible to attribute an employee's independent choice to the employer.

We reject this position because it assumes that moral culpability for the religious believer can extend no further than the government's legal culpability in the Establishment or Free Speech contexts. Again, *Thomas* teaches that the plaintiff is not required to articulate a legal principle for the line he draws, let alone point to an analog from potentially related fields of constitutional law. And the question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity.[17]

Hobby Lobby and Mardel have therefore established a substantial burden to their sincerely held religious beliefs. We now turn to the final question: whether the government has presented a compelling interest implemented through the least restrictive means available.[18]

C. Compelling Interest and Least Restrictive Means

As noted above, even at the preliminary injunction stage, RFRA requires *the government* to demonstrate that mandating a plaintiff's compliance with the contraceptive-coverage requirement is "the least restrictive means of advancing a compelling interest." *O Centro,* 546 U.S. at 423 (citing 42 U.S.C. § 2000bb1-(b)). As the Supreme Court emphasized, this standard requires that we "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431.

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[17] At oral argument, the government relied upon language from *Doremus v. Bd. of Ed. of Borough of Hawthorne*, 342 U.S. 429 (1952), a taxpayer standing case. The Supreme Court denied the taxpayer standing to bring the claims, reasoning in part that "the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure." *Id.* at 433. *Doremus* does not apply here because Hobby Lobby and Mardel do not bring their claims as taxpayers but rather as entities alleging injury from coercive government regulation. Thus, the taxpayer standing concerns animating the court's *Doremus* decision are not implicated here.

[18] The district court relied on a test for substantial burden applied by the Seventh Circuit in *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003). As the district court noted, the Seventh Circuit used *Civil Liberties* to change the test for what constitutes "inhibition" of religious practice by defining inhibition as any government act that "bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Id.* at 761. But *Abdulhaseeb* does not accept this formulation.

The interest must also be narrowly tailored. "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—*the particular claimant* whose sincere exercise of religion is being substantially burdened." *Id.* at 430 (quoting 42 U.S.C. § 2000bb-1(b)) (emphasis added). Thus, the government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting [the] exemption" specifically requested by Hobby Lobby and Mardel. *Wisconsin v. Yoder,* 406 U.S. 205, 236 (1972).

1. Compelling Interest

The government asserts two interests here: "the interests in [1] public health and [2] gender equality." Aple. Br. at 34. We recognize the importance of these interests. But they nonetheless in this context do not satisfy the Supreme Court's compelling interest standards.

First, both interests as articulated by the government are insufficient under *O Centro* because they are "broadly formulated interests justifying the general applicability of government mandates." 546 U.S. at 431. And the government offers almost no justification for not "granting specific exemptions to particular religious claimants." *Id.*

Second, the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people. As noted above, this exempted population includes those working for private employers with grandfathered plans, for employers with fewer than fifty employees, and, under a proposed rule, for colleges and universities run by religious institutions. As the Supreme Court has said, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547; *see also O Centro*, 546 U.S. at 433 (citing *Lukumi* as instructive in determining whether exemptions undermine a compelling government interest for purposes of RFRA). The exemptions at issue here would yield precisely this result: they would leave unprotected all women who work for exempted business entities.

On this question, *O Centro* is particularly instructive. In that case, a religious group sought an exemption for the sacramental use of hoasca, a hallucinogen classified as a Schedule I(c) controlled substance under the Controlled Substances Act. The question in *O Centro* was limited to whether the government could show a compelling governmental interest under RFRA to justify what was indisputably a substantial burden on the plaintiffs' exercise of religion. The government in part relied on its interest in promoting public health and safety and upon Congress's determination that hoasca "'has a high potential for abuse,' 'has no currently accepted medical use,' and has 'a lack of accepted safety for use . . . under medical supervision.'" *O Centro,* 546 U.S. at 433 (quoting 21 U.S.C. § 812(b)(1)).

The Supreme Court refused to credit this argument, however, in part because the CSA and related regulations contained an exemption for the religious use of another substance categorized as a Schedule I hallucinogen, peyote. As the Court reasoned, "Everything the Government says about the [dangerous chemicals] in hoasca . . . applies in equal measure to the [dangerous chemicals] in peyote." *Id.* Because both the Executive Branch and Congress had decreed a religious exemption for Native American use of peyote, the Court concluded that "it [was] difficult to see how" those same concerns could "preclude any consideration of a similar exception for" the religious use of hoasca. *Id.* If the peyote exemption in *O Centro,* which applied to "hundreds of thousands of Native Americans," *id.*, was enough to undermine the government's compelling interest argument in that case, we conclude the exemption for the millions of individuals here must dictate a similar result.

2. *Least Restrictive Means*

Even if the government had stated a compelling interest in public health or gender equality, it has not explained how those larger interests would be undermined by granting Hobby Lobby and Mardel their requested exemption. Hobby Lobby and Mardel ask only to be excused from covering four contraceptive methods out of twenty, not to be excused from covering contraception altogether. The government does not articulate why accommodating such a limited request fundamentally frustrates its goals.[19]

3. Hobby Lobby and Mardel Employees

Finally, we note a concern raised both at oral argument and in the government's briefing that Hobby Lobby and Mardel are, in effect, imposing their religious views on their employees or otherwise burdening their employees' religious beliefs. But Hobby Lobby and Mardel do not prevent employees from using their own money to purchase the four contraceptives at issue here.

Of course, employees of Hobby Lobby and Mardel seeking any of these four contraceptive methods would face an economic burden not shared by employees of companies that cover all twenty methods. But the government must show why the employees' burden creates a compelling interest that can only be met by requiring the corporations to conform to a mandate.

Accommodations for religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere. The government itself has even taken this step with the contraceptive-coverage requirement by accommodating certain religious employers, at the expense of their employees. That is part of accommodating religion—and is RFRA's basic purpose.

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[19] The government suggests on appeal that a limited number of women can only use the four contraceptives to which Hobby Lobby and Mardel object. The government did not raise this argument below nor has it provided any factual support for this claim. It is free to raise this argument below in permanent injunction proceedings.

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In sum, for all of these reasons, Hobby Lobby and Mardel have established they are likely to succeed on their RFRA claim.

VI. Remaining Preliminary Injunction Factors[20]

Having concluded that Hobby Lobby and Mardel are likely to succeed on the merits, we turn to the remaining preliminary injunction factors: whether Hobby Lobby and Mardel face irreparable harm; whether the balance of equities tips in Hobby Lobby and Mardel's favor; and whether an injunction is in the public interest. *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009). The district court did not analyze these factors (having disposed of the question on the likelihood-of-success prong) but Hobby Lobby and Mardel nonetheless ask that we reach them.

A. Propriety of Reaching the Remaining Factors

"If the district court fails to analyze the factors necessary to justify a preliminary injunction, this court may do so [in the first instance] if the record is sufficiently developed." *Westar Energy*, 552 F.3d at 1224.

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[20] Judge Bacharach joins only Section VI(B)(1) of this Part.

The record we have is the record the parties chose to create below—it is the record they deemed sufficient for the district court to decide the preliminary injunction question. For each element, we believe this record suffices for us to resolve each of the remaining preliminary injunction factors.[21]

In addition, "in First Amendment cases, the likelihood of success on the merits will often be the determinative factor." *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012). That is because:

- "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury, *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (internal quotation marks omitted);

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[21] In many First Amendment cases, courts of appeal have weighed these additional factors in the first instance after having determined that the district court had erroneously denied the preliminary injunction on the likelihood-of-success element. *See, e.g.*, *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002) (so holding in the context of a Free Exercise Claim); *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (same in the context of Free Speech claim); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (same), *cert. denied*, 133 S. Ct. 651 (2012); *see also Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1191 (10th Cir. 2003) (addressing—in the context of an affirmance of a denial of a preliminary injunction on a Free Exercise claim—all the preliminary injunction factors, even though the district court seemed to only address likelihood of success).

- "when [a] law . . . is likely unconstitutional, the[] interests [of those the government represents, such as voters] do not outweigh [a plaintiff's interest] in having [its] constitutional rights protected," *Awad v. Ziriax*, 670 F.3d 1111, 1131-32 (10th Cir. 2012); and
- "it is always in the public interest to prevent the violation of a party's constitutional rights," *id.* at 1132.

This is likewise true here since RFRA is no ordinary statute: "Federal statutory law adopted after November 16, 1993 is subject to [RFRA] unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). Congress thus obligated itself to *explicitly exempt* later-enacted statutes from RFRA, which is conclusive evidence that RFRA trumps later federal statutes when RFRA has been violated. That is why our case law analogizes RFRA to a constitutional right. *Kikumura*, 242 F.3d at 963 (stating, in analyzing a RFRA claim, that "[w]hen an alleged *constitutional right* is involved, most courts hold that no further showing of irreparable injury is necessary" (emphasis added; internal quotation marks omitted)); *see also* Michael Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253 (1995) (characterizing RFRA as a "super-statute" given its binding nature on subsequent federal action). Congress did not exempt the ACA from RFRA, nor did it create any sort of wide-ranging exemption for HHS and other agencies charged with implementing the ACA through the regulations challenged here.

Finally, the government nowhere contested the *factual* adequacy or accuracy of Hobby Lobby and Mardel's allegations, and given that those allegations were established through a verified complaint, they are deemed admitted for preliminary injunction purposes. *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 542 (7th Cir. 1998) (noting that "[v]erified complaints[are] the equivalent of affidavits"); 11A Charles Alan Wright et al., Fed. Prac. & Proc. § 2949 (2d ed., Apr. 2013 update) ("[T]he written evidence [in a preliminary injunction proceeding] is presumed true if it is not contradicted.").

In short, the record before us is enough to resolve the remaining preliminary injunction factors. Given Hobby Lobby and Mardel's July 1 deadline, prudence strongly counsels in favor of reaching those factors. Thus, we would reach them and find that they favor Hobby Lobby and Mardel. Indeed, as we discuss next, even if likelihood of success was not enough to settle the question, we would find in favor of Hobby Lobby and Mardel.

B. Analysis of Remaining Factors

1. Irreparable Harm

Hobby Lobby and Mardel have established a likely violation of RFRA. We have explicitly held—by analogy to First Amendment cases—that establishing a likely RFRA violation satisfies the irreparable harm factor. *See Kikumura*, 242 F.3d at 963 ("a plaintiff satisfies the irreparable harm analysis by alleging a violation of RFRA"); *see also O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1187 (10th Cir. 2003) (same). Hobby Lobby and Mardel have therefore demonstrated irreparable harm.

2. *Balance of Equities*

Nor is there any question about the balance of equities. A preliminary injunction would forestall the government's ability to extend all twenty approved contraceptive methods to Hobby Lobby and Mardel's 13,000 employees. But Hobby Lobby and Mardel will continue to provide sixteen of the twenty contraceptive methods, so the government's interest is largely realized while coexisting with Hobby Lobby and Mardel's religious objections. And in any event, the government has already exempted health plans covering millions of others. These plans need not provide *any* of the twenty contraceptive methods.

By contrast, Hobby Lobby and Mardel remain subject to the Hobson's choice between catastrophic fines or violating its religious beliefs. Accordingly, the balance of equities tips in Hobby Lobby and Mardel's favor.

3. *Public Interest*

Finally, as stated above, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Awad*, 670 F.3d at 1132. Again, as already noted, although RFRA violations are not constitutional violations, Congress has given RFRA similar importance by subjecting all subsequent congressional enactments to a strict scrutiny standard of review unless those enactments explicitly exclude themselves from RFRA. *See* 42 U.S.C. § 2000bb-3(b). And accommodating the two companies in this case does not undermine the application of the contraceptive-coverage requirement to the vast number of employers without religious objections. Because Hobby Lobby and Mardel have demonstrated a likely violation of their RFRA rights, an injunction would be in the public interest.

In sum, all preliminary injunction factors tip in favor of Hobby Lobby and Mardel, and we would therefore remand to the district court with instructions to enter a preliminary injunction.

VII. Conclusion

For the reasons set forth above, we reverse the district court's denial of the plaintiffs' motion for a preliminary injunction and remand with instructions that the district court address the remaining two preliminary injunction factors and then assess whether to grant or deny the plaintiffs' motion. The Clerk is directed to issue the mandate forthwith.

HARTZ, Circuit Judge, concurring:

I join Judge Tymkovich's opinion but write separately to explain why I think (1) that all corporations come within the protection of the Free Exercise Clause and RFRA and (2) that the substantial-burden analysis here is a simple one.

I. CORPORATIONS AS PERSONS

To analyze whether corporations have civil rights, one must begin by recognizing what they are. For our purposes, two characteristics are the most important. First, ordinarily they are a means of organizing group activity, for social or business reasons. Second, the personal liability of owners is limited, thereby encouraging investment in the enterprise. The sole aim of a corporation may be to maximize profit or long-term value to shareholders. But no law requires a strict focus on the bottom line, and it is not uncommon for corporate executives to insist that corporations can and should advance values beyond the balance sheet and income statement. *See* ALI Principles of Corporate Governance: Analysis and Recommendations § 2.01(b) (2012) ("Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business: . . . (2) May take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and (3) May devote a reasonable amount of resources to public welfare, humanitarian, educational and philanthropic purposes.").

Those who argue that a for-profit corporation does not have a right to the free exercise of religion point to three features of such an entity: (1) it is for profit, (2) it has adopted a corporate form, and (3) it is a group activity. It is unclear which of these features is thought to be the one that disqualifies corporations from the free-exercise right. In my view, however, none of these features can justify denial of rights protected under the First Amendment, including the right to free exercise of religion.

The first feature is the easiest to address because the Supreme Court has already recognized that profit-seekers have a right to the free exercise of religion. In *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961), the Court entertained a free-exercise challenge to Sunday blue laws by Jewish merchants "engage[d] in the retail sale of clothing and home furnishings." And in *United States v. Lee*, 455 U.S. 252, 254 (1982), an Amish farmer and carpenter was permitted to object on religious grounds to paying Social Security taxes for his employees. Perhaps profit-making is not a religious enterprise, but those who engage in profit-making enterprises can still have religious convictions that require them to do or refrain from doing certain things in their businesses. The Constitution does not require compartmentalization of the psyche, saying that one's religious persona can participate only in non-profit activities. As Justice Brennan wrote, "[A] State may [not] put an individual to a choice between his business and his religion." *Braunfeld*, 366 U.S. at 611 (Brennan, J., dissenting).

Also, there is no principled reason why an individual who uses the corporate form in a business must thereby sacrifice the right to the free exercise of religion. Rabbi Manischewitz starts a business preparing kosher matzo. A city ordinance prohibits certain kosher practices. No one could doubt that he can challenge the ordinance under the Free Exercise Clause or RFRA. But, some say, he can no longer raise such a challenge if he decides to limit his personal liability arising from the business by converting it to a sole-shareholder corporation. Why? True, the government may impose special duties on those who use a corporate form, such as a duty to produce corporate records, and those duties may require limitations on constitutional rights. *See Wilson v. United States*, 221 U.S. 361, 383-85 (1911) (no Fifth Amendment privilege to refuse to produce corporate records). But surely the limitations must relate to use of the corporate form. Does it make sense to say, "Since you have acted to reduce your personal financial risk, you can now be required to stop making kosher matzo."? What does limiting financial risk have to do with choosing to live a religious life? Although a corporation takes on a legal identity distinct from the sole shareholder, First Amendment jurisprudence is based on the substance of the constitutional protections, not matters of form. *See Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 667, 679-80 (1996) (citing cases); *Bd. of Educ. v. Grumet*, 512 U.S. 687, 698 (1994) (plurality opinion) ("In the circumstances of these cases, the difference between thus vesting state power in the members of a religious group as such instead of the officers of its sectarian organization is one of form, not substance."). Indeed, as Judge Tymkovich's opinion recites, use of the corporate form has not disqualified nonprofit corporations from invoking the protections of the Free Exercise Clause and RFRA. And for-profit corporations have been protected by rights to freedom of speech and freedom of the press. *See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State*

Crime Victims Bd., 502 U.S. 105 (1991); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

What about the group-activity feature of corporations? No one suggests that organizations, in contrast to their members, have souls. But it does not follow that people must sacrifice their souls to engage in group activities through an organization. Working with others through an organization can often be advantageous in many respects. Of course, one who acts through a group loses a measure of personal autonomy and privacy. The group may say something that is anathema to one of its members or do something contrary to the religious faith of a member. Thus, the civil liberties of an organization—say, to exercise religion or to speak—must be considered distinct from the civil liberties of any particular member. Its speech or conduct may reflect the view of only a bare majority of the members, or even just the view of the members' delegate—such as the editor of a newspaper or the pastor of a congregation. It suffices that the speech or conduct represents an "official position." *See Boy Scouts of Am. v. Dale,* 530 U.S. 640, 655 (2000) ("[T]he First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.' The Boy Scouts takes an official position . . . and that is sufficient for First Amendment purposes.") But the advantages of acting through an organization may still be attractive to the individual. One who wants to have a prosperous business, but a business that still does nothing contrary to one's faith, can reasonably decide that the best way to accomplish this is to join with like-minded persons, perhaps as partners, perhaps as fellow shareholders. Is that desire to be thwarted because the government can require the organization to engage in sins that could not be required of any of the members individually? Rabbi Manischewitz need not comply with an ordinance prohibiting the baking of kosher matzo, but when he obtains investors and the business is incorporated as Manischewitz, Inc., the anti-kosher law can be enforced against it? Must he reorganize the business as a sole proprietorship to continue to make and sell kosher matzo?[1]

As noted in Judge Tymkovich's opinion, the Supreme Court has recognized that civil liberties are preserved for those who work through groups. "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *cf. Grumet*, 512 U.S. at 698 ("religious people (or *groups of religious people*) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise" (emphasis added)).[2] There is no reason why that group should lose constitutional protection if it is organized in corporate form. *Cf. United States v. Int'l Union UAW-CIO*, 352 U.S. 568, 597 (1957) (Douglas, J., dissenting, joined by C.J. Warren and J. Black) ("Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group —labor or corporate.").

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[1] Judge Matheson suggests that it is not necessary for the corporation to have a RFRA claim because the rabbi himself could raise a claim as an individual. *See* Matheson Op. at 20-21 n.15. But I do not share his confidence that a shareholder, director, or officer can have a personal free-exercise claim (under the First Amendment or RFRA) to challenge a law that commands only the corporation.

Perhaps in certain circumstances the use of the corporate form can be a proper ground for limiting (but not eliminating) First Amendment rights. The reasons argued for restricting political expenditures by corporations include the asserted inclinations and advantages of corporations in corrupting officeholders. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 447-75 (Stevens, J., dissenting). But no such concern has been raised here, and I fail to see how such a concern could arise. A corporation exercising religious beliefs is not corrupting anyone. Nor do I see how it would have any special inclination or advantage in exercising religious beliefs to the public detriment.

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[2] To be entitled to First Amendment protection, the group's speech or conduct need not be the purpose for forming the group. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 655 (2000) ("[A]ssociations do not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired to be entitled to protection.").

In short, those arguing that for-profit corporations cannot be "persons" under RFRA can find no support in any principles established in Supreme Court First Amendment jurisprudence. They must resort to pointing out that the Supreme Court has never ruled that a for-profit corporation has a right to the free exercise of religion. But neither has it ruled to the contrary. The fact of the matter is that it has never had to decide the issue. Interestingly, the issue was raised by the government in *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961), one of the associated cases challenging Sunday blue laws on various grounds. Because the Court had already rejected the free-exercise claim in another decision, it said that it did not have to decide whether the corporation, its customers, or the rabbis who supervised the condition of kosher meat had standing to bring a free-exercise challenge. *See id.* at 631. But the three dissenters, Justices Douglas, Brennan, and Stewart, implicitly found standing.

Of course, a corporation is protected only in its sincere religious beliefs. Chief Judge Briscoe's opinion expresses concern about "how easily an 'exercise of religion' could now be asserted by a corporation to avoid or take advantage of any governmental rule or requirement." Briscoe Op. at 4. This is certainly a proper concern, just as courts can properly be concerned about the sincerity of prisoners who convert to Judaism and demand kosher meals. But sincerity questions with respect to corporations should not be unmanageable. It should not be hard to determine who has authority to speak or act for the corporation. And sincerity can be measured by consistency of the present stated belief with the history of the enterprise. Unlike prisoners, for example, corporations are not known to have epiphanies or sudden conversions.

Insofar as Chief Judge Briscoe's opinion is concerned about "open[ing] the floodgates to RFRA litigation challenging any number of federal statutes that govern corporate affairs," *id.* at 25, it does not explain why that danger is any greater than the possibility of litigation on behalf of sole proprietors, or perhaps partnerships and other business organizations. But in any event, it makes no sense under RFRA to refuse to grant a merited exemption just because others may also seek it. How ironic if a burden on religious objectors can be justified because "too many" objectors find a law repugnant. The fears expressed are reminiscent of what the Supreme Court wrote almost a quarter-century ago:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling—permitting him, by virtue of his beliefs, to become a law unto him-

> self, contradicts both constitutional tradition and common sense . . . . Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.

Emp't Div. v. Smith, 494 U.S. 872, 885, 888 (1990) (citations and internal quotation marks omitted). Accordingly, the Court held that a "neutral law of general applicability" cannot be challenged on free-exercise grounds. *Id.* at 879; *see id.* at 888-89 (listing civic obligations, such as paying taxes and minimum wages, that could otherwise be subject to "constitutionally required" exemptions). That view, of course, was soundly rejected when Congress enacted RFRA.

II. SUBSTANTIAL BURDEN

I would also add a few words on the meaning of "substantial burden." It is important to distinguish between two types of laws that may violate the right to free exercise of religion. Some laws require a person to do something contrary to the person's religious beliefs or to refrain from doing something required by those beliefs. Other laws do not order the violation of a religious duty but simply make it more difficult for a person to obey that duty. As I understand Supreme Court precedent, the first type of law imposes a substantial burden on free exercise, whatever the penalty imposed for violating the law. Measuring coercive impact to determine whether the law imposes a "substantial" burden is necessary only for the second type of law. For example, in *Lee* the law required the

Amish businessman to pay social security taxes, which his faith prohibited him from doing. The substantial-burden discussion in *Lee* is short and sweet: "Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." 455 U.S. at 257. And in *Thomas*, which required the payment of unemployment benefits to a worker who was fired for refusing to engage in work contrary to his religious beliefs, the Court turned to an analysis of the burden on the worker only after noting that "the Indiana [unemployment-compensation] law does not *compel* a violation of conscience." 450 U.S. at 717. Later cases that examined whether there was a substantial burden similarly pointed out that compliance with the law would not itself violate the person's religious views. *See Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391 ("There is no evidence in this case that collection and payment of the tax violates appellant's sincere religious beliefs."); *Hernandez v. Comm'r*, 490 U.S. 680, 699 ("Neither the payment nor the receipt of taxes is forbidden by the Scientology faith generally, and Scientology does not proscribe the payment of taxes in connection with auditing or training sessions specifically."). The law we address today compels the corporations to act contrary to their religious beliefs. They therefore suffer a substantial burden. I see no need to examine how damaging the sanctions for noncompliance would be or how difficult it would be for the corporations to rear-range their present manner of operating their businesses to avoid violating the law.

GORSUCH, joined by KELLY and TYMKOVICH, Circuit Judges, concurring.

Judge Tymkovich explains why Hobby Lobby and Mardel are entitled to a preliminary injunction. I write to explain why the Greens themselves, as individuals, are also entitled to relief and why the Anti-Injunction Act does not preclude us from supplying that relief.

* * * * *

All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing wrongful conduct themselves bear moral culpability. The Green family members are among those who seek guidance from their faith on these questions. Understanding that is the key to understanding this case.

As the Greens explain their complaint, the ACA's mandate requires them to violate their religious faith by forcing them to lend an impermissible degree of assistance to conduct their religion teaches to be gravely wrong. No one before us disputes that the mandate compels Hobby Lobby and Mardel to underwrite payments for drugs or devices that can have the effect of destroying a fertilized human egg. No one disputes that the Greens' religion teaches them that the use of such drugs or devices is gravely wrong.[1] It is no less clear from the Greens' uncontested allegations that Hobby Lobby and Mardel cannot comply with the mandate unless and until the Greens direct them to do so—that they are the human actors who must compel the corporations to comply with the mandate. And it is *this* fact, the Greens contend, that poses their problem. As they understand it, ordering their companies to provide insurance coverage for drugs or devices whose use is inconsistent with their faith *itself* violates their faith, representing a degree of complicity their religion disallows. In light of the crippling penalties the mandate imposes for failing to comply with its dictates—running as high as $475 million per year—the Greens contend they confront no less than a choice between exercising their faith or saving their business.

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[1] *See* Gov't Br. at 9 n.6 (acknowledging that some of the drugs referenced in the ACA mandate can "inhibit[ ] implantation"); Plaintiffs' Complaint ¶ 95 (suggesting same and citing an FDA publication). The dissent takes issue with the government's concession and asserts that the *drugs* referenced in the ACA mandate do not have the effect of preventing the implantation of a fertilized egg. *See* Briscoe Op. at 3, 31. But the dissent also acknowledges that the *devices* referenced in the mandate *do* have this effect. *Id.* at 3. Given this, there is no dispute from any quarter that the ACA forces Hobby Lobby and Mardel to underwrite *something* (be it drug or device) that offends the Greens' religious beliefs, and of course the only relief the corporations or Greens seek is relief sufficient to protect those beliefs. *See* Tymkovich Op. at 13 n.3.

No doubt, the Greens' religious convictions are contestable. Some may even find the Greens' beliefs offensive. But no one disputes that they *are* sincerely held religious beliefs. This isn't the case, say, of a wily businessman seeking to use an insincere claim of faith as cover to avoid a financially burdensome regulation. *See United States v. Quaintance*, 608 F.3d 717 (10th Cir. 2010) (an example of just that). And to know this much is to know the terms of the Religious Freedom Restoration Act apply. The Act doesn't just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs, vindicating this nation's long-held aspiration to serve as a refuge of religious tolerance.

The Greens' claim in this case closely parallels claims the Supreme Court vindicated in *Thomas* and *Lee*. In *Thomas*, the plaintiff, a faithful Jehovah's Witness, was willing to participate in manufacturing sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets. *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 711 (1980). That's the line he understood his faith to draw when it came to complicity in war-making, an activity itself forbidden by his faith. The Supreme Court acknowledged this line surely wasn't the same many others would draw, and that it wasn't even necessarily the same line other adherents to the plaintiff's own faith might always draw. But the Court proceeded to hold that it was not, is not, the place of courts of law to question the correctness or the consistency of tenets of religious faith, only to protect the exercise of faith. *Id.* at 714-16. No different result can reasonably follow here.

In *Lee*, a devout Amish employer refused to pay social security taxes on behalf of his employees. *See United States v. Lee*, 455 U.S. 252, 254-55 (1982). The employer's faith taught that it is sinful to accept governmental assistance. By being forced to pay social security taxes on behalf of his employees, the employer argued, he was being forced to create for his employees the possibility of accepting governmental assistance later. This much involvement or complicity, the employer argued, was itself sinful under the teachings of his religion. The government argued there—much as the government argues here—that the enforcement of its mandate on the employer would "not threaten the integrity of the [employer's] religious belief" because the employer didn't have to accept social security benefits himself and his employees could choose for themselves whether to do so. *See Lee*, 455 U.S. at 257; Brief for Gov't, *Lee* (No. 80-767), 1981 WL 389829 at *10 (June 5, 1981). The Supreme Court squarely rejected this argument in language no less applicable to our case, explaining that it is not within "the judicial function and competence . . . to determine whether the Government has the proper interpretation of the Amish faith." 455 U.S. at 257.

The district court reached a different result only because it mistook the nature of the Greens' objection. As the district court described it, "the particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by Hobby Lobby's plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff's religion." Order at 23 (Nov. 19, 2012), ECF No. 45 (emphasis added). The dissent proceeds along the same lines today, asserting that the Greens have no claim because they do not "become a party to, or otherwise encourage, an individual employee's decision to use a particular drug or device." Briscoe Op. at 34. All this, however, mistakes or rewrites the Greens' sincerely held religious convictions. As the Greens describe it, it is their *personal involvement* in facilitating access to devices and drugs that can have the effect of destroying a fertilized human egg that their religious faith holds impermissible. And as we have seen, it is not for secular courts to rewrite the religious complaint of a faithful adherent, or to decide whether a religious teaching about complicity imposes "too much" moral disapproval on those only "indirectly" assisting wrongful conduct. Whether an act of complicity is or isn't "too attenuated" from the underlying wrong is sometimes itself a matter of faith we must respect. *Thomas* and *Lee* teach no less.[2]

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[2] The primary authority the dissent relies on for its reading of the Greens' religious objection turns out to be another circuit dissent that itself fails to account for *Thomas* or *Lee*. *See Grote v. Sebelius*, 708 F.3d 850, 856-57 (7th Cir. 2013) (Rovner, J., dissenting). The only other authority the dissent relies on has nothing to do with RFRA, let alone the degree to which we must defer to a sincerely held religious belief about complicity. It concerns

With that much in mind, it is beyond question that the Greens have Article III standing to pursue their claims individually. This is so not simply because the company shares of which they are the beneficial owners would decline in value if the mandate's penalties for non-compliance were enforced, though that alone would satisfy Article III. *See Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990); *Grubbs v. Bailes*, 445 F.3d 1275, 1280 (10th Cir. 2006). It is also because the mandate infringes the Greens' religious liberties by requiring them to lend what their religion teaches to be an impermissible degree of assistance to the commission of what their religion teaches to be a moral wrong. This sort of governmental pressure to compromise an article of religious faith is surely sufficient to convey Article III standing to the Greens, as it was for the plaintiffs in *Thomas* and *Lee* and in so many other religious liberty cases. Certainly our sister circuits have had no trouble finding Article III standing in similar cases where, say, individual pharmacists sought to contest regulations requiring their employers to dispense some of the same drugs or devices challenged here, *see Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1121 (9th Cir. 2009), or where individual soldiers sought to challenge military rules prohibiting their on-base day-care providers from including religious practices in their pro-

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instead the degree of assistance the government (not a religious person) may afford religious activities before running afoul of the Constitution's Establishment Clause (not an article of religious faith). *See* Briscoe Op. at 34 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002)).

grams, *see Hartmann v. Stone,* 68 F.3d 973, 979 n.4 (6th Cir. 1995). Indeed, I do not understand the government or any of my colleagues to dispute the Greens' Article III standing.[3]

But what of prudential standing doctrines, and perhaps most especially the shareholder standing rule? Prudential standing doctrines are not jurisdictional: they may be forfeited or waived. *Finstuen v. Crutcher,* 496 F.3d 1139, 1147 (10th Cir. 2007). In this case, the government did not raise prudential standing as a defense in the district court; the district court did not raise the issue for itself but proceeded to address the Greens' claim on the merits; and the government did not mention any prudential standing concern in its principal brief to this court. To be sure, the government finally took up that cudgel when we *asked* for supplemental briefing on the issue. But even then it left critical questions unaddressed.

Take this one. Under the plain text of RFRA, standing is "governed by the general rules of standing *under article III.*" 42 U.S.C. § 2000bb-1(c) (emphasis added). Congress's directive seems clear on its face—the text expressly tells us to apply the rules of standing under Article III and makes no mention of prudential (non-Article III) standing rules. In this way, the plain language seems to suggest prudential standing doctrine failed to make its way into RFRA. The government never confronts this possibility, let alone suggests the statute's language is fairly susceptible to an alternative reading that might suffice to suggest an ambiguity about its meaning. In fact, the government's supplemental brief on prudential standing doesn't even cite RFRA's text.

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[3] The dissent emphasizes the fact that the Greens are the beneficial owners of Hobby Lobby and Mardel through trusts rather than the corporation's direct owners, *see* Briscoe Op. at 32, but I do not take this discussion as going so far as to suggest the Greens lack Article III standing. *See generally Gollust v. Mendell,* 501 U.S. 115, 125-27 (1991) (indirect ownership of one corporation through another found sufficient for standing under federal securities laws); Fed. R. Civ. P. 17(a)(1)(E) (allowing a trustee to sue in her own name on behalf of a trust).

That's not all. Judicially importing prudential standing doctrine into RFRA would appear not only to defy the statute's plain text, it would also appear to run the risk of rendering the text surplusage. After all, Congress could hardly suspend Article III standing rules even if it wished to do so, and Congress had no need to speak if it wished to leave existing prudential rules in place. *See Bennett v. Spear*, 520 U.S. 154, 163 (1997) (Congress "legislates against the background of . . . prudential standing doctrine, which applies unless it is expressly negated"). So if Congress's directive in § 2000bb-1(c) cannot curb the operation of *constitutional* standing rules, and if Congress's directive is not needed to perpetuate *prudential* standing rules, what work is left for it to accomplish? The most obvious candidate is to rule out the use of *prudential* standing restrictions and, as we've seen, the text is certainly sufficient to that task. Again, however, the government fails to consider, let alone refute, this complication.

To be sure, at oral argument the government finally directed us to *Jackson v. Dist. of Columbia*, 254 F.3d 262 (D.C. Cir. 2001), and suggested that case endorsed the use of prudential standing doctrine in RFRA cases. But it turns out that *Jackson* discussed only the interaction of exhaustion (not standing) doctrine and RFRA. *See id.* at 266-67. Moreover, when *Jackson* briefly mentioned standing in the course of addressing the plaintiffs' exhaustion argument, it proceeded to consult the legislative history without first identifying an ambiguity in the text, as it was obliged to do. *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." (citations and internal quotation marks omitted)).

At the end of the day, then, and even after inviting supplemental briefing, we are left with almost no help from the government on the critical question of the statutory text's receptivity to prudential standing doctrine. Without that assistance, without as well some meaningful adversarial engagement on the question, we run a serious risk of reaching "an improvident or ill-advised opinion," not to mention causing unfairness to the individual plaintiffs who cannot now respond to the government's eleventh-hour oral argument reference to *Jackson*. *See Hill v. Kemp*, 478 F.3d 1236, 1250-51 (10th Cir. 2007) (citing *Headrick v. Rockwell Int'l Corp.*, 24 F.3d 1272, 1277-78 (10th Cir. 1994)

(White, J.)). Applying our normal forfeiture rules in these circumstances is both more prudent and more just. We should bypass questions of prudential standing and reach the merits of the Greens' claims, just as the district court did and both parties have.

That said, even if we were to entertain prudential standing questions at this late stage and assume the doctrine applies to RFRA despite the gaping questions the government left unaddressed, it's far from clear the doctrine bars the Greens' claim on its own terms. The government points us in the general direction of the shareholder standing rule, a feature of prudential standing doctrine barring corporate owners from asserting claims belonging to the corporation. *See Alcan*, 493 U.S. at 336. But that prudential rule does not bar corporate owners from bringing suit if they have "a direct, personal interest in a cause of action . . . even if the corporation's rights are also implicated." *Id.* And in our case the Greens contend that they, as the controlling owners and operators of Hobby Lobby and Mardel, are the human beings who must direct the corporations to comply with the mandate and do so in defiance of their faith. They contend the ACA prevents them as individuals from owning and managing a corporation of the size of Hobby Lobby and Mardel—from practicing their traditional trade—without violating their religious beliefs. That much would seem to qualify as a quintessentially "direct" and "personal" interest protected even under the shareholder standing rule. *See Heart of Am. Grain Inspection Serv., Inc. v. Missouri Dep't of Agriculture*, 123 F.3d 1098, 1102 (8th Cir. 1987) (both employee grain inspectors and their corporate employer had standing to sue to enjoin law preventing employer from weighing grain because not only would the corporation be injured but the inspectors themselves would be "*prevented from practicing their trade by virtue of the state's actions*") (emphasis added)); *Grubbs*, 445 F.3d at 1280. On this score, we find ourselves in full agreement with Judge Matheson.[4]

Turning finally to the merits, they are by this point clear enough. Unlike Hobby Lobby and Mardel, there can be no colorable question that the Greens are "persons" entitled to RFRA's protections. Neither can there be any colorable question that the Greens face a "substantial burden" on their "exercise of religion." This statutory threshold is met when, among other things, the government presents a plaintiff with a "Hobson's choice—an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010). As we have already seen, the Greens face precisely that—a choice between abiding their religion or saving their business. With respect to the remaining statutory and equitable factors, Judge Tymkovich shows why they all favor granting rather than withholding the requested relief, and none of that discussion warrants repetition here. Here it is enough to observe simply that the Greens, no less than Hobby Lobby and Mardel, merit the court's protection while this case proceeds.

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[4] Whether other individuals with lesser claims to involvement in a company or effecting a governmental mandate could lay claim to such a direct and personal interest is, no doubt, an important question, but it is one for a different case with different facts, not the one we confront today. Ours simply is not the case of "managers" seeking standing, *see* Briscoe Op. at 34, it is one involving individuals who are the beneficial owners, as well as the directors and officers, of privately held companies.

In many ways this case is the tale of two statutes. The ACA compels the Greens to act. RFRA says they need not. We are asked to decide which legislative direction controls. The tie-breaker is found not in our own opinions about good policy but in the laws Congress enacted. Congress structured RFRA to override other legal mandates, including its own statutes, if and when they encroach on religious liberty. When construing any "federal statutory law adopted after November 16, 1993," Congress told us in no uncertain terms we should deem it "subject to [RFRA] unless such law explicitly excludes such application." *See* 42 U.S.C. § 2000bb-3(b). In this way, RFRA is indeed something of a "super-statute." Michael Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code,* 56 Mont. L. Rev. 249, 253 (1995). And because the government identifies no explicit exclusion in the ACA to its dictates, it is RFRA's legislative direction that must prevail in the end. Indeed, though our opinions today may be many and the routes we follow various, no fewer than six of us agree that the district court's holding failed to give sufficient attention to RFRA's powerful voice.

* * * * *

We could not, of course, reach the merits of the RFRA question if we thought the Anti-Injunction Act barred our way. The AIA precludes our consideration of suits seeking to "restrain the assessment or collection of any [federal] tax." 26 U.S.C. § 7421(a). Though they agree on little else, both sides before us insist this lawsuit doesn't meet that description. But a non-trivial argument could be made that they are all wrong: the plaintiffs, after all, seek to restrain the government's use of *any* of the ACA's enforcement mechanisms, including one that is expressly labeled a "tax." *See* 26 U.S.C. § 4980D(a). And Congress's decision to label something a tax usually is enough for it to trigger the AIA, "even where that label [is] inaccurate." *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2583 (2012).

I write to emphasize that, even if the parties are wrong and the AIA *does* apply to this case, it *still* wouldn't allow us to avoid reaching the merits. It wouldn't because the government has expressly waived any reliance on the AIA: not only did it fail to raise the AIA as a defense in the district court, it discouraged us from applying the statute when we invited additional briefing on the matter. So long as the AIA affords the government only a *waivable defense*—so long as it doesn't impose on the courts a *jurisdictional limit* on our statutory authority to entertain this case—we are bound to reach the merits. And a waivable defense, we are persuaded, is all the AIA provides.

The Supreme Court has cautioned that "[j]urisdiction . . . is a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998) (internal quotation marks omitted). As a result, the Court has instructed us against relying on "drive-by jurisdictional rulings" that do not properly grapple with the distinctions between procedural requirements, claim elements, and bona fide jurisdictional limits on a court's power. *See Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-11 (2006); *Steel Co.*, 523 U.S. at 91. To rein in courts' "profligate use of the term jurisdiction," the Supreme Court has recently adopted "a readily administrable bright line for determining whether to classify a statutory limitation as jurisdictional." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (alterations omitted) (internal quotation marks omitted). That rule requires us to "inquire whether Congress has clearly stated that the rule is jurisdictional; absent such a clear statement . . . courts should treat the restriction as nonjurisdictional in character." *Id.; see also Gonzalez v. Thaler*, 132 S. Ct. 641, 648-49 (2012); *Arbaugh*, 546 U.S. at 515-16. Statutes that speak clearly to "the courts' statutory or constitutional *power* to adjudicate the case" must of course be treated as jurisdictional and given their full effect. *Steel Co.*, 523 U.S. at 89 (emphasis in original). But statutes that speak to the rights or obligations of parties to a lawsuit establish "claim-processing rules," are not and should not be treated as "jurisdictional prescriptions." *Reed Elsevier*, 559 U.S. at 161. In addition to the consulting statutory text, we may when necessary consider as well "context, including [the Supreme] Court's interpretation of similar provisions in many years past." *Id.* at 168.

When it comes to the AIA, all of these considerations point in the same direction.

First and most importantly, the AIA's text dictates merely that "[e]xcept as provided in [other provisions inapplicable here] no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court *by any person*." 26 U.S.C. § 7421(a). Similar to other claims processing rules, the statute does not apply its prohibition to the *court* (let alone more specifically to the court's *power* or *jurisdiction*) but applies its prohibition instead to a *person*. Indeed, the AIA's language is nearly identical to the language of the copyright statute analyzed in *Reed Elsevier*—and we know with certainty *that* language "says nothing about whether a federal court has subject-matter jurisdiction." 559 U.S. at 1664. *Compare* 26 U.S.C. § 7421(a) (AIA: "no suit . . . shall be maintained"), *with* 17 U.S.C. § 411(a) (copyright statute: "no civil action . . . shall be instituted").

Second, the AIA does not even appear in the same *title* of the Code as most statutes bearing on federal courts' jurisdiction. *See* 28 U.S.C. § 1330 *et seq.* Instead, Congress chose to place the AIA in Title 26, in a chapter of the tax code discussing claims processing rules in proceedings brought by "Taxpayers and Third Parties." On at least two occasions, the Supreme

Court has found Congress's decision to locate a statute "separate" from jurisdictional provisions suggestive contextual evidence that the statute in question was non-jurisdictional. *See Reed Elsevier,* 559 U.S. at 164-65; *Arbaugh,* 546 U.S. at 514. Precisely the same sort of suggestive contextual evidence exists here.

Third, in both of these respects (in both its language and placement) the AIA contrasts sharply with its cousin, the Tax Injunction Act (TIA), a provision controlling federal jurisdiction over suits seeking to enjoin *state* rather than *federal* tax collection. The TIA speaks directly to courts rather than to the parties. *See* 28 U.S.C. § 1341 ("*The district courts shall not enjoin, suspend or restrain* the assessment, levy or collection of any tax under State law . . . ." (emphasis added)). And the TIA is located within the same chapter of the same title of the U.S. Code as the other principal statutes governing federal jurisdiction. *See id.* Facts like these suggest Congress could have easily made the AIA jurisdictional if it wished and that it "would have spoken in clearer terms [in the AIA] if it intended" to do so. *Gonzalez,* 132 S. Ct. at 649. Neither is it insensible to think Congress might wish to protect state taxes even more than its own from federal lawsuits: comity and federalism concerns lurk there, while federal taxes and the lower federal courts are equally creations of Congress itself.

Finally, there is the Supreme Court's treatment of the AIA in past cases. It is settled that the courts have "no authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell,* 551

U.S. 205, 214 (2007). Yet the Supreme Court has repeatedly recognized equitable exceptions to the AIA's application. *See, e.g., Bob Jones Univ. v. Simon*, 416 U.S. 725, 742-46 (1974); *Enochs v. Williams Packing*, 370 U.S. 1, 7 (1962). In fact, the Supreme Court has expressly indicated that the predecessor to the AIA—containing substantially the same language—is nonjurisdictional, going so far as to allow the Solicitor General to proffer a "waiver of a defense" so the Court could reach the merits of the case before it. *See Helvering v. Davis*, 301 U.S. 619, 639 (1937) (discussing Rev. Stat. § 3224). All of these results would seem impossible if the AIA really were jurisdictional. Admittedly, both the Supreme Court and this court have on *other* occasions referred to the statute as jurisdictional. *See, e.g., Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 5 (1962); *Sterling Consulting Corp. v. United States*, 245 F.3d 1161, 1167 (10th Cir. 2001). But these cases employ the jurisdictional label with little or no analysis—amounting to exactly the sort of "drive-by jurisdictional rulings" the Court tells us to view with a jaundiced eye. And more recently the Supreme Court has approached the AIA much more gingerly, taking care to avoid the jurisdictional epithet. *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2582 (2012) (holding that the AIA didn't apply in that case by its own terms).

In the end, the AIA shows none of the hallmarks of a jurisdictional restriction, and has many features that collectively indicate otherwise. The government can waive its application, and it has done so before us. Given that, we can be sure, perhaps doubly sure, that reaching the merits of this case is appropriate and indeed our duty.

BACHARACH, J., concurring.

I join Parts I, II, III, IV, V, and VI(B)(1) of Judge Tymkovich's thorough, finely-crafted opinion. Like Judge Tymkovich, I believe that Hobby Lobby Stores, Inc. and Mardel, Inc. are "persons" under the Religious Freedom Restoration Act. I write separately to:

- discuss the need for a remand so that the district court can address the balancing elements of the preliminary-injunction inquiry and
- address prudential standing and conclude that we should instruct the district court to dismiss the Greens' claims.

I. The Need for Remand to the District Court on the Balancing Elements

I respectfully decline to join Parts VI(A), (B)(2), and (B)(3) of the plurality opinion because I believe that the required balancing of interests should be conducted by the district court rather than the court of appeals. Because we convene as an appellate tribunal, rather than a front-line court of equity, our only function is to determine whether the district court committed legal error.

The district court did err, as the plurality concludes, by holding that Hobby Lobby and Mardel are unlikely to succeed on the merits. Still, Hobby Lobby and Mardel can obtain a preliminary injunction only if they persuade a court of three additional elements: (1) irreparable injury; (2) avoidance of injury to the public interest; and (3) greater injury to themselves, if a preliminary injunction were to be denied, than to the defendants if a preliminary injunction were to be granted. *See* Plurality Op., Part VI; *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008) (identifying the equitable elements for a preliminary injunction). These elements have not been addressed by the district court.

I agree with the plurality that Hobby Lobby and Mardel have demonstrated irreparable injury, for the government argued in the district court that the elements involving irreparable injury and likelihood of success had merged.

The remaining issue is whether the district court should be allowed to engage in the balancing required by the other two elements or whether, as the plurality proposes, we should undertake that task ourselves. Unlike the plurality, I think the equitable balancing should be performed by the district court.

As the Supreme Court has recognized, "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006). Thus, when a district court has not addressed one or both of the balancing elements because of a legal error involving some other part of the inquiry, the general practice is to remand the case to the district court for initial consideration of the public interest and balancing of the potential harm to the parties.[1] Our court ordinarily follows this practice. *See Kikumura v. Hurley,* 242 F.3d 950, 963 (10th Cir. 2001) (remanding for consideration of the public interest and balancing of interests because the district court had not discussed them).

The reasons for this practice are sound. As the Seventh Circuit Court of Appeals observed, the "cold record" before the appellate court may not reflect the district judge's sense of the equities. *Lawson Prods., Inc. v. Avnet, Inc.,* 782 F.3d 1429, 1437-38 (7th Cir. 1986). Thus, it is hard to imagine why an appellate tribunal would be better than the district court at balancing the relevant interests. *Id.*

Now that we have decided the issues of likelihood of success on the merits and irreparable harm, a court must weigh the competing equities, such as the public interest in ensuring access to emergency contraceptives and the interests of Hobby Lobby and Mardel in exercising their religious beliefs. In my view, this weighing process is more properly suited to the institutional expertise and function of the district court.

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[1] *See eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 394 (2006) (vacating the decision of the court of appeals and ordering a remand so that the district court could address the equitable elements of a preliminary injunction); *Acumed LLC v. Stryker Corp.,* 483 F.3d 800, 811 (Fed. Cir. 2007) (remanding a case to the district court and explaining that "[i]f we were to weigh the evidence ourselves to reach a conclusion on injunctive relief, we would effectively be exercising our own discretion as if we were the first-line court of equity," a role belonging "exclusively to the district court"); *Lawson Prods., Inc. v. Avnet, Inc.,* 782 F.2d 1429, 1437-38 (7th Cir. 1986) (remanding to the district court for consideration of the equitable elements of a preliminary injunction because "the appellate process is not well suited to an appreciation of the subtle shadings of a case" involved in the balancing of equities).

In its own weighing of interests, the plurality does not mention the public interest that the government had relied on at the preliminary-injunction hearing: the health reasons for promoting employee access to emergency contraceptives. JA 158a. A court of equity might ultimately decide that this interest is outweighed by the public interest in extending RFRA protection to Hobby Lobby and Mardel. But whichever court does the balancing must at least consider the government's stated interest and weigh it against the public interest in religious freedom.

As Judge Tymkovich notes, we have occasionally balanced the equities in the first instance when "the record is sufficiently developed to allow for an analysis of the equitable factors on appeal." *Westar Energy, Inc. v. Lake,* 552 F.3d 1215, 1224 (10th Cir. 2009); *see* Plurality Op., Parts IV, VI. But here, the record does not contain any evidence. Thus, I do not believe the record was sufficiently developed for us to do the balancing in the first instance.

The plurality suggests that balancing of statutory public interests is unnecessary because: (1) RFRA supersedes other statutes, and (2) rights under RFRA should be treated as if they are constitutional rights. I respectfully disagree. Public interests can arise from non-statutory sources, and the rights under RFRA and the Constitution are distinct.

First, public interests are found in a variety of places, often outside of statutes. *See, e.g.*, *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (discussing the public interest in ensuring access to "Plan B" for sexually active women of childbearing age without citing statutes that support that interest). Thus, even if a court of equity were to find that the public interest in RFRA always outweighs other statutory interests, it could also find that the non-statutory public interest in access to emergency contraceptives outweighs the public interest under RFRA for Hobby Lobby and Mardel to exercise religion.

Second, RFRA and the First Amendment are distinct and the scope of the protections are different. And when we address the likelihood of success, we are doing so in the context of the RFRA claims—not the constitutional claims.

In an effort to equate RFRA and the First Amendment, the plurality relies on *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001). But *Kikumura* compared RFRA to the Constitution in the context of only one equitable element: irreparable injury. *Kikumura v. Hurley*, 242 F.3d at 963. In that context, we simply applied the general rule that an injury is irreparable when the court would be unable to grant an adequate remedy at law. *Id.* With regard to the remaining equitable elements, however, we declined to conduct the initial balancing of the public interests and the equities. *Id.* Instead, we remanded for the district court to consider the applicable public interests even if the plaintiff were to show likelihood of success on the merits. *Id.* Thus, *Kikumura* does not support balancing of the public interests and equities on appeal even when the plaintiff is likely to succeed under RFRA. Indeed, by remanding in *Kikumura*, we did precisely the opposite of what the plurality would have us do here.

In urging that we allow the district court to balance the remaining elements, I am mindful of the time pressures on the courts—and on Hobby Lobby and Mardel —as the deadline of July 1, 2013, approaches. Still, I do not think these time pressures should induce us to step outside of our institutional limits and usurp a role better suited to the district court.

II. The Greens' Standing to Sue in their Personal Capacities

In footnote 4, the plurality opinion states that we need not address the Greens' standing. I believe, however, that we should do so. In addressing the Greens' standing, we should consider whether Congress abrogated prudential restrictions in RFRA and, if not, whether the Greens' alleged injuries derive solely from the injuries sustained by Hobby Lobby and Mardel.

In my view, Congress did not abrogate prudential-standing restrictions in RFRA, and the Greens' claims derive solely from the alleged injuries sustained by Hobby Lobby and Mardel. As a result, I would direct the district court to dismiss the Greens' claims based on the shareholder-standing rule.

A. Waiver

Prudential-standing limitations are subject to waiver. *See Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007). But this court has discretion to address prudential standing *sua sponte*. *Adams ex rel. D.J.W. v. Astrue*, 659 F.3d 1297, 1299-1301 (10th Cir. 2011) (addressing a prudential-standing restriction *sua sponte*). We should invoke this discretion here, for we have raised the issue, obtained briefs on the parties' positions, and learned that the Defendants object to the Greens' claims based on prudential-standing limitations.

B. Abrogation by Congress

If this Court were to address standing, we would need to consider whether Congress abrogated prudential-standing limitations in RFRA. The Greens argue that Congress abrogated these limitations by stating that standing under RFRA "shall be governed by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000bb-1(c) (2006). In my view, this language does not eliminate prudential-standing restrictions.

The restrictions apply unless they are expressly abrogated by Congress. *Bennett v. Spear*, 520 U.S. 154 (1997). In § 2000bb-1(c), Congress never mentioned prudential restrictions or said that the standing rules under Article III would be exclusive. Instead, Congress simply said that Article III would govern standing issues under RFRA. At best, this language is ambiguous regarding Congress's intent to modify prudential-standing rules.

Notwithstanding the potential ambiguity in the text, Congress clarified its intent in the legislative history. There Congress stated that the language in RFRA is designed only to preserve the existing body of case law on article III limitations when taxpayers sue to challenge the tax-exempt status of religious institutions. *See* S. Rep. No. 103-111, at 12-13 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1902-03; H.R. Rep. 103-88 (1993), 1993 WL 158058. Though Congress rarely includes language solely to emphasize its intention to keep standing limitations, "that appears to be precisely what Congress did here." *Jackson v. District of Columbia*, 254 F.3d 262, 267 (D.C. Cir. 2001). Indeed, in explaining the cited statutory language, the House Judiciary Committee noted that "[t]he Act would not provide a basis for standing in situations where standing to bring a free exercise claim is otherwise absent." H.R. Rep. 103-88 (1993), 1993 WL 158058. As a result, I do not believe that Congress has expressly abrogated the prudential-standing requirements through RFRA.

C. Application of the Shareholder-Standing Rule

With this conclusion, I believe we should instruct the district court to dismiss the Greens' claims under the shareholder-standing rule.

One prudential limit on standing is the general restriction against asserting the legal rights and interests of third parties. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). This restriction frequently applies when shareholders bring claims deriving solely from their relationship to the corporation. In such situations, courts generally apply the "shareholder-standing rule," which "prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990). This rule is designed to "limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 100 (1979).

But sometimes shareholders and their corporations suffer distinct injuries. In these cases, courts have carved out an exception to the shareholder-standing rule, allowing shareholders to sue when they have "a direct, personal interest in a cause of action." *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990). Thus, the issue of standing turns on whether the Greens claim an injury from the Affordable Care Act that is direct and personal or merely derivative of the injury to Hobby Lobby and Mardel.

In my view, the Greens' injury stemming from the Affordable Care Act is purely derivative of the corporations' injury. The mandate does not require anything of the Greens; the obligation falls solely on the corporations.

In oral argument, the Greens argue that they incurred a direct injury from their duty to implement the contraceptive mandate for Hobby Lobby and Mardel. But the Greens are implementing these decisions as officers and directors of the corporations, not as individuals acting in their personal capacities.

The Greens must subordinate their own religious beliefs to fulfill their fiduciary duties under Oklahoma law as officers and directors of Hobby Lobby and Mardel. *See Fields v. Victor Bldg. & Loan Co.*, 175 P. 529, 531 (Okla. 1918) (per curiam). As fiduciaries, the Greens must implement corporate decisions by setting aside their own religious beliefs and advancing the best interests of the corporations. *See id.*

In advancing the best interests of Hobby Lobby and Mardel, the Greens face a difficulty because the mandate creates conflicting interests for Hobby Lobby and Mardel: the financial interest in complying with the mandate and the religious interest in not covering insurance for certain contraceptives. But this Hobson's choice falls solely on the two corporations, and the Greens' injury is not directly or personally created by the Affordable Care Act. Instead, the Greens' injury stems derivatively from their fiduciary duties under Oklahoma law to advance the conflicting financial and religious interests of Hobby Lobby and Mardel. As a result, I do not believe the Greens can avoid the shareholder-standing rule based on a "direct" or "personal" injury created by the Affordable Care Act.

Accordingly, I would remand with instructions to dismiss the Greens' claims for lack of prudential standing under the shareholder-standing rule.

BRISCOE, Chief Judge, concurring in part and dissenting in part, joined by LUCERO, Circuit Judge.

In its eagerness to afford rights under the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause of the First Amendment to Hobby Lobby and Mardel, the majority ignores the fundamental components upon which sound judicial decisionmaking is grounded: evidence, of which plaintiffs presented none; burdens of persuasion, which indisputably rest on the plaintiffs but which the majority effectively imposes on the defendants; and precedent, of which there is none to support the plaintiffs' novel claims under RFRA, or the new class of corporations effectively recognized by the majority. I therefore dissent from the majority's conclusion that Hobby Lobby and Mardel have established a substantial likelihood of success on the merits of their RFRA claims, and the majority's concomitant decision to reverse the district court's denial of plaintiffs' motion for preliminary injunctive relief.

I. The Anti-Injunction Act

Regarding the threshold question of the applicability of the Anti-Injunction Act (AIA), three judges would have us take the unnecessary step of concluding that the AIA is not jurisdictional, but instead a waivable, non-jurisdictional "claims processing rule." Gorsuch Op. at 14, 15. In my view, it is sufficient simply to conclude, as everyone agrees, that the AIA does not apply to the RFRA claims asserted by Hobby Lobby and Mardel, and to leave the jurisdictional/nonjurisdictional question (which neither side has raised) for another case in which it matters. See generally Nat'l Fed'n of Indep. Bus. v. Sebelius, 132

S. Ct. 2566 (2012) (Scalia, J., dissenting) ("The values that should have determined our course today are caution [and] minimalism . . . . "). I therefore concur in the conclusion that the AIA does not bar the RFRA claims at issue in this appeal.

II. The Record on Appeal

Section I of the majority opinion purports to outline the "Background & Procedural History" of this case, including a description of the plaintiffs and their businesses, and the types of drugs and devices mandated under the challenged contraceptive-coverage regulation. Reading this section, one would think either that the government had admitted all of the allegations in plaintiffs' complaint, or, more likely, that the plaintiffs had presented a wealth of evidence at the preliminary injunction hearing to support those allegations. But as it turns out, neither is true. At the hearing on plaintiffs' motion for preliminary injunction, plaintiffs presented no evidence of any kind. And, although the government opposed plaintiffs' motion for preliminary injunction, it never had an opportunity to file an answer to plaintiffs' complaint. That is because, shortly after the district court denied plaintiffs' motion for preliminary injunction, the district court proceedings were stayed pending the outcome of this appeal.

As a result, we know very little about any of the important facts of this case. For example, although the allegations in plaintiffs' complaint touch on certain aspects of the structure and operation of the two corporate plaintiffs, we do not know, even assuming the truth of those allegations, precisely how each corporation was established, how it is structured, or how it is operated. Relatedly, plaintiffs presented no evidence attempting to demonstrate whether or how Hobby Lobby and Mardel hold religious beliefs, and whether or how these corporate plaintiffs, which collectively operate hundreds of retail stores and employ thousands of employees, exercise religion. In turn, plaintiffs presented no evidence indicating how the contraceptive-coverage regulation would burden Hobby Lobby's and Mardel's religious beliefs. Lastly, there is no evidentiary support in the record for plaintiffs' allegations that the objected-to contraceptive drugs and devices actually have the potential to prevent implantation of fertilized eggs. To be sure, a review of the briefs filed in this case suggests there is agreement among the parties and amici that intrauterine devices have such potential. But the same cannot be said about the challenged contraceptive drugs (e.g., Plan B and Ella). See Tummino v. Hamburg, — F. Supp. 2d —, 2013 WL 1348656 at *1 (E.D.N.Y. Apr. 5, 2013) (finding that levonorgestrel-based emergency contraception, such as Plan B and Plan B One-Step, interfere with prefertilization events and have not been shown to interfere with implantation of a fertilized egg).

In light of these evidentiary deficiencies, I fail to see how plaintiffs could reasonably be said to have carried their burden of establishing their entitlement to a preliminary injunction. And, relatedly, I am concerned, given these evidentiary deficiencies, about the majority's eagerness to issue seemingly definitive rulings on the merits of plaintiffs' novel claim that for-profit corporations are entitled to coverage under RFRA. See generally Kennedy v. Silas Mason Co., 334 U.S. 249, 256-57 (1948) ("noting that "summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation").

III. Are Hobby Lobby and Mardel Persons Exercising Religion Under RFRA?

In the first part of its merits analysis, the majority addresses the question of whether Hobby Lobby and Mardel qualify as "persons exercising religion for purposes of RFRA." Maj. Op. at 25. As I shall outline below, the majority makes a number of critical mistakes in doing so. And its ultimate holding, which is unprecedented, is sufficiently ambiguous that neither the majority nor anyone else can confidently predict where it may lead, particularly when one considers how easily an "exercise of religion" could now be asserted by a corporation to avoid or take advantage of any governmental rule or requirement.

A.

The majority begins its analysis by suggesting that Hobby Lobby has a "religious mission." Id. The majority also notes, and effectively adopts, the plaintiffs' characterization of the two corporations as "faith-based compan[ies]." Id. at 10.

These characterizations, however, find meager support in the factual record, and virtually no support in federal or state law. The certificates of incorporation for both Hobby Lobby and Mardel were submitted to the district court as exhibits to the defendants' brief in opposition to plaintiffs' motion for preliminary injunction and are now part of the joint appendix in this appeal. Notably, there is not a single reference to religion in either certificate. Instead, the certificates state simply that Hobby Lobby and Mardel were created for the purpose of "engag[ing] in any lawful act or activity for which corporations may be organized under the Oklahoma General Corporation Act." JA at 162a, 166a. Consistent with these certificates, the plaintiffs' complaint concedes that both Hobby Lobby and Mardel are "privately held, for-profit corporations[s] . . . organized under Oklahoma law." Id. at 18a. More specifically, the complaint alleges that Hobby Lobby operates approximately 514 craft stores in the United States, selling "a variety of art and craft supplies, home decor, and holiday decorations." Id. at 20a. As for Mardel, the complaint alleges that it is "a bookstore and educational supply company that specializes in Christian materials, such as Bibles, books, movies, apparel, church and educational supplies, and homeschool curricula." Id. at 21a. Assuming the truth of these allegations, Hobby Lobby and Mardel are, in a nutshell, for-profit businesses focused on selling merchandise to consumers.

To be sure, plaintiffs allege in their complaint that "Hobby Lobby's statement of purpose reads:

> In order to effectively serve our owners, employees, and customers the Board of Directors is committed to:
>
> > Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.
> >
> > Offering our customers an exceptional selection and value.
> >
> > Serving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families.
> >
> > Providing a return on the owners' investment, sharing the Lord's blessings with our employees, and investing in our community.
> >
> > We believe that it is by God's grace and provision that Hobby Lobby has endured. He has been faithful in the past, we trust Him for our future."

Id. at 22a-23a. The complaint also alleges that "[t]he Green family's business practices . . . reflect their Christian faith in unmistakable and concrete ways." Id. at 14a. For example, they allege that "[t]hey give millions of dollars from their profits to fund missionaries and ministries around the world," and "they close all their stores on Sundays, even though they lose millions in annual sales by doing so." Id.

But these alleged facts, though perhaps establishing a sincerity of purpose on the part of the Green family that is rooted in their faith, cannot alter the basic for-profit status of the two corporations, or otherwise place these corporations into a unique class for purposes of RFRA in particular, or federal or state law in general. Significantly, the majority, despite employing the unique characterizations of "faith-based companies" and businesses with "a religious mission," does not cite to a single source in support of this new legal category of for-profit corporation.

That is because it cannot. As far as I can determine, neither the United States Supreme Court nor any federal circuit court, until now, has ever used the phrase "faith-based company," let alone recognized such a distinct legal category of for-profit corporations. Nor, as far as I can tell, has the United States Supreme Court or any federal circuit court, until now, recognized a for-profit corporation as having a "religious mission." Finally, Oklahoma state law, under which Hobby Lobby and Mardel were formed and currently exist, does not recognize any such unique class of corporation.

B.

The majority concludes that Hobby Lobby and Mardel are "persons" for purposes of RFRA. Maj. Op. at 25-35. In reaching this conclusion, the majority correctly notes that "RFRA contains no special definition of 'person.'" Id. at 27. The majority thus turns to "the Dictionary Act, which instructs: 'In determining the meaning of any Act of Congress, unless the context indicates otherwise * * * the word[] "person" . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.'" Id. (quoting 1 U.S.C. § 1). The majority then cites Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006), which involved RFRA claims raised by a New Mexico-based religious sect organized as a non-profit corporation. Relying on O Centro, the majority asserts that "the Supreme Court has affirmed the RFRA rights of corporate claimants, notwithstanding the claimants' decision to use the corporate form." Maj. Op. at 27. Proceeding on the assumption that "at least some types of corporate entities can bring RFRA claims," the majority then asks "whether Congress intended to exclude for-profit corporations, as opposed to non-profit corporations, from RFRA's scope." Id. at 28. Ultimately, the majority concludes that Congress "chose not to do so in RFRA," id., and that, instead, "Congress meant 'person' in RFRA to [carry] . . . its default meaning in the Dictionary Act—which includes corporations regardless of their profit-making status," id. at 34-35.

The problem, however, is that the majority fails to properly recognize that "the context [of RFRA, including its legislative history,] indicates otherwise," 1 U.S.C. § 1, and thus it is unreasonable to assume from Congress's silence that Congress anticipated that for-profit corporations would be covered as "persons" under RFRA. RFRA, as the majority notes, was enacted by Congress in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S.

872 (1990), which construed the Free Exercise Clause of the First Amendment to hold that "neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." City of Boerne v. Flores, 521 U.S. 507, 514 (1997). In Congress's view, "the compelling interest test as set forth in [pre-Smith] Federal court rulings [wa]s a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5). Thus, RFRA was intended "to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened." Id. § 2000bb(b)(1). In short, the purpose of RFRA was restoration of pre-Smith free exercise jurisprudence, not expansion of the scope of the Free Exercise Clause. See O Centro, 546 U.S. at 1216 (noting that Congress, by way of RFRA, "adopt[ed] a statutory rule comparable to the constitutional rule rejected in Smith."); Vill. of Bensenville v. Fed. Aviation Admin., 457 F.3d 52, 62 (D.C. Cir. 2006) ("[W]ith RFRA Congress intended to 'restore' the standard by which federal government actions burdening religion were to be judged, not to expand the class of actions to which the standard would be applied.").

The relevant context, then, is the body of free exercise case law that existed at the time of RFRA's passage. See Bruesewitz v. Wyeth LLC, 131 S. Ct. 1068, 1082 (2011) ("When all (or nearly all) of the relevant judicial decisions have given a term or concept a consistent judicial gloss, we presume Congress intended the term or concept to have that meaning when it incorporated it into a later-enacted statute.") (internal quotation marks omitted); Stewart v. Dutra Constr. Co., 543 U.S. 481, 490 (2005) (examining "[t]he context surrounding the . . . enactment" of the statute at issue); Rowland v. Calif. Men's Colony, 506 U.S. 194, 199 (1993) (holding that context includes "the texts of other related congressional Acts").[1] And the proper inquiry is whether, at the time of RFRA's passage, the Supreme Court had said anything about for-profit corporations possessing and exercising rights under the Free Exercise Clause of the First Amendment.[2]

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[1] Obviously, there were no "related congressional Acts" that existed at the time of RFRA's passage. Because, however, RFRA was intended to effectively overrule Smith and supplement the existing body of free exercise case law, City of Boerne, 521 U.S. at 531 (noting that RFRA was intended "to attempt a substantive change in constitutional protections"), it is precisely that existing body of free exercise case law that provides the proper context for understanding the text of RFRA.

[2] The majority ignores this inquiry and instead concludes, after discussing religious exemptions contained in Title VII, the Americans with Disabilities Act, and the National Labor Relations Act, that "Congress knows how to craft a corporate religious exemption, but chose not to do so in RFRA." Maj. Op. at 28. But those statutes, all of which address the relationship between an employer and an employee, are significantly different than RFRA and, in my view, do not support the majority's assumption that Congress anticipated that for-profit corporations would be deemed "persons" under RFRA. Indeed, I believe we must assume just the opposite since, at the time of RFRA's passage, Congress had never exempted for-profit corporations, on the basis of religious reasons, from any of these employment-related laws. As I discuss in greater detail below, affording for-profit corporations rights under

Plaintiffs, who carry the burden on this inquiry, provide us with no persuasive authority.[3] Indeed, they don't even directly address this question. Not because they have overlooked precedent. But rather

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RFRA effectively creates a religious-based exemption to any number of federal statutes, including all of those that impact the employer-employee relationship. Because, however, Congress has never expressly created any such exemption in any employment-related laws, it is improper for us to effectively create such exemptions based upon Congress's silence in employing the term "person" in RFRA.

[3] The majority properly acknowledges, as it must, that the plaintiffs carry two related burdens at this stage of the proceedings. First, to establish their entitlement to a preliminary injunction. Maj. Op. at 24. Second, to prove that there is a substantial likelihood that they will establish "a prima facie case under RFRA by showing that the government substantially burdens a sincere religious exercise." Id. at 19. But in addressing whether Hobby Lobby and Mardel "can take advantage of RFRA's protections," Maj. Op. at 31, the majority quite clearly places the burden of persuasion on the defendants, rather than on the plaintiffs who, as the parties seeking relief under RFRA and the movants seeking preliminary injunctive relief, properly carry that burden. In particular, the majority, rather than examining what precedents, if any, the plaintiffs can muster in support of their position, focuses almost exclusively on the defendants' arguments in opposition to the plaintiffs' RFRA claims. E.g., at 26 ("The government makes two arguments for why this is not the case."), id. ("We reject both of these arguments."), 32 ("we do not see what the government sees in Amos"), id. ("Nor do the other post-RFRA circuit cases on which the government relies provide more guidance."), 34 ("to the extent the government sees Spencer and Great Falls as following principles laid down in Amos . . . we disagree."), id. ("In conclusion, the government has given us no persuasive reason to think that Congress meant 'person' in RFRA to mean anything other than its default meaning in the Dictionary Act").

because none exists. At the time of RFRA's passage, the Supreme Court had never addressed whether, let alone recognized that, a for-profit corporation possessed free exercise rights under the First Amendment. In other words, during the 200-year span between the adoption of the First Amendment and RFRA's passage, the Supreme Court consistently treated free exercise rights as confined to individuals and non-profit religious organizations. E.g., Jimmy Swaggart Ministries v. Bd. of Equalization of Calif., 493 U.S. 378 (1990) (addressing free exercise claims asserted by religious organization); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) (holding that the purpose of the Free Exercise Clause is "to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority.") (emphasis added). And, in United States v. Lee, 455 U.S. 252 (1982), decided approximately a decade prior to RFRA's enactment, the Supreme Court emphasized that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." Id. at 261. In light of this body of precedent, the only reasonable conclusion we can draw is that Congress, in employing the term "person" in RFRA, anticipated that it would encompass only individuals and non-profit religious organizations.

The limitation of RFRA's applicability to individuals and non-profit religious organizations is reinforced by examining the legislative history of RFRA. In discussing the "BACKGROUND AND NEED" for RFRA, Congress noted "that the right to observe one's faith, free from Government interference, . . . is enshrined in the free exercise clause of the first amendment." Religious Freedom Restoration Act of 1993, S. Rep. 103-111 (1993), reprinted in 1993 U.S.S.C.A.N. 1892, 1893-94 (emphasis added). In turn, Congress recognized that "[t]his fundamental constitutional right may be undermined . . . by governmental rules of general applicability which operate to place substantial burdens on individuals' ability to practice their faiths." Id. at 1894 (emphasis). Congress further stated that "[t]he extent to which the Free Exercise Clause requires government to refrain from impeding religious exercise defines nothing less than the respective relationships in our constitutional democracy of the individual to government and to God." Id. at 1897 (emphasis added). Later, in discussing the intended purpose of RFRA and its impact on other areas of the law, Congress made explicit reference to "religious institutions" and "religious organizations." Id. at 1898 ("The act thus would not require such a justification for every government action that may have some incidental effect on religious institutions."), 1902 ("the courts have long adjudicated cases determining the appropriate relationship between religious organizations and government."). Entirely absent from the legislative history, however, is any reference to for-profit corporations. In short, Congress clearly recognized that individuals and religious organizations enjoy free exercise rights, and thus it anticipated that RFRA's reach would extend to them. But nowhere is there any suggestion that Congress foresaw, let alone intended that, RFRA would cover for-profit corporations.

Consequently, it comes as no surprise that not a single case, until now, has extended RFRA's protections to for-profit corporations. Although the majority finds significance in the Supreme Court's O Centro decision, see Maj. Op. at 27 ("the Supreme Court has affirmed the RFRA rights of corporate claimants"), the fact of the matter is that the plaintiff in O Centro was a New Mexico non-profit corporation, specifically "[a] religious sect with origins in the Amazon Rainforest." 546 U.S. at 423. Thus, O Centro is entirely consistent with pre-RFRA free exercise precedent and tells us nothing about RFRA's application to for-profit corporations.

The same can be said for Citizens United v. FEC, 558 U.S. 310 (2010). In Citizens United, the Supreme Court held that corporations have free speech rights under the First Amendment. But that holding has no bearing on our assessment of RFRA's "context" because it was issued nearly twenty years after RFRA's enactment, and it dealt with a different provision of the First Amendment than the one Congress was concerned with in RFRA. See generally Conestoga Wood Specialities Corp. v. Sebelius, — F. Supp. 2d —, 2013 WL 140110 at *7 (E.D. Pa. Jan. 11, 2013) ("Although [the Free Speech and Free Exercise Clauses] reside within the same constitutional amendment, these two provisions have vastly different purposes and precedents, and we decline to make the significant leap Plaintiffs ask of us without clear guidance from Congress or the Supreme Court."). In short, a 2010 Supreme Court decision concerning the First Amendment free speech rights of a corporation cannot, in retroactive fashion, impact our determination of what Congress intended when it enacted RFRA in 1993.[4]

In sum, "there is no plausible basis for inferring that Congress intended or could have anticipated" that for-profit corporations would be covered by RFRA. McQuiggin v. Perkins, 133 S. Ct. 1924, 1942 (2013) (Scalia, J., dissenting). The majority's conclusion to the contrary thus "amounts to a pure judicial override of the statute Congress enacted." Id.

C.

Having concluded that Hobby Lobby and Mardel qualify as "persons" for purposes of RFRA, the majority in turn concludes, "as a matter of constitutional law, [that] Free Exercise rights may extend to some for-profit organizations." Maj. Op. at 26. In doing so, the majority purports to rely on the precise body of case law that it ignored in assessing the "context" of RFRA, i.e., pre-RFRA "jurisprudence regarding who can bring Free Exercise claims." Maj. Op. at 36. And, despite the fact that, as I have explained, this jurisprudence does not include a single case extending free exercise rights to for-profit corporations, the majority concludes, remarkably, that at least some for-profit corporations enjoy free exercise rights.

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[4] To the extent the majority means to suggest that RFRA can incorporate evolving free exercise or First Amendment case law, that view is simply wrong. Although RFRA originally defined free exercise as "the exercise of religion under the First Amendment to the Constitution, 42 U.S.C. § 2000bb-2(4) (1999), Congress subsequently amended this part of RFRA to instead provide a fixed statutory definition of religious exercise for both RFRA and the Religious Land Use and Institutionalized Persons Act of 2000. This fixed statutory definition makes no reference to the First Amendment and instead provides that "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

How does the majority arrive at this conclusion? It first asserts, correctly, that the Supreme Court has recognized "'a right to associate for the purpose of . . . exercis[ing] . . . religion,'" Maj. Op. at 37 (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (addressing claim brought by non-profit civic and service organization)), and that, consequently, "the Free Exercise Clause at least extends to associations like churches—including those that incorporate," id.[5] It then asserts, again correctly, that "the Supreme Court has settled that *individuals* have Free Exercise rights with respect to their *for-profit businesses,*" i.e., sole proprietorships. Id. at 38 (emphasis in original; citing Lee and Braunfeld v. Brown, 366 U.S. 599 (1961)).

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[5] In doing so, the majority cites to, but does not place significant reliance on, the Supreme Court's decision in Citizens United. Maj. Op. at 37. As I have already explained, I agree that Citizens United, which held that corporations have free speech rights under the First Amendment, has no bearing on the outcome of this appeal.

From there, however, the majority abandons its purported examination of pre-RFRA jurisprudence and "wander[s] into uncharted areas of the law with no compass other than [its] own opinions about good policy." Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C., 518 U.S. 727 (1996) (Kennedy, J., concurring in part and dissenting in part). To begin with, the majority, noting that the First Amendment was intended by Congress to protect not only belief but conduct, suggests that "religious conduct includes religious expression . . . communicated by . . . for-profit corporations," Maj. Op. at 39, such as the alleged efforts by Hobby Lobby and Mardel to "proselytize by purchasing hundreds of newspaper ads to 'know Jesus as Lord and Savior,'" id. at 40 (quoting JA at 24a). But the majority cites to no authority suggesting that Congress, either at the time of the First Amendment's adoption or the passage of RFRA, remotely considered, let alone firmly believed, that for-profit corporations, as entities separate from the individuals that form them, could "exercise religion."

Indeed, at the time of RFRA's passage, the law had long distinguished between categories of corporations based upon "the specific purposes of their creation." Bank of Augusta v. Earle, 38 U.S. 519, 580 (1839); see Lankford v. Menefee, 145 P. 375, 378 (Okla. 1914) ("Every such corporation must be organized or incorporated for a particular purpose."). In particular, "corporations [we]re, from the particular purposes to which they [we]re devoted, denominated spiritual, and some lay; and the latter . . . again divided into civil and eleemosynary corporations."[6] Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 668 (1819). And, quite logically, only those "spiritual" corporations, i.e., non-profit religious organizations, had been recognized as having the ability to "exercise religion."

In turn, the majority, citing Citizens United, asserts there is "no reason [why] the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression." Maj. Op. at 40. But, as I have already noted, there are a number of reasons why we must not allow Citizens United to impact our assessment of what Congress anticipated or intended when it enacted RFRA: Citizens United was issued nearly twenty years after RFRA; it dealt with the Free Speech Clause rather than the Free Exercise Clause of the First Amendment; and "mark[ed] a dramatic break from" the Court's prior Free Speech precedents. Citizens United, 558 U.S. at 394 (Stevens, J., dissenting).

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[6] In this case, it is quite clear even from the little we know about Hobby Lobby and Mardel that, notwithstanding the intentions of the Green family to operate them in a manner consistent with Biblical principles, they were created for the specific purpose of selling goods and making a profit. In other words, nothing in the record on appeal remotely suggests that Hobby Lobby and Mardel were created primarily to function as a vehicle through which a group of believers could associate and collectively exercise their religion.

The majority next states that it "cannot see why an individual operating for profit retains Free Exercise protections but an individual who incorporates—even as the sole shareholder—does not, even though he engages in the exact same activities as before." Maj. Op. at 40. The obvious response to this is that, in the latter situation, a new entity separate from the natural individual has been formed. The Supreme Court has clearly stated that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001). Consistent with these principles, Oklahoma law, under which Hobby Lobby and Mardel were created and continue to exist, provides that "even a family corporation is a separate and distinct legal entity from its shareholders." Sautbine v. Keller, 423 P.2d 447, 451 (Okla. 1966); see Fanning v. Brown, 85 P.3d 841, 846 (Okla. 2004) ("Generally, a corporation is regarded as a legal entity, separate and distinct from the individuals comprising it.").[7] And, as I have noted, the specific purpose for which this new entity is created matters greatly to how it will be categorized and treated under the law.

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[7] Given the apparent ownership structure of the two corporate plaintiffs in this case, the majority would apparently have us disregard two organizational structures: first, the corporate structure of Hobby Lobby and Mardel; second, the organizational structure of the trusts that actually own Hobby Lobby and Mardel.

The majority, obviously aware of these legal distinctions, asserts that "[t]his cannot be about the protections of the corporate form, such as limited liability and tax rates," because "[r]eligious associations can incorporate, gain those protections, and nonetheless retain their Free Exercise rights." Maj. Op. at 40. In turn, the majority asserts, with no support other than its own view of public policy, that "sincerely religious persons could find a connection between the exercise of religion and the pursuit of profit." Id. at 41. Finally, the majority suggests, most remarkably and again with no support other than its own views, that the operation of a successful for-profit corporation can reasonably be viewed as a "form of evangelism" on the part of its owners. Id. Consequently, the majority concludes, such businesses, which it has effectively deemed "faith-based businesses" or businesses with a "religious mission," are entitled to free exercise rights.

This is nothing short of a radical revision of First Amendment law, as well as the law of corporations. But whatever one might think of the majority's views, the fact remains that they are wholly unsupported by the language of the Free Exercise Clause or the Supreme Court's free exercise jurisprudence, and are thus, at best, "considerations for the legislative choice." North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 167 (1973). Adhering to the Supreme Court's holdings, as we must, there is, as I have explained, literally no support for the proposition that for-profit corporations enjoy free exercise rights.

Finally, the majority poses a series of hypothetical questions intended to call into question what it refers to as "the for-profit/non-profit distinction." E.g., Maj. Op. at 41-42 ("What if Congress eliminates the for-profit/non-profit distinction in tax law? Do for-profit corporations then gain Free Exercise rights? Or do non-profits lose Free Exercise rights?"). But that purported distinction is not entirely accurate. As I have explained, the Supreme Court's free exercise jurisprudence tells us two key things: non-profit religious organizations, including those that have assumed the corporate form, enjoy free exercise rights; for-profit corporations have never been recognized as enjoying free exercise rights. Whatever theoretical distinctions might be raised by the majority concerning categories of non-profit corporations are immaterial for purposes of this appeal because it is undisputed that Hobby Lobby and Mardel are for-profit corporations focused on selling merchandise to consumers. Under the Supreme Court's free exercise jurisprudence, there is no basis for concluding that they enjoy free exercise rights.

D.

Having concluded that RFRA's protections may, at least in some instances, extend to for-profit corporations, the majority proceeds to conclude that Hobby Lobby and Mardel in particular are entitled to RFRA's protections. In doing so, the majority lists, but does not otherwise explain, four factors that it considers relevant to that determination: (1) "Hobby Lobby and Mardel are not publicly traded corporations";

(2) "they are closely held family businesses with an explicit Christian mission as defined in their governing principles"; (3) "[t]he Greens . . . have associated through Hobby Lobby and Mardel with the intent to provide goods and services while adhering to Christian standards as they see them, and they have made business decisions according to those standards"; and (4) "the Greens are unanimous in their belief that the contraceptive-coverage requirement violates the religious values they attempt to follow in operating Hobby Lobby and Mardel." Maj. Op. at 44.

In my view, these factors are problematic. To begin with, the first and second factors emphasize the fact that Hobby Lobby and Mardel are closely held corporations. But the majority offers no explanation as to why that factor is key in affording Hobby Lobby and Mardel rights under RFRA. And, in turn, the majority fails to explain whether (or why) registration as a publicly held corporation deprives a for-profit corporation of rights under RFRA.

As I see it, the publicly-held/closely-held distinction identified in the first and second factors, as well as the "unanimity of belief" mentioned in the fourth factor, are relevant only to the extent that they allow the majority to take into account the personal religious beliefs of the corporations' founders and owners—although, as I have noted, the Greens apparently do not directly own Hobby Lobby or Mardel, but rather these corporations are owned by trusts that are not named as party plaintiffs. Indeed, the majority's stated third and fourth factors make that clear by emphasizing the Greens' religious beliefs in general, and their beliefs regarding the contraceptive-coverage requirement in particular. But by doing so, the majority disregards the legal distinctions between the corporate entities and the individual founders/owners. Nothing that I am aware of in federal or Oklahoma state law allows the majority to do so. To be sure, "Oklahoma has long recognized the doctrine of disregarding the corporate entity in certain circumstances." Fanning, 85 P.3d at 846. In particular, Oklahoma "[c]ourts may disregard the corporate entity and hold stockholders personally liable for corporate obligations or corporate conduct under the legal doctrines of fraud, alter ego and when necessary to protect the rights of third persons and accomplish justice." Id. Neither the plaintiffs nor the majority, however, cite to a single case that would allow us to employ these doctrines in a situation such as this. Moreover, as some of the defendants' amici have noted, it is simply unreasonable to allow the individual plaintiffs in this case to benefit, in terms of tax and personal liability, from the corporate/individual distinction, but to ignore that distinction when it comes to asserting claims under RFRA.

Although the plaintiffs have argued that Hobby Lobby and Mardel may bring RFRA claims on behalf of the individual plaintiffs in a representative capacity, there is no indication that the majority agrees with that argument or is otherwise relying on the doctrine of associational standing. Indeed, the majority appears to recognize that the doctrine of associational standing does not apply to the alleged facts of this case. Maj. Op. at 44 n.11 ("This is not a special case of associational standing."); see United Food and Comm. Workers Union Local 751 v. Brown Group, Inc., 517 U.S. 544, 552 (1996) (discussing "[t]he modern doctrine of associational standing, under which an organization may sue to redress its members' injuries, even without a showing of injury to the association itself"); Harris v. McRae, 448 U.S. 297 (1980) (holding that a non-profit religious organization lacked associational standing to assert the free exercise rights of its members). But, notwithstanding its apparent rejection of plaintiffs' associational standing argument, the majority nevertheless looks to the religious beliefs of the individual plaintiffs in assessing whether the corporate plaintiffs, Hobby Lobby and Mardel, are entitled to protection under RFRA.

To be sure, the second factor listed by the majority emphasizes the purported "explicit Christian mission" of the two corporate plaintiffs. But all we know at this point, based upon the limited record, is that Hobby Lobby's statement of purpose allegedly includes a reference to "Biblical principles." JA at 22a. Precisely why that is sufficient to accord Hobby Lobby rights under RFRA is unexplained by the majority. Indeed, the majority dodges several related questions: (1) whether a corporation can "believe" at all, see Citizens United, 130 S. Ct. at 972 ("It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires.") (Stevens, J., concurring in part and dissenting in part); (2) if so, precisely how courts are to go about determining a for-profit corporation's religious beliefs, and (3) whether a for-profit corporation has "cognizable religious liberties independent of the people who animate" it, Grote v. Sebelius, 708 F.3d 850, 856 (7th Cir. 2013) (Rovner, J., dissenting).

Curiously, the majority declines to indicate whether the four factors it mentions are intended to be exclusive, or even controlling. Maj. Op. at 45 ("We need not decide today whether any of these factors is necessary."). Likewise, it refuses to address concerns raised by the defendants concerning how the factors might translate to "a large publicly traded corporation [seeking] to assert religious rights under RFRA." Id. at 44. Thus, the precise scope of the majority's holding remains unclear. That said, however, it is difficult to imagine why the majority's holding would not apply to any number of large, closely-held corporations that employ far more employees, and generate substantially more revenue, than Hobby Lobby and Mardel.

And, if all it takes for a corporation to be categorized as a "faith based business" for purposes of RFRA is a combination of a general religious statement in the corporation's statement of purpose and more specific religious beliefs on the part of the corporation's founders or owners, the majority's holding will have, intentionally or unwittingly, opened the floodgates to RFRA litigation challenging any number of federal statutes that govern corporate affairs (e.g., Title VII of the Civil Rights Act of 1964, the Fair Labor Standards Act).[8] See City of Boerne, 521 U.S. at 532 (noting that RFRA's "[s]weeping coverage" has the potential to "displac[e] laws and prohibit[] official actions of almost every description and regardless of subject matter."); id. at 534 (noting the potential of RFRA to exact "substantial costs . . . , both in practical terms of imposing a heavy litigation burden on the [government] and in terms of curtailing [its] traditional general regulatory power"). In short, the majority's holding threatens to entangle the government in the impermissible business of determining whether for-profit corporations are sufficiently "religious" to be entitled to protection under RFRA from a vast array of federal legislation. See Snyder v. Murray City Corp., 159 F.3d 1227, 1243 (10th Cir. 1998) (Lucero, J., concurring) ("[A]s Madison recognized, 'religion flourishes in greater purity, without than with the aid of Government.'" (alteration omitted) (quoting James Madison, Memorial and Remonstrance against Reli-

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[8] Americans United for Separation of Church and State assert in their amicus brief, and I agree, that the majority's holding

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> would transcend the provision of coverage for contraception. A Jehovah's Witness could choose to exclude blood transfusions from his corporation's health-insurance coverage. Catholic-owned corporations could deprive their employees of coverage for end-of-life hospice care and for medically necessary hysterectomies. Scientologist-owned corporations could refuse to offer their employees coverage for antidepressants or emergency psychiatric treatment. And corporations owned by certain Muslims, Jews, or Hindus could refuse to provide coverage for medications or medical devices that contain porcine or bovine products—including anesthesia, intravenous fluids, prostheses, sutures, and pills coated with gelatin.

Br. of Amici Curiae Am. United for Separation of Church and State, Inc., at 35.

gious Assessments (1785), in The Complete Madison 309 (S. Padover ed. 1953))).

E.

For all of these reasons, I reject the majority's conclusion that Hobby Lobby and Mardel are "persons" exercising religion for purposes of RFRA. And, consequently, I conclude on that basis that Hobby Lobby and Mardel have failed to carry their burden of establishing a likelihood of success on the merits of their RFRA claims.

IV. Substantial Burden

In the second part of its merits analysis, the majority addresses the question of "whether the contraceptive-coverage requirement constitutes a substantial burden on plaintiffs' exercise of religion." Maj. Op. at 45. At the outset, the majority purports to "identify the religious belief in this case." Id. at 52. But it commits two errors in doing so.

To begin with, the majority once again conflates the alleged beliefs of the individual and corporate plaintiffs. In particular, the majority states that "[t]he corporate plaintiffs believe life begins at conception." Id. To be sure, the complaint reasonably alleges that the individual plaintiffs possess this belief. But nothing in the plaintiffs' complaint suggests that Hobby Lobby or Mardel have ever taken an official stance on this particular topic. Instead, the complaint alleges only that Hobby Lobby's statement of purpose makes reference to "Biblical principles." JA at 22a. Consequently, the majority is left to treat the religious beliefs of the individual plaintiffs as those of Hobby Lobby and Mardel, even though doing so violates basic principles of corporation law.

The majority also fails to carefully parse, and thus overstates, the nature of the plaintiffs' religious beliefs. It is undisputed that the individual plaintiffs believe, as part of their religion, that "life begins at conception." Maj. Op. at 52. But, in addition to erroneously treating these beliefs as belonging to the corporate plaintiffs, the majority erroneously concludes that these beliefs encompass the plaintiffs' views regarding the contraceptive drugs Plan B and Ella, as well as certain intrauterine devices.

I agree that the clear offshoot of plaintiffs' belief that life begins at conception is their belief, also religious in nature, that any action that threatens to harm a fertilized egg, including by preventing it from implanting in the uterus, is immoral. But what is the connection between these religious beliefs and plaintiffs' opposition to Plan B, Ella, and certain intrauterine devices? According to plaintiffs' complaint and their motion for preliminary injunction, it is statements from the Food and Drug Administration (FDA), in particular an "FDA birth control guide," suggesting "that Plan B and Ella may work by preventing 'attachment (implantation)' of a fertilized egg to a woman's uterus." JA at 33a (complaint); see id. at 50a (allegation in complaint that "[s]ome FDA-approved 'contraceptives' cause abortions.") and 70a (reference in motion for preliminary injunction to "FDA Birth Control Guide"). In other words, the connection is not one of religious belief, but rather of purported scientific fact, i.e., how the challenged contraceptives operate to prevent pregnancy. Consequently, rather than being off limits to examination, plaintiffs' allegations regarding the abortion-causing potential of the challenged drugs are subject not only to examination but evidentiary proof. In short, they must be proven by plaintiffs on the basis of sufficient evidence.

As I have noted, however, plaintiffs presented no evidence at all during the hearing on their motion for preliminary injunction. That failure is not entirely fatal to their claims, because there appears to be agreement among the parties and amici that certain intrauterine devices actually have, as a matter of scientific fact, the potential to prevent implantation of a fertilized egg. But there is no such consensus with respect to the contraceptive drugs challenged by the plaintiffs. E.g., Br. of Amici Curiae Physicians for Reprod. Health, et al., at 8-15 (discussing the current scientific evidence regarding how the challenged contraceptive drugs function to prevent pregnancy and asserting that the FDA labels for these drugs do not reflect this evidence). Consequently, plaintiffs' tactical decision to present no evidence on this point appears, to me, to prevent them from establishing that the regulatory requirement to provide healthcare coverage encompassing these drugs substantially burdens their exercise of religion.

V. Remaining Preliminary Injunction Factors

I also believe that the plurality errs in its consideration of the three remaining preliminary injunction factors, i.e., whether Hobby Lobby and Mardel face irreparable harm, whether the balance of equities tips in favor of Hobby Lobby and Mardel, and whether an injunction is in the public interest. The plurality suggests it is proper for this court to address each of those factors in the first instance because "[t]he record we have is the record the parties chose to create below," Maj. Op. at 63, "this record suffices for us to resolve each of the remaining preliminary injunction factors," id., RFRA is analogous to constitutional law and thus plaintiffs' likelihood of success on the merits of their RFRA claims should be considered a determinative factor, id. at 63-64, and the government did not "contest[] the *factual* adequacy or accuracy of Hobby Lobby's allegations," all of which were contained in "a verified complaint," id. at 65.

Surely, however, the plaintiffs, as the parties who unsuccessfully moved for a preliminary injunction and now appeal from the district court's decision, must be required to present some evidence to establish the remaining three preliminary injunction factors. Although the plurality suggests that the existing record is sufficient to resolve the remaining factors, the plaintiffs presented literally no evidence at the preliminary injunction hearing. And, although it is true that plaintiffs filed a verified complaint, defendants have not yet had an opportunity to file an answer to the complaint. Thus, we do not yet know which of the plaintiffs' allegations might be admitted by the defendants. Finally, we must not forget that the district court denied plaintiffs' motion for preliminary injunction based solely on its conclusion that plaintiffs failed to demonstrate a probability of success on the merits of their RFRA claims. JA at 228a-229a. Consequently, the district court concluded "it [wa]s unnecessary to determine whether the three other [preliminary injunction] factors tip[ped] in [plaintiffs'] favor." Id. at 229a n.19. It is thus completely understandable why the defendants in this appeal have focused their arguments on the likelihood of success factor: that, as I have noted, was the sole basis for the district court's decision. And, presumably, the defendants believed, and reasonably so, that if we disagreed with the district court's conclusion, we would remand the case to the district court for further consideration of the remaining three preliminary injunction factors (all of which the defendants vigorously disputed in opposing plaintiffs' motion for preliminary injunction in the district court proceedings, see id. at 156a-158a).

VI. The Individual Plaintiffs' Standing to Sue under RFRA

As a final matter, I believe it necessary to briefly address several points raised by Judge Gorsuch and Judge Matheson regarding the Article III standing of the individual plaintiffs.

At the outset of his concurring opinion, Judge Gorsuch asserts that "[n]o one before us disputes that the [regulation] compels Hobby Lobby and Mardel to underwrite payments for drugs or devices that can have the effect of destroying a fertilized human egg." Gorsuch Op. at 1. As I have already explained, however, there are, indeed, factual disputes regarding the actual potential of the challenged drugs to destroy a fertilized human egg. And because the plaintiffs collectively failed to present any evidence to support their allegations regarding these challenged drugs, there is no basis upon which a preliminary injunction could be issued that relieves Hobby Lobby and Mardel from offering its employees coverage for those drugs.

Judge Gorsuch proceeds to suggest that there are two bases upon which the individual plaintiffs have Article III standing. First, he suggests the individual plaintiffs have Article III standing "because the company shares of which they are the beneficial owners would decline in value if the mandate's penalties for noncompliance were enforced." Id. at 6. Although there is no disputing the principle that "shareholders suffer injury in the Article III sense when the corporation incurs significant harm, reducing the return on their investment and lowering the value of their stockholdings," Grubbs v. Bailes, 445 F.3d 1275, 1280 (10th Cir. 2006), the problem in this case is that, as far as we know, the individual plaintiffs are not the shareholders of Hobby Lobby and Mardel. Rather, plaintiffs' complaint alleges that both corporations are owned by trusts. JA at 13a. Thus, there is no basis in the limited record on appeal for concluding that the individual plaintiffs can rely on this principle of Article III standing. And even if we were to assume otherwise, I agree with the views expressed in Section II of Judge Bacharach's concurring opinion that Congress did not abrogate prudential-standing restrictions in RFRA and that the shareholder standing rule would prevent the individual plaintiffs from asserting distinct claims under RFRA.

Judge Gorsuch and Judge Matheson, in their separate concurring opinions, also suggest that the individual plaintiffs have Article III standing on the basis of a novel "management standing" rule. As Judge Gorsuch describes it in his concurring opinion, the individual plaintiffs, "as the exclusive and controlling owners of Hobby Lobby and Mardel, are the human beings who must direct the corporations to comply with the [contraceptive-coverage regulation] and do so in defiance of their faith." Gorsuch Op. at 10. On this point, I agree with Judge Bacharach that the so-called "choice" that results from the contraceptive-coverage regulation "falls solely on the two corporations, and the [individual plaintiffs]' injury is not directly or personally created by the Affordable Care Act." Bacharach Op. at 10.

In addition, to the extent the individual plaintiffs in this case are involved in the corporate decisionmaking of Hobby Lobby and Mardel, I am not persuaded that the contraceptive-coverage regulation imposes a substantial burden on the exercise of their religion. The contraceptive-coverage regulation requires employers such as Hobby Lobby and Mardel to provide to their employees health insurance coverage for the full range of FDA-approved contraceptive drugs and devices. Period. Although the plaintiffs, and in turn Judge Matheson, artfully suggest that compliance with the regulation "would assist others in using particular contraceptives," Matheson Op. at 15, the fact of the matter is that the regulation is drug/device-neutral. And the decision of a female employee as to which contraceptive drug or device to use remains a private matter of individual choice. Thus, neither an employer, nor its officers and directors, by choosing to comply with the contraceptive-coverage regulation, become a party to, or otherwise encourage, an individual employee's decision to use a particular drug or device. See Grote, 708 F.3d at 865 (Rovner, J., dissenting) ("No individual decision by an employeer and her physician—be it to sue contraception, treat an infection, or have a hip replaced—is in any meaningful sense the [employer's or company owner's] decision or action."); cf. Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002) (upholding a state school voucher program on the ground that "[t]he incidental advancement of a religious mission . . . is reasonably attributable to the individual [voucher] recipient, not to the government, whose role ends with the disbursement of benefits."). But, by recognizing a new "management standing" rule applicable to the individual plaintiffs, Judge Gorsuch and Judge Matheson "upend th[is] traditional understanding" and effectively conclude "that when a company insures its employees' health care, a company owner indeed is a party to that care, with a cognizable religious interest in what services are made available to the employee." Grote, 708 F.3d at 865 (Rovner, J., dissenting). In my view, "[h]olding that a company [owner]'s religious beliefs and practices are implicated by the autonomous health care decisions of company employees, such that the obligation to insure those decisions, when objected to by [the owner], represents a substantial burden on that [owner]'s religious liberties [is] an [unduly] expansive understanding of what acts in the commercial sphere meaningfully interfere with an individual's religious beliefs and practices." Id. at 866.

MATHESON, J., concurring in part and dissenting in part.

INTRODUCTION

The plaintiffs in this case are two corporations—Hobby Lobby and Mardel—and the owners and managers of those corporations—the Greens. Asserting claims under the Religious Freedom Restoration Act ("RFRA") and the Free Exercise Clause, these corporate and individual plaintiffs challenge a federal regulation requiring employers to provide employee health insurance that covers certain contraceptives. The challenged regulation ("the Regulation") was promulgated under the 2010 Patient Protection and Affordable Health Care Act and applies to Hobby Lobby and Mardel. The Greens allege that it burdens their religious beliefs to manage their corporations in compliance with the Regulation by providing health insurance coverage for the contraceptives at issue.

The plaintiffs seek a preliminary injunction to bar the enforcement of the Regulation. In addressing this request for "an extraordinary remedy never awarded as of right," *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008), we cannot forget that the corporate and individual plaintiffs are not on common legal and factual ground. Each faces a unique set of problems that must be overcome to obtain a preliminary injunction.

Hobby Lobby and Mardel face a distinct and formidable challenge: a dearth of legal precedent that for-profit, secular corporations have rights under RFRA or the Free Exercise Clause. To overcome this obstacle, the plaintiffs attribute the beliefs of the Greens to the corporations and ignore the corporate form.

In contrast, the Greens start on more solid ground with respect to RFRA and the Free Exercise Clause. No one disputes that, as natural persons, the Greens have free exercise rights. Their distinct challenge is to demonstrate that the Regulation imposed on the corporations also burdens *the Greens'* exercise of religion. To do so, they must first show they have standing to assert their free exercise rights and, if they do, demonstrate that the Regulation substantially burdens their exercise of religion.

Each set of plaintiffs must show that the district court abused its discretion when it denied their request for a preliminary injunction because they could not meet their burden to demonstrate a substantial likelihood of success on the merits. *See Gen. Motors Corp. v. Urban Gorilla, LLC,* 500 F.3d 1222, 1226 (10th Cir. 2007). With the plaintiffs' burden in mind, I conclude that the district court did not abuse its discretion as to the corporate plaintiffs, Hobby Lobby and Mardel, but would remand for further consideration of the Greens' request for a preliminary injunction on their RFRA claim.

As to the corporate plaintiffs, I agree with Chief Judge Briscoe that they did not meet their burden to show that RFRA applies to them. Their briefs lack adequate supporting precedent, and the record lacks evidence of how Hobby Lobby and Mardel hold and exercise religious beliefs in conflict with the Regulation. Also, I am thus far unconvinced that for-profit, secular corporations can so easily seize upon the religious beliefs of their owners to demonstrate a corporate religious conviction. The structural barriers of corporate law give me pause about whether the plaintiffs can have their corporate veil and pierce it too.

In contrast to Chief Judge Briscoe, however, I am not prepared to conclude once and for all that RFRA or the Free Exercise Clause provides no protection to any for-profit corporation. The legal and factual arguments have not been sufficiently developed to provide a definitive answer. Up until the recent court challenges to the Regulation, there is little or no case authority on whether a for-profit corporation has free exercise rights. We should not attempt a final answer on such a novel and significant question until we have to, and we do not have to at this early stage of this case. The circumstances in which this issue of first impression comes to us counsel against deciding it, other than to say that the plaintiffs have not met their burden at this point.

As to the Greens, the threshold issue is whether they have standing to assert their rights under RFRA and the Free Exercise Clause. I think they do. I also agree with the Greens that the district court failed to address their precise burden under RFRA. It should do so on remand.

In accordance with the foregoing, my analysis of the district court's preliminary injunction ruling begins with the corporate plaintiffs' RFRA claim and then proceeds to the Greens' RFRA claim. I end with a brief discussion of why the plaintiffs have not shown they are entitled to a preliminary injunction on their Free Exercise Clause claim.[1]

DISCUSSION

I. THE CORPORATIONS' RFRA CLAIM

Hobby Lobby and Mardel seek a preliminary injunction, asserting that the Regulation violates their rights under RFRA. I agree with much of Sections I and II in Chief Judge Briscoe's separate opinion, in which she raises serious concerns about the corporations' entitlement to RFRA protection. In addition, I do not think the corporate plaintiffs have demonstrated they can so easily disregard the corporate form and assume the Greens' religious beliefs. Accordingly, I do not think the district court abused its discretion in holding that Hobby Lobby and Mardel failed to show they are substantially likely to succeed on the merits of their RFRA claim.

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[1] I address whether the plaintiffs should receive preliminary relief on their Free Exercise Clause claim for two reasons. First, because I would affirm on Hobby Lobby's and Mardel's RFRA claim and remand the Greens' RFRA claim, the district court would need to know where we stand on its earlier Free Exercise Clause preliminary injunction ruling. Second, consistent with avoidance of novel constitutional questions, *see Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157 (1984), we need not decide whether the Free Exercise Clause applies to for-profit corporations, an issue of first impression, by instead addressing the more conventional question of whether the Regulation is neutral, generally applicable, and rationally based. *See* Section III, *infra*.

Nevertheless, I would stop at concluding that the plaintiffs have not met their preliminary injunction burden and would not foreclose the issue of RFRA coverage for secular, for-profit corporations from future consideration. Prudential considerations of judicial restraint take me to this position.

A. *Plaintiffs' Failure to Meet Preliminary Injunction Burden on Law and Facts*

Chief Judge Briscoe raises serious concerns about the majority's analysis and conclusions. These concerns are sufficient to conclude that the district court did not abuse its discretion in denying a preliminary injunction to Hobby Lobby and Mardel.

I agree with the district court that our usual preliminary injunction standard applies because the plaintiffs seek relief that would "stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme." *Nova Health Sys. v. Edmondson,* 460 F.3d 1295, 1298 n.6 (10th Cir. 2006). Accordingly, the plaintiffs "must show that four factors weigh in [their] favor: (1) [they are] substantially likely to succeed on the merits; (2) [they] will suffer irreparable injury if the injunction is denied; (3) [their] threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest." *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012) (quotations omitted). The district court focused on the "substantially likely to succeed" factor.

RFRA itself contains no express indication that it covers secular, for-profit corporations. *See generally* 42 U.S.C. §§ 2000bb-2000bb-4. The majority relies on the Dictionary Act, which provides that corporations are persons "unless the context indicates otherwise." 1 U.S.C. § 1. At least some of the context surrounding RFRA's enactment does indicate otherwise: (1) no court decision recognizing free exercise rights for secular, for-profit corporations, *see* Briscoe Op. at 9-12;[2] (2) no federal statute recognizing for-profit corporations as religious organizations; and (3) no acknowledgement that granting for-profit corporations such coverage could allow them to challenge a wide swath of federal laws governing employers' obligations to employees.[3]

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[2] "Context" for purposes of the Dictionary Act includes "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993). In considering statutory text, if "the plain meaning . . . is unclear, we turn to the 'legislative environment' . . . searching for an indicia of congressional intent at the time the statute was enacted." *United States v. Doe*, 572 F.3d 1162, 1169 (10th Cir. 2009) (quotations omitted). RFRA itself guides us to consider free exercise case law decided before its enactment. The text refers to Supreme Court decisions, including in the statute's description of findings and purpose. *See, e.g.*, § 2000bb(a)-(b). Indeed, "Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)." *City of Boerne v. Flores*, 521 U.S. 507 (1997).

To obtain a preliminary injunction "the right to relief must be clear and unequivocal." *Nova Health Sys.*, 460 F.3d at 1298 (quotations omitted). Given the uncertainty regarding whether the corporate plaintiffs are covered by RFRA, they have not met their burden to clearly and unequivocally show that they are substantially likely to succeed on the merits.

I also share Chief Judge Briscoe's concerns that the plaintiffs have provided almost no evidence to support many of the allegations in their complaint. In particular, they have not provided sufficient facts about specific alleged religious beliefs of the corporations with respect to the contraceptives at issue here or how those beliefs are defined and exercised by the corporations. The plaintiffs also provided few detailed facts and no supporting evidence concerning their employee health care policies and practices, including how they are managed and precisely how they affect the corporations' religious beliefs.[4]

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[3] As Chief Judge Briscoe notes, granting RFRA coverage to for-profit corporations opens the door to challenges to federal statutes such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and various immigration laws. If the majority is correct that Congress intended to grant free exercise rights to for-profit corporations under RFRA, we would expect to find evidence in the legislative record that Congress addressed, or at least discussed, these consequences. The legislative record contains no such evidence. *See* Briscoe Op. at 12-13.

The majority attempts to answer this concern, in part, by suggesting that the government has a compelling interest in uniform enforcement of the FLSA. Maj. Op. at 55 n.16. But the answer to this question is far from clear. Neither the Supreme Court nor this circuit has held that uniform enforcement of FLSA is a compelling government interest or that its application would satisfy the least restrictive alternative requirement in a RFRA challenge. Moreover, many of the reasons the majority cites for concluding that the Regulation fails strict scrutiny would apply equally to the FLSA and to other federal laws, including those mentioned above.

This evidence vacuum may explain why the plaintiffs paint their RFRA claim with a broad brush, pressing us to provide expansive answers to abstract legal questions. The allegations in the complaint suggest that Hobby Lobby and Mardel have features that could set them apart from other for-profit businesses and even from each other, but the plaintiffs provide no evidence in support. The record does not allow meaningful consideration of whether RFRA applies to either of the two plaintiff corporations.

B. *Disregarding the Corporate Form*

A threshold question is how Hobby Lobby and Mardel hold and exercise religious beliefs, including the specific beliefs at issue here. The majority and the plaintiffs attempt to bridge this gap by ignoring the corporate form and imputing the religious beliefs of the Greens to the corporations.[5] But they fail to contend with corporate law that recognizes legal distinctions between corporations and shareholders. *See New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 442, (1934) ("As a general rule a corporation and its stockholders are deemed separate entities."); *Sipma v. Mass. Cas. Ins. Co.*, 256 F.3d 1006, 1010 (10th Cir. 2001) ("[A] corporation is treated as a legal entity separate from its shareholders." (quotations omitted)).

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[4] The plaintiffs have failed, for example, to provide the district court with complete information about the financial strain they would bear if they did not provide health care insurance coverage to their employees. They allege that they would face a penalty of $26 million but do not allege or prove the offsetting expenses they would save. *See* Maj. Op. at 54. These facts are relevant to substantial burden and other preliminary injunction factors.

Although courts generally recognize corporations and their shareholders as distinct legal entities, in limited circumstances courts "disregard the corporate form" or "pierce the corporate veil." *Floyd v. IRS*, 151 F.3d 1295, 1298 (10th Cir. 1998).[6] This is done

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[5] For example, the majority asks, "Where did Hobby Lobby and Mardel lose their Free Exercise rights?" Maj. Op at 45 n.12. But this begs the question of whether these entities acquired such rights. Have Hobby Lobby and Mardel shown clearly and unequivocally that it is substantially likely they have such rights?

[6] The issue of piercing the corporate veil has surfaced in other RFRA challenges to the Regulation. *See, e.g., Grote v. Sebelius*, 708 F.3d 850, 858 (7th Cir. 2013) (Rovner, J., dissenting) (stating that individual plaintiffs did not make a "piercing the corporate veil" argument to attribute corporate expenditures for the health care plan to themselves); *Conestoga Wood Specialties, Inc. v. Sebelius*, No. 13-1144, 2013 U.S. Dist. LEXIS 2706, at *14-15 (3d Cir. Feb. 7, 2013) (Garth, J., concurring) (rejecting the corporate plaintiff's claim "that it should be construed as holding the religious beliefs of its owners," stating, "'It would be entirely inconsistent to allow [individual plaintiffs] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited

"only reluctantly and cautiously," *NLRB v. Greater Kan. City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993), and the Supreme Court has called it a "rare exception." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003). For instance, "Oklahoma has long recognized the doctrine of disregarding the corporate entity in certain circumstances[,] . . . under the legal doctrines of fraud, alter ego and when necessary to protect the rights of third persons and accomplish justice." *Fanning v. Brown*, 85 P.3d 841, 846 (Okla. 2004); *see also Luckett v. Bethlehem Steel Corp.*, 618 F.2d 1373, 1378-80 (10th Cir. 1980); *Smoot v. B & J*

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purpose of challenging these regulations.'") (quoting *Conestoga Wood Specialties, Inc. v. Sebelius*, No. 12-6744, 2013 U.S. Dist. LEXIS 4449, 2013 WL 140110, at *8 (E.D. Pa. Jan. 11, 2013)); *Gilardi v. Sebelius*, No. 13-104 (EGS), 2013 WL 781150, at *7 (D.D.C. Mar. 3, 2013) (using the same quote and agreeing with *Conestoga*); *Briscoe v. Sebelius*, No. 13-cv-00285-WYD-BNB, 2013 WL 755413, *6 (D. Colo. Feb. 27, 2013) (same); *Korte v. U.S. Dep't of Health & Human Servs.*, No. 3:12-CV-01072-MJR, 2012 WL 6553996, at *11 (S.D. Ill. Dec. 14, 2012) ("The fact that a 'corporate veil' (regardless of how thin) stands between the [individual owners] and [the corporation], and another legal 'veil' is between [the corporation] and the group health plan, cannot be ignored.") (denying motion for preliminary injunction), *injunction pending appeal granted by*, *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012). The court in *Gilardi* also said it was "troubled by plaintiffs' apparent disregard of the corporate form in this case" and "decline[d] to disregard the corporate form by imputing the religious belief of the Gilardis to the corporations they own." 2013 WL 781150, at *4, 6. In *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012), the court asked, "Is it possible to 'pierce the veil' and disregard the corporate form in this context?" *Id.* at 1296.

Restoration Servs., Inc., 279 P.3d 805, 813 (Okla. Ct. Civ. App. 2012).

Many jurisdictions apply an alter ego theory in veil piercing cases. *See Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1251 (10th Cir. 2004) (applying Utah law to ordinary veil piercing claim); *Floyd*, 151 F.3d at 1298 (applying Kansas law to reverse veil piercing claim).[7] In analyzing whether an alter ego theory justifies veil piercing under federal law, this court asks (1) "was there such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders that the personalities and assets of the corporation and the individual are indistinct," and (2) "would adherence to the corporate fiction sanction a fraud, promote injustice, or lead to an evasion of legal obligations." *Greater Kan. City Roofing*, 2 F.3d at 1052.

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[7] Ordinary veil piercing occurs when *external* plaintiffs seek to hold shareholders liable for the corporation's debts. *See Floyd*, 151 F.3d at 1298. The plaintiffs' claims would likely involve so-called reverse veil piercing, in which the corporation itself or a controlling insider asks a court to disregard the corporate form to obtain some advantage, avoid liability, or claim legal protections not otherwise available. *See id.*; *Love v. Flour Mills of Am.*, 647 F.2d 1058 (10th Cir. 1981) (declining to apply reverse veil pierce under Oklahoma law but leaving open the possibility in other circumstances); *Cargill, Inc. v. Hedge*, 375 N.W.2d 477 (Minn. 1985) (allowing reverse veil pierce in bankruptcy action to recognize homestead exception for home owned by a corporation but occupied by shareholder family); *see also* Gregory S. Crespi, *The Reverse Pierce Doctrine*, 16 J. Corp. L. 33, 37 (1991).

Perhaps Hobby Lobby, Mardel, and the Greens can make a successful argument for disregarding the corporate form and sharing religious beliefs. But courts require evidence to disregard the corporate form, and the plaintiffs have presented none. Yet they filed their suit and immediately asked the district court to relieve the corporations of their legal obligations to their employees under the Regulation, even when we have repeatedly said that "a preliminary injunction is an extraordinary remedy, and thus the right to relief must be clear and unequivocal." *Nova Health Sys.*, 460 F.3d at 1298 (alterations omitted) (quotations omitted).

C. ***Judicial Restraint***

Although I conclude that the district court did not abuse its discretion in denying the corporate plaintiffs' RFRA claim, I do not think we need to decide as a final matter whether for-profit, secular corporations have RFRA or Free Exercise Clause rights. The corporate plaintiffs' failure to meet their burden of showing they are substantially likely to succeed on the merits is a sufficient basis to affirm the district court's order.

Moreover, this court is being asked to answer whether RFRA covers for-profit, secular corporations in an expedited process, at a preliminary stage of the case, and without the benefit of a full record, a final judgment from the district court, or prior consideration from a panel of this court. The Supreme Court has not addressed this question, and few courts have even considered it. The issue is complex and involves critical areas of statutory and constitutional law. The answer will profoundly affect the relationship between the government and potentially millions of business entities in our society in ways we can only begin to anticipate. These circumstances are far from optimal to decide a heretofore unexplored question, yet the majority does so broadly and without hesitation.

To understand the meaning of RFRA requires delving into the scope and meaning of the Free Exercise Clause. *See* 42 U.S.C. §§ 2000bb (describing RFRA's purpose and meaning in terms of the Free Exercise Clause).[8] "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *United States v. Cusumano*, 83 F.3d 1247, 1250-51 (10th Cir. 1996) (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)). Because we are at the preliminary injunction stage, where emphasis should be on the plaintiffs' burden and the evidence presented, I do not think adjudication of the RFRA coverage issue is unavoidable. In these circumstances, we ought to exercise the "fundamental rule of judicial restraint." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157 (1984). I am therefore reluctant to hold that all, some, or no for-profit corporations are entitled to RFRA or Free Exercise Clause protection.

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[8] The majority's attempt at using history to support its conclusion illustrates the uphill burden of showing clearly and unequivocally a substantial likelihood that RFRA covers for-profit corporations. Not surprisingly, opinions differ about the history surrounding the adoption of the Free Exercise Clause. The Supreme Court's limited attempts to explore that history have taken different directions. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 575-77 & n.6 (1993) (Souter, J., concurring). Professor McConnell's article explores multiple possible explanations for the inclusion of "free exercise of religion" rather than "liberty of conscience" in the First Amendment. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1488-1500 (1990); *but see* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: A Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992) (reviewing and criticizing Professor McConnell's general conclusions regarding original meaning of the Free Exercise Clause). If history is to be our guide, neither the plaintiffs nor the majority have marshaled the evidence or fully canvassed the scholarship.

* * *

Chief Judge Briscoe should not have to remind us that the plaintiffs need to do more than file a complaint and a motion to receive a preliminary injunction. They must earn it by meeting their "clear and unequivocal" burden of persuasion. They have not done so as to Hobby Lobby and Mardel. I would therefore affirm the district court's denial of the preliminary injunction as to the corporate plaintiffs' RFRA claim.

II. THE GREENS' RFRA CLAIM

Unlike Hobby Lobby and Mardel, the Greens do not have to convince us that they have RFRA rights. It is clear they do. The obstacle they must overcome is whether they can claim that the Regulation violates their RFRA rights even though the Regulation applies to the corporate plaintiffs.

I would hold that the Greens have standing to pursue their RFRA claim because they have shown the Regulation injures them in a direct, personal way. I would then remand to the district court with instructions to reconsider their request for a preliminary injunction in light of a proper understanding of the Greens' claim that the Regulation substantially burdens their religious beliefs.

A. *The Greens Have Standing*

The Greens must first convince us they have standing to challenge the Regulation under RFRA.

The standing "inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *see also Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 471 (1982). As "[t]he party invoking federal jurisdiction," the Greens "bear[] the burden of establishing [their standing] . . . in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citations omitted). Thus, "at the preliminary injunction stage, [the Greens] must make a 'clear showing'" that they have standing. *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

1. Article III Standing

"[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 560. This "irreducible constitutional minimum" is established by three elements. *Id.* The Greens must demonstrate "(1) that [they have] suffered an injury in fact; (2) that the injury is 'fairly traceable to the challenged [regulation];' and (3) that it is 'likely' that 'the injury will be redressed by a favorable decision.'" *Awad*, 670 F.3d at 1120 (quoting *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442 (2011)).

The crux of the Greens' Article III standing concerns the first element, injury in fact. An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (citations omitted) (quotations omitted). Here, the Greens allege they are injured because by July 1, 2013, they must either manage their corporations to comply with the Regulation, and thereby violate their religious beliefs, or subject the corporations to fines for noncompliance. At the very least, they have shown their alleged injury is imminent. But they must also show they have suffered an injury that goes to a "legally protected" interest and that their injury is "concrete and particularized." *Id.*

"Determining whether a plaintiff has alleged a sufficient injury in fact is often not difficult," but when the alleged injury is neither physical nor economic, it may be more challenging. *Awad*, 670 F.3d at 1120.[9] Although "standing may be predicated on noneconomic injury," not every noneconomic injury is sufficient. *Valley Forge*, 454 U.S. at 486. For example, "the psychological consequence presumably produced by observation of conduct with which one disagrees is not a sufficient injury in fact." *Green v. Haskell Cnty. Bd. of Comm'rs*, 568 F.3d 784, 793 (10th Cir. 2009) (quotations omitted). A plaintiff's grievance must be more than a mere "'religious difference'" that is "'a generally available grievance about government,'" *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 601 (2007) (quoting *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952), and *Lujan*, 504 U.S. at 573-74), "hurt feelings," *Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011), or even a "deep and genuine offense" to a particular law or conduct, *Catholic League*

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[9] As Judge Gorsuch's concurrence notes, Hobby Lobby and Mardel face penalties if they do not comply with the Regulation. These penalties would reduce the corporations' value, and the resulting economic injury would affect the Greens as shareholders. Such an injury ordinarily satisfies Article III's injury requirement. *See Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990); *Grubbs v. Bailes*, 445 F.3d 1275, 1280 (10th Cir. 2006). Even if the Greens were not shareholders, as Chief Judge Briscoe suggests, *see* Briscoe Op. at 32, no one disputes that the Greens are exposed to a *financial injury*, which is sufficient for Article III standing. *See Alcan*, 493 U.S. at 665 (analyzing whether injury to a corporation will cause "actual financial injury" to those with an ownership interest). Nevertheless, I understand the Greens' primary alleged injury to be interference with their religion.

for Religious & Civil Rights v. City & Cnty. of San Francisco, 624 F.3d 1043, 1062 (9th Cir. 2010) (en banc) (Graber, J., dissenting).[10]

The Greens assert an injury to their free exercise rights, which certainly constitute a legally protected interest. *See Wisconsin v. Yoder*, 406 U.S. 205, 214, (1972). To establish an injury to this legally protected interest, the Greens must show that the challenged government action infringes on their "particular religious freedoms." *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 224 n.9 (1963). They have done so.

The Greens contend their religious beliefs require them to refrain from any conduct or action that would assist others in using particular contraceptives.[11] The

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[10] These examples come from cases involving claims brought under the Establishment Clause, while the Greens' claims involve religious exercise. We know from case law that requirements for standing under the Establishment Clause and the Free Exercise Clause differ, but these cases are nevertheless instructive.

[11] The Greens' statements in their verified complaint are sufficient evidence of *their* individual religious beliefs. *See Taft v. Vines*, 83 F.3d 681, 685 n.* (4th Cir. 1996) ("[A] verified complaint is the equivalent of an . . . affidavit . . . when the allegations . . . are based on personal knowledge."); *see also Sheinkopf v. Stone*, 927 F.2d 1259, 1263 (1st Cir. 1991) (verified complaint equivalent to affidavit to the extent it is based on matters of personal knowledge); *Runnels v. Rosendale*, 499 F.2d 733, 734, n.1 (9th Cir. 1974) (same). (We note that the complaint does not specify the corporations' alleged religious beliefs, but even if it did, there is no legal precedent to guide us in how a corporate entity could establish and define legally recognized religious beliefs.)

Greens' roles as managers of Hobby Lobby and Mardel place them between two imminent, concrete, and particularized injuries: the Regulation requires them (1) to violate this religious obligation by implementing their corporations' compliance with the Regulation or (2) to disregard the Regulation and risk the financial future of the corporations they own and operate. The Regulation causes this injury, and an exemption under RFRA or the Free Exercise Clause would redress it.

The Government argues that the Greens have not shown an injury in fact because only the corporations are subject to the Regulation and its penalties for noncompliance. But this does not preclude the Greens' satisfaction of the injury requirement. Even an indirect injury may be an injury for Article III purposes. *See Warth,* 422 U.S. at 505 ("[T]he indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights."). And plaintiffs may suffer injury from the enforcement of a law or regulation even if it does not directly apply to them. *See Summers v. Earth Island Inst.,* 555 U.S. 488, 493 (2009).

"'At bottom, the gist of the question of standing is whether petitioners have such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Awad,* 670 F.3d at 1120 (quoting *Massachusetts v. E.P.A.,* 549 U.S. 497, 517, 127 (2007)). The Greens' RFRA and Free Exercise claims satisfy this requirement.

2. **Prudential Standing**

Even when Article III's standing requirements are satisfied, there are "other limits on the class of persons who may invoke [federal courts'] decisional and remedial powers." *Warth*, 422 U.S. at 499. Such prudential standing requirements include the "shareholder standing rule," which provides that "conduct which harms a corporation confers standing on the corporation, not its shareholders." *Bixler v. Foster*, 596 F.3d 751, 756 (quoting *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990) ("*Alcan*")). A shareholder may not bring claims for injuries that are "derivative" of, or indistinct from, the corporation's injury. *Id.* at 758.

Because the Regulation applies to Hobby Lobby and Mardel, there is a question of whether the Greens' alleged injury is derivative. This issue arises because the Greens emphasize their shareholder status, and the Greens do not help matters because they insist that their interests, burdens, and injuries are identical to the corporations'.[12] Nonetheless, I do not believe the shareholder standing rule applies because the Greens have alleged an injury that is direct and personal.[13]

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[12] The plaintiffs' appellate brief describes the corporations throughout as a "family business" and the Greens as "owners." *See* Aplt. Br. at 1-2, 20, 22, 33-36. The plaintiffs' complaint and arguments acknowledge no distinction between the corporate plaintiffs and the Greens, and they continuously attribute the Regulation's requirements and penalties and the religious beliefs at issue interchangeably to "the Greens," "Hobby Lobby," and "Plaintiffs." *E.g.*, Complaint at 24, 27-39 (myriad references to the "Plaintiffs'" obligations under the Regulation and "Plaintiffs' religious beliefs"); *see also, e.g.*, Aplt. Br. at 5 (The Regulation "forces the Greens and Hobby Lobby to violate their religious beliefs . . . "); *id.* at 1

("If the Greens do not comply . . . they face massive fines."); *id.* at 18, 22, 27. As discussed earlier, this ignores that "a corporation is regarded as a legal entity, separate and distinct from the individuals comprising it." *Fanning*, 85 P.3d at 846. The Greens have failed to develop a legal or factual basis to allow the court to disregard the corporate form.

[13] My conclusions on the Greens' standing are generally consistent with Judge Gorsuch's concurrence. I do not join his concurrence for several reasons. I do not believe we can conclude at this point that the Greens are entitled to relief. Because this court raised the standing issue and asked the Government to brief it, I do not think we should decline to consider the Government's prudential standing arguments. And I am not convinced that RFRA forecloses consideration of prudential standing for the reasons Judge Bacharach has raised in his concurring opinion. Bacharach Op. at 7-8.

I disagree, however, with Judge Bacharach's conclusion that the shareholder standing rule prevents the Greens' claims, for reasons described in this section. Additionally, I do not agree that the Greens' fiduciary duties to the corporations as officers and directors determine whether their free exercise injury is derivative. Shareholders do not owe the same fiduciary duties to corporations that officers and directors do. *See, e.g., In re Midway Games, Inc.*, 428 B.R. 303, 313, 319 (Bankr. Del. 2010) (officers and directors owe a duty of loyalty and good faith to advance the interests of the corporation, while shareholders are entitled to advance their own economic interests). The fiduciary duties to which Judge Bacharach refers are separate from the Greens' shareholder status and cannot resolve the shareholder standing issue. Even if these fiduciary duties were relevant to standing, assuming they place added pressure on the Greens to comply with the Regulation and thereby violate their religious obligations, this would strengthen

a. *Shareholder standing exception: direct and personal injury*

A well-established exception to the shareholder standing rule is that "a shareholder with a direct, personal interest in a cause of action [may] bring suit even if the corporation's rights are also implicated." *Alcan*, 493 U.S. at 336; *see also Grubbs v. Bailes*, 445 F.3d 1275, 1280 (10th Cir. 2006). Purely financial injuries to a shareholder's corporate investment are typically derivative and do not fall under this exception. *E.g.*, *Bixler*, 596 F.3d at 758 (alleged injury—financial loss from corporation's RICO violations—was derivative because it was based solely on plaintiffs' status and rights as shareholders). This is true even when the defendant's alleged wrongdoing involves a civil rights violation. *E.g.*, *Diva's Inc. v. City of Bangor*, 411 F.3d 30, 42 (1st Cir. 2005) (shareholder's § 1983 claim barred because alleged injuries were purely financial and were identical to the corporation's); *Potthoff v. Morin*, 245 F.3d 710, 717-18 (8th Cir. 2001) (same); *Smith Stzer & Sons, Inc. v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 317-18 (4th Cir. 1994) (same).

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the argument that their injury is direct and personal and not derivative of any injury to the corporations.

Chief Judge Briscoe suggests this analysis would create a "management standing" rule. Briscoe Op. at 33. No such rule is proposed. The standing analysis in this section applies well-established Article III and prudential standing law to the facts of this case.

But even though shareholders may suffer derivative financial harm, they may also separately suffer a direct and personal injury. In *Alcan*, a foreign corporation challenged a state franchise tax imposed on its subsidiary corporation. 493 U.S. at 336-37. At issue was whether the plaintiff's injury was merely the "decline in the value of [the shareholder's] ownership interest," in which case it would have been derivative. *Id.* at 337. The Supreme Court dismissed the claim on other grounds, but it left open the possibility that a separate injury—namely, a burden on the shareholder's decisions about "participation in the American economy"—would satisfy prudential standing requirements. *Id.* at 338.

We applied *Alcan* in *Grubbs*, where the shareholder of a corporation that held land for shareholder use sued a sheriff's department for failing to protect the land against trespassers. 445 F.3d at 1277. The shareholder retained an individual leasehold in the property, giving him a state law right against trespass. *Id.* at 1280. His injury was to a "distinct legally recognized interest," and therefore was direct and personal and "sufficient to satisfy the prudential standing principles in *Alcan*." *Id.* at 1277, 1280.[14] (As in *Al-*

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[14] Another case from this circuit came to a different conclusion. In *Guides Ltd. v. Yarmouth Group Property Management., Inc.*, 295 F.3d 1065 (10th Cir. 2002), a corporation brought a § 1981 claim for race discrimination, and the corporation's sole shareholder added an individual claim for emotional distress. We rejected the individual claim on prudential standing grounds. But *Guides* did not apply the *Alcan* rule. It relied on *In re Stat-Tech Int'l Corp.*, 47 F.3d 1054 (10th Cir. 1995), a Tenth Circuit case that applied a

can, we ultimately rejected the claim on other grounds without "definitively resolv[ing]" the shareholder standing issue. *Id.* at 1280.)

b. *Direct and personal injury exception applies to the Greens*

The Greens' injury is direct and personal regardless of whether the corporations are covered by RFRA. If the corporations have no RFRA rights, the Greens' alleged free exercise injury is not derivative of a corporate free exercise injury. If, on the other hand, the corporations do possess RFRA rights, a bit more analysis is required.

Although the Greens may suffer financial losses arising from non-compliance with the Regulation, their core alleged injury is religious. The Greens claim that the Regulation injures them directly and personally because it requires them to take *affirmative action* contrary to their religious beliefs: they must implement coverage for the contraceptives at issue.

"different shareholder standing exception" that "does not look for direct injury distinct from a shareholder's derivative harm; it looks for harm to the plaintiff *as a shareholder* but requires that it be unique in some way from that suffered by shareholders generally." *Grubbs*, 445 F.3d at 1280 n.2 (10th Cir. 2006) (summarizing *Guides); see also In re Stat-Tech*, 47 F.3d at 1059. We have most often applied this second shareholder standing exception in cases arising under state law where minority shareholders claim financial injuries from actions of the corporation or a majority shareholder. *E.g., Combs v. Price WaterhouseCoopers LLP*, 382 F.3d 1196, 1199-1200 (10th Cir. 2004); *In re Stat-Tech*, 47 F.3d at 1059.

The Greens are not only shareholders, they are also directors and officers of the corporations. They own and manage Hobby Lobby and Mardel and will be directly and personally involved in implementing the Regulation.[15] The situation might be different, for example, for a shareholder who has no role in managing the corporation and is unlikely to be involved in any of the details of the corporation's health plan. Conversely, a human resources manager who does not also serve as shareholder, officer, or director could be relieved of responsibility connected to the Regulation, perhaps by requesting accommodation under Title VII. *See Rodriguez v. City of Chicago,* 156 F.3d 771, 774-78 (7th Cir. 1998) (police officer's religious beliefs opposing abortion entitled him to reasonable accommodation under Title VII to be excused from assignment guarding health clinic where abortions were performed).

The Greens' injury is not purely financial. At its core, their injury is religious. Like the shareholder in *Grubbs,* they assert rights that are independent of their shareholder status. Whether or not their RFRA claim prevails, the Greens have standing to have the claim heard in federal court.

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[15] This point answers Judge Hartz's hypothetical about the rabbi who owns a kosher-matzo business. The rabbi retains his RFRA rights when he incorporates his business. Conversely, his corporation does not necessarily acquire his RFRA rights by virtue of his religious beliefs, though, as noted earlier, I would leave that question open for now.

B. *The Greens' RFRA Claim Should Be Remanded*

The next issue is whether the district court abused its discretion in concluding that the Greens failed to show a substantial likelihood of success on the merits of their RFRA claim. The court determined that the burden on their religious exercise was not substantial. Because I conclude the court misunderstood the nature of the Greens' burden, I would remand for reconsideration of their RFRA claim.

The district court concluded that the Greens' RFRA claim was not substantially likely to succeed because the burden on their religious exercise was "indirect and attenuated" and therefore not substantial. *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012). It defined the burden as the possibility that "funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [their] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff's religion." *Id.* (quoting *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012)). This statement misconstrues the Greens' religious objection.

The Greens acknowledge that their religious beliefs are not "even implicated" by their employees' independent medical choices. Aplt. Br. at 27. But they assert "that their faith demands they refrain from participating in, providing access to, paying for, training others to engage in, or otherwise supporting" the use of particular contraceptives. *Id.* (quotations omitted). The district court abused its discretion by applying its substantial burden analysis to an incorrectly understood religious burden. *See Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012) ("The religious-liberty violation at issue here inheres in the *coerced coverage* of contraception . . . *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services."). The burden would arise from having to provide coverage in contravention of the Greens' religious beliefs.

As previously explained, the alleged burden on the Greens' religious exercise constitutes an injury for standing purposes. But to prevail on the merits of a RFRA claim, the Greens must show a substantial burden. The district court did not conduct the proper analysis due to its erroneous view of the burden on the Greens' exercise of religion. I therefore would remand to the district court to reconsider the substantial burden issue. Depending on the outcome of that analysis, the court may also need to address whether the Regulation satisfies strict scrutiny and also consider the remaining preliminary injunction factors with respect to the Greens' RFRA claim.

III. FREE EXERCISE CLAUSE CLAIM

The district court did not abuse its discretion in denying a preliminary injunction for the plaintiffs' Free Exercise claim because they have not clearly and unequivocally shown that they are substantially likely to succeed on the merits.

"[T]he 'right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) (quoting *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990)). For this reason, the Supreme Court has concluded that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Rather, "[g]overnment actions that stem from 'neutral' rules of 'general applicability' are subject to rational basis review." *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 52 (10th Cir. 2013) (quoting *City of Hialeah*, 508 U.S. at 531).

The Regulation is a neutral rule of general applicability "so long as its object is something other than the infringement or restriction of religious practices." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649-50 (10th Cir. 2006); *see also Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1233 (10th Cir. 2009); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) ("A rule that is discriminatorily motivated and applied is not a neutral rule of general applicability."). The Regulation was enacted to promote women's access to health care—a purpose entirely unrelated to religion. And it applies generally to for-profit corporations based on criteria unrelated to its shareholders' religious views. *See Swanson ex rel. Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 698 (10th Cir. 1998) (law is generally applicable because it applies to an activity whether motivated by religious or secular purpose).

Under rational basis review, the Regulation survives a constitutional challenge if it is at least "rationally related to a legitimate government interest." *Corder*, 566 F.3d at 1232. The plaintiffs have not argued that the Government's stated purpose of promoting women's access to health care is not legitimate, nor have they suggested that the Regulation is not rationally related to this purpose.

The district court did not abuse its discretion in concluding that the plaintiffs have not shown that their Free Exercise Clause claim is substantially likely to succeed on the merits.

CONCLUSION

I would (1) affirm the district court's denial of a preliminary injunction for Hobby Lobby and Mardel on their RFRA claim; (2) conclude that the Greens have standing to assert their RFRA and Free Exercise claims; (3) reverse the district court's holding that the Greens' RFRA claim is not substantially likely to succeed and remand for reconsideration; and (4) affirm the district court's denial of a preliminary injunction on the plaintiffs' Free Exercise Clause claim.

Finally, I concur that the Anti-Injunction Act does not apply to this case.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-12-1000-HE

HOBBY LOBBY STORES, INC., ET AL., PLAINTIFFS

v.

KATHLEEN SEBELIUS, IN HER OFFICIAL CAPACITY AS THE SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL., DEFENDANTS

Nov. 19, 2012

ORDER

JOE HEATON, District Judge.

Plaintiffs, Hobby Lobby Stores, Inc., Mardel, Inc., David Green, Barbara Green, Steve Green, Mart Green and Darsee Lett sued Kathleen Sebelius, Secretary of the United States Department of Health and Human Services ("HHS"), and other government officials and agencies challenging regulations issued under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act, Publ. L. No. 111-152, 124 Stat. 1029 (2010) ("Affordable Care Act" or "ACA"). Specifically, plaintiffs object to the preventive care coverage regulations or mandate which they allege forces them to "provide health insurance coverage for abortion-inducing drugs and devices, as well as related education and counseling." Complaint, ¶ 8. Plaintiffs contend the mandate violates their statutory and constitutional rights and seek both declaratory and injunctive relief. Presently at issue is plaintiffs' motion for preliminary injunction in which they ask the court to prohibit defendants from enforcing the mandate against them. A hearing on the motion was held on November 1, 2012.

This lawsuit is one of many challenging various aspects of the Affordable Care Act. While the legislation is controversial, as another judge has stated in similar circumstances, "this Court's personal views on the necessity, prudence, or effectiveness of the Affordable Care Act are of no moment whatsoever. The only issues concerning the ACA presently before this Court are those raised by the parties: namely, whether [the preventive services coverage provision] passes muster under the Constitution of the United States, and whether it violates the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq." *Mead v. Holder,* 766 F. Supp. 2d 16, 19 (D.D.C. 2011), *aff'd on other grounds, Nat'l Fed'n of Indep. Bus. v. Sebelius,* — U.S. — (2012).

Background

The ACA, signed into law on March 23, 2010, effected a variety of changes to the healthcare system.

The Act includes a preventive services provision which provides:

> A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for . . . (4) with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration[1] for purposes of this paragraph.

42 U.S.C. § 300gg-13(a). The Health Resources and Services Administration (HRSA) commissioned the Institute of Medicine (IOM) to develop recommendations for the HSRS guidelines. The IOM published a report which proposed, among other things, that insurance plans cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[2] Included among the FDA-approved contraceptive methods are diaphragms, oral contraceptive pills, emergency contraceptives such as Plan B and ulipristal, commonly known as the morning-after pill and the week-after pill, respectively, and intrauterine devices.[3]

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[1] The Health Resources and Services Administration (HRSA) is an agency within HHS.

[2] See http://www.hrsa.gov/womensguidelines/.

[3] See www.fda.gov/forconsumers/byaudience/forwomen/ucm118465.htm.FreePublications/UCM282014.pdf (last updated Aug. 2012).

On August 1, 2011, HRSA adopted IOM's recommendations in full, *see* 76 Fed. Reg. 46621; 45 C.F.R. § 147.130, and, on February 15, 2012, HHS, the Department of Labor and the Department of Treasury published rules finalizing the HRSA guidelines. Unless grandfathered or otherwise exempt, employers' group health plans must provide coverage conforming with the guidelines for plan years beginning on or after August 1, 2012. 75 Fed. Reg. 41726, 41729.

Grandfathered health plans are not subject to the preventive services provision of the ACA. 75 Fed. Reg. 34538-01 (June 17, 2010).[4] Some religious employers also are exempt from providing plans that cover contraceptive services. To qualify as a "religious employer" an employer must satisfy the following criteria:

> (1) The inculcation of religious values is the purpose of the organization; (2) The organization primarily employs persons who share the religious tenets of the organization; (3) The organization serves primarily persons who share the religious tenets of the organization; (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

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[4] A grandfathered plan is one that was in existence on March 23, 2010, and which has not undergone any of a defined set of changes. See 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140. The government estimates that by 2013, a majority of group health plans will lose their grandfathered status.

45 C.F.R. § 147.130(a)(1)(iv)(B); 76 Fed. Reg. 46621-01, 46623. A temporary enforcement safe-harbor provision applies to other non-profit organizations that do not qualify for any other exemption and "do not provide some or all of the contraceptive coverage otherwise required, consistent with any applicable State law, because of the religious beliefs of the organization." 77 Fed. Reg. 16501, 16502 (March 21, 2012); 77 Fed. Reg. 8725 (Feb. 15, 2012).[5] Finally, an employer with fewer than 50 employees is not required to provide any health insurance plan. 26 U.S.C. § 4980H(c)(2)(A).

The individual plaintiffs (collectively the "Greens"), are members of a family that owns and operates Hobby Lobby Stores, Inc. and Mardel, Inc., privately held, for-profit corporations. Hobby Lobby operates 514 arts and crafts stores in 41 states with 13,240 full-time employees. Mardel is a bookstore and educational supply company that specializes in Christian materials. It has 35 stores in 7 states with 372 employees. Both Hobby Lobby and Mardel are operated through a management trust which owns all the voting stock in the corporations.[6] Each member of the Green family is a trustee of the trust.

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[5] The government is in the process of finalizing amendments to the preventive services coverage regulations to accommodate the religious objections of non-exempt, non-grandfathered religious organizations to providing coverage for contraceptive services. See 77 Fed. Reg. at 8728.

[6] It is not altogether clear from the parties' submissions whether Hobby Lobby and Mardel are wholly owned by the Green plain-

Although Hobby Lobby and Mardel are for-profit, secular corporations, the Green family operates them according to their Christian faith. "As part of their religious obligations" the Green family provides health insurance coverage to Hobby Lobby's and Mardel's employees through a self-insured plan. Complaint, ¶ 52. However, "[t]he Green family's religious beliefs prohibit them from deliberately providing insurance coverage for prescription drugs or devices inconsistent with their faith, in particular abortion-causing drugs and devices. Hobby Lobby's insurance policies have long explicitly excluded—consistent with their religious beliefs—contraceptive devices that might cause abortions and pregnancy-termination drugs like RU-486." *Id.* at ¶¶ 53-54. The government does not dispute the sincerity of the Greens' beliefs.

Hobby Lobby and Mardel, as secular, for-profit companies, do not satisfy the ACA's definition of a "religious employer" and are ineligible for the protection of the safe-harbor provision. Their health plans also are not grandfathered under the Act. The mandate takes effect as to the corporations' employee health plan on January 1, 2013, as that is the date upon which the plan year begins. Plaintiffs assert that they "face an unconscionable choice: either violate the law, or violate their faith." *Id.* at ¶ 133. If

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tiffs or just wholly controlled by them, with some portion of the non-voting, equity ownership of the companies held by others. See Complaint, ¶ 38. The complaint alleges only voting control. The distinction does not affect the disposition of the pending motion.

Hobby Lobby fails to provide the mandated coverage, plaintiffs contend the corporation will incur penalties of about $1.3 million a day. Mardel also will be fined if it does not comply with the mandate. Plaintiffs seek a preliminary injunction to prevent defendants from enforcing the mandate against them, arguing that the mandate violates their right to free exercise of religion under the First Amendment and their statutory rights under the Religious Freedom Restoration Act of 1993. ("RFRA"), 42 U.S.C. § 2000bb-1.

Legal Standard

A preliminary injunction is an extraordinary remedy and should "not be issued unless the movant's right to relief is 'clear and unequivocal.'" *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) (quoting *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001)). To obtain a preliminary injunction the moving party must establish that:

> (1) [the movant] will suffer irreparable injury unless the injunction issues; (2) the threatened injury . . . outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood [of success] on the merits.

Id. (quoting *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992)). Plaintiffs, as the movants, have the burden of demonstrating that each factor tips in their favor. *Id.* at 1188-89.

The Tenth Circuit has applied a relaxed "probability of success" requirement when the moving party has "established that the three 'harm' factors tip *decidedly* in its favor." *Id.* at 1189. The movant in such cases "need only show questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation." *Id.* (internal quotations omitted). Plaintiffs urge application of the "'less rigorous fair-ground-for-litigation standard.'" *Heideman*, 348 F.3d at 1189 (quoting *Sweeney v. Bane*, 996 F.2d 1384, 1388 (2d Cir. 1993)).

The relaxed standard does not apply if the injunction "is one that alters the status quo and therefore is disfavored." *Northern Natural Gas Co. v. L.D. Drilling, Inc.*, 697 F.3d 1259, 1266 (10th Cir. 2012). Defendants argue that plaintiffs are not seeking to maintain the status quo because, prior to the enactment of the mandate, Hobby Lobby provided coverage for emergency contraceptives that could cause an abortion. The court is not persuaded that the coverage was due to anything other than a mistake. Upon discovery of the coverage, Hobby Lobby immediately excluded the two drugs, Plan B and Ella, from its prescription drug policy. Defendants do not dispute that the company's policies have otherwise long excluded abortion-inducing drugs. Here plaintiffs are not seeking a disfavored injunction, but rather ask the court to preserve the status quo.

The court agrees with plaintiffs that the questions presented here are "serious, substantial, difficult and doubtful." However, an additional limitation on the applicability of the "less rigorous fair-ground-for-litigation standard" exists. The Tenth Circuit has concluded the "'liberal definition of the 'probability of success' requirement'" does not apply "'where a preliminary injunction seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme.'" *Nova Health Systems v. Edmondson*, 460 F.3d 1295, 1298 n.6 (10th Cir. 2006) (quoting *Heideman*, 348 F.3d at 1189).[7] Here, plaintiffs challenge a regulatory requirement imposed pursuant to a statutory or regulatory scheme. As a result, the more liberal "fair ground for litigation" standard does not apply.

One court in this circuit has reached a contrary conclusion.[8] In *Newland v. Sebelius*, — F. Supp. 2d —, 2012 WL 3069154 (D. Colo. 2012), a factually similar case, the court concluded the relaxed "likelihood of success" standard should be applied because the "government's creation of numerous exceptions to the preventive care coverage mandate has undermined its alleged public interest." *Id.* at —, 2012 WL 3069154, at *5. However, for purposes of determining the appropriate preliminary injunction standard, the question is not whether the public interest is strong or compelling, but rather whether it is in the public interest at all. And as to that question, the court is obliged to defer to the determination of Congress. As the Tenth Circuit observed in a somewhat similar context, applying the *Heideman* rule, "we presume that all governmental action pursuant to a statutory scheme is 'taken in the public interest.'" *Aid for Women v. Foulston*, 441 F.3d 1101, 1115 n.15 (10th Cir. 2006) (more relaxed standard inapplicable to plaintiff's challenge to a Kansas statute requiring reporting of minors' voluntary sexual activity). In like manner, this court presumes the challenged government actions at issue here are taken in the public interest within the meaning of the *Heideman* standard, notwithstanding the existence of exceptions to the coverage requirement.[9]

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[7] Defendants argue that in *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008), the Supreme court abrogated the more flexible standard for the preliminary injunction. The court does not have to reach that issue, due to its conclusion that, because plaintiffs are seeking to enjoin the enforcement of an action taken, pursuant to a statutory scheme, they "must meet the traditional substantial likelihood of success' standard." *Nova Health Systems*, 460 F.3d at 1298 n.6.

[8] Two district courts in other circuits have issued preliminary injunctions in similar cases, employing different standards than those adopted by the Tenth Circuit. See *Legatus v. Sebelius*, — F. Supp. 2d —, 2012 WL 5359630 (E.D. Mich. Oct. 31, 2012) and *Tyndale House Publishers, Inc. v. Sebelius*, — F. Supp. 2d —, 2012 WL 5817323 (D.D.C. Nov. 16, 2012).

Similarly unpersuasive is plaintiff's argument that the more flexible preliminary injunction standard applies here because they are not attacking the entire statutory scheme, just a small part of it. First, the *Heideman* exception, as articulated by the Tenth Circuit, does not require the challenge to be to an entire statutory scheme. Instead, it refers to attempts to "stay governmental action taken in the public interest" that is "pursuant to a statutory or regulatory scheme." *Heideman*, 348 F.3d at 1189 (internal quotations omitted). The mandate at issue here is both (1) an action in the public interest, as determined by Congress, and (2) one taken *pursuant* to the statute. That is all that is required. Moreover, none of the cases plaintiffs cite offer any explicit support for their view and at least some of them clearly involve challenges to less than a whole "scheme." For example, in *Foulston*, the challenge was not to the entire scheme (which imposed a reporting requirement on various professionals for instances of physical, mental or emotional abuse or neglect or sexual abuse of a child), but to a limited aspect of it (mandatory reporting of consensual sex between minors).

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[9] And, as noted above, the presumption is made without regard to the court's owns views of whether the ACA or the particular regulatory requirements at issue are sound public policy.

As plaintiffs are challenging a coverage requirement imposed as part of a regulatory or statutory scheme, the "fair ground for litigation standard" does not apply. To obtain injunctive relief, they must show a substantial likelihood of success on the merits, in addition to the standard's three other requirements. The requirement for showing a substantial likelihood of success on the merits is determinative of the present motion for the reasons which follow.

First Amendment—Free Exercise of Religion

The First Amendment's Free Exercise Clause states that "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." Plaintiffs maintain they exercise their religion by complying with their religious beliefs which prohibit them from providing coverage, or access to coverage, for abortion-causing drugs or devices or related education and counseling. The mandate forces them, plaintiff's argue, to violate their religious beliefs and substantially burdens their religious exercise.

The question of whether plaintiffs are likely to prevail on their constitutional claims requires a threshold determination of whether the particular plaintiffs have constitutional "free exercise" rights subject to being violated. As to the Greens, the answer to that is obviously yes. However, as to the corporations—Hobby Lobby and Mardel—the court concludes otherwise.

Corporations have constitutional rights in some circumstances, such as the right to free speech, but the rights of corporate persons and natural persons are not coextensive. Courts have not extended all constitutional rights to all corporations. Corporations do not possess a "right to exercise a privilege against self-incrimination." *Application to Enforce Admin. Subpoenas Duces Tecum of the S.E.C. v. Knowles,* 87 F.3d 413, 416 n.3 (10th Cir. 1996), They have been denied "[c]ertain 'purely personal' guarantees . . . because the 'historic function' of the particular guarantee has been limited to the protection of individuals." First *Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 778 n.14, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978) (citing *United States v. White,* 322 U.S. 694, 698-701, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944)). "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *Id.*

The purpose of the free exercise clause is "to secure religious liberty in the *individual* by prohibiting any invasions thereof by civil authority." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (emphasis added). Churches and other religious organizations or religious corporations have been accorded protection under the free exercise clause, *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, — U.S. —, 132 S. Ct. 694, 706, 181 L. Ed. 2d 650 (2012); *Lukumi*, 508 U.S. at 531-32, 113 S. Ct. 2217, because believers "exercise their religion through religious organizations." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 341, 107 S. Ct. 2862, 97 L. Ed. 2d 273 (1987) (BRENNAN, J. concurring) (internal quotations omitted). However, Hobby Lobby and Mardel are not religious organizations. Plaintiffs have not cited, and the court has not found, any case concluding that secular, for-profit corporations such as Hobby Lobby and Mardel have a constitutional right to the free exercise of religion. *See Anselmo v. Cnty. of Shasta*, 873 F. Supp. 2d 1247, 1264, 2012 WL 2090437, at *12 (E.D. Cal. 2012) ("Although corporations and limited partnerships have broad rights, the court has been unable to find a single RLUIPA case protecting the religious exercise rights of a non-religious organization such as Seven Hills.").[10]

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[10] The court has considerable doubt whether the corporations would have standing to assert a claim on behalf of the Greens.

The court concludes plaintiffs Hobby Lobby and Mardel do not have constitutional free exercise rights as corporations and that they therefore cannot show a likelihood of success as to any constitutional claims they may assert. Plaintiffs' ability to show a likelihood of success therefore depends on evaluation of the claims of the individual plaintiffs—the Greens.

The question of whether the Greens can establish a free exercise constitutional violation by reason of restrictions or requirements imposed on general business corporations they own or control involves largely uncharted waters. However, the court concludes it is unnecessary, as to the constitutional claims, to resolve those questions here as the challenged statutory scheme and regulations are substantially likely to survive constitutional scrutiny in any event.

"While the First Amendment provides absolute protection to religious thoughts and beliefs, the free exercise clause does not prohibit Congress and local governments from validly regulating religious conduct." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006). "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes

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See generally *Grace*, 451 F.3d at 670 (discussing prerequisites for associational standing as stated by the Supreme Court in *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)). However, as the Greens are parties appearing and asserting their own rights, it is unnecessary to belabor the issue.

(or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) (Stevens, J., concurring in judgment)). If a law is both neutral and generally applicable, it only has to be "rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace*, 451 F.3d at 649. A law that burdens a religious practice and is not neutral or generally applicable is subject to strict scrutiny. *Id.* "[U]nless it is narrowly tailored to advance a compelling governmental interest," the law violates the Free Exercise Clause. *Id.*

To analyze plaintiffs' free exercise claims the court must first determine the level of scrutiny to apply. *Id.* A law is neutral if its object is "something other than the infringement or restriction of religious practices." *Id.* at 649-50. Citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993), plaintiffs argue that the mandate is not neutral because it exempts some religious employers from compliance while compelling others to provide coverage for preventive services. They contend it discriminates between religious objectors, exempting "only organizations whose 'purpose' is to inculcate religious values; who 'primarily' employ and serve co-religionists; and who qualify as churches or religious orders under the tax code." Plaintiffs' motion, p. 18, Carving out an exemption for defined religious entities does not make a law nonneutral as to others. Plaintiffs do not allege that "the *object* of [the mandate] is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533, 113 S. Ct. 2217 (emphasis added);[11] *see Grace*, 451 F.3d at 649-50. They do not dispute that the mandate's purpose is secular in nature and intended to promote public health and gender equality. "[T]here is no evidence that the exception is in any way based on religious categorization or discrimination." *Grace*, 451 F.3d at 652 (quoting *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998)); *see Axson-Flynn v. Johnson*, 356 F.3d 1277, 1294 (10th Cir. 2004) ("A rule that is discriminatorily motivated and applied is not a neutral rule of general applicability."); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1232-33 (10th Cir. 2009); *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 825 N.Y.S.2d 653, 859 N.E.2d 459, 464 (2006). In fact, the religious employer exemption and the safe harbor provision suggest the opposite of what plaintiffs argue and must show to warrant strict scrutiny of the mandate. Using well established criteria to determine eligibility for an exemption based on religious belief, such as the nonsecular nature of the organization and its nonprofit status, the ACA, through its implementing rules and regulations, both recognizes and protects the exercise of religion. The fact that the exceptions do not extend as far as plaintiffs would like does not make the mandate non-neutral. *O'Brien v. United States Dep't of Health and Human Servs.*, — F. Supp. 2d —, —, 2012 WL 4481208, at *8 (E.D. Mo. 2012) ("[T]he religious employer exemption does not compromise the neutrality of the regulations by favoring certain religious employers over others. Rather . . . the religious employer exemption presents a strong argument in favor of neutrality. . . ."). As the New York Court of Appeals explained in *Serio*, a case involving a free exercise challenge to a state law requiring employers providing coverage for prescription drugs to include coverage for contraceptives:

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[11] Plaintiffs also do not argue that the preventive care coverage regulations lack "facial neutrality." *See Lukumi*, 508 U.S. at 533, 113 S. Ct. 2217.

> The neutral purpose of the challenged portions of the [health care law]—to make contraceptive coverage broadly available to New York women—is not altered because the Legislature chose to exempt some religious institutions and not others. To hold that any religious exemption that is not all-inclusive renders a statute non-neutral would be to discourage the enactment of any such exemptions—and thus to restrict, rather than promote, freedom of religion.

Serio, 825 N.Y.S.2d 653, 859 N.E.2d at 464. "[T]he neutrality inquiry leads to one conclusion: The [preventive services coverage regulations] [did not have] as their object the suppression of religion." *Lukumi*, 508 U.S. at 542, 113 S. Ct. 2217.

The second requirement of the constitutional test is that "laws burdening religious practice must be of general applicability." *Id.* "The Free Exercise Clause protect[s] religious observers against unequal treatment, and inequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Id.* at 542-43, 113 S. Ct. 2217 (internal citation and quotations omitted).

Plaintiffs contend the mandate is not generally applicable because of the numerous exemptions, including those for grandfathered plans and religious employers. However, the mandate does not "pursue[] . . . governmental interests only against conduct motivated by religious belief." *Id.* at 545, 113 S. Ct. 2217. As the court noted in *O'Brien*, — F. Supp. 2d at —, 2012 WL 4481208, at *8, "[t]he regulations in this case apply to all employers not falling under an exemption, regardless of those employers' personal religious inclinations." *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1134 (9th Cir. 2009) ("Pharmacies and pharmacists who do not have a religious objection to Plan B must comply with the rules to the same extent—no more and no less—than pharmacies and pharmacists who may have a religious objection to Plan B. Therefore, the rules are generally applicable.").

As the court concludes the mandate is neutral and of general applicability, it is subject only to rational basis scrutiny under the First Amendment. *Smith*, 494 U.S. at 883-85, 110 S. Ct. 1595. Plaintiffs do not argue that there is no legitimate government interest for the mandate or that the regulations are not rationally related to protect that interest, and the court finds no basis on the present showing to conclude the law, under the rational basis test, is unconstitutional.

Applying these principles, the court concludes plaintiffs have not established a likelihood of success as to their constitutional claims. The corporations lack free exercise rights subject to being violated and, as the challenged statutes/regulations are neutral and of general applicability as contemplated by the constitutional standard, plaintiffs are unlikely to successfully establish a constitutional violation in any event.

Religious Freedom Restoration Act

Plaintiffs' claims under the Religious Freedom Restoration Act of 1993 present a closer question. RFRA applies standards which are more protective of religious exercise than the constitutional standard. It prohibits the federal government from substantially burdening a person's exercise of religion, unless the government demonstrates that application of the burden to the person is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006). The Act "provides a statutory claim to individuals whose religious exercise is burdened by the federal government." *United States v. Wilgus*, 638 F.3d 1274, 1279 (10th Cir. 2011). Congress passed RFRA to restore the compelling interest test that had been applied to laws substantially burdening religious exercise before the Supreme Court's decision in *Smith.*

RFRA provides that:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1.

As was the case with plaintiffs' constitutional claims, a threshold question here is whether all the plaintiffs are in a position to assert rights under RFRA. That depends on whether particular plaintiffs qualify as a "person" within the meaning of the statute. The Greens are unquestionably "persons" under the statute, entitled to assert its potential application to them. Less clear is the status of Hobby Lobby and Mardel.

RFRA does not include a specific definition of "person." Plaintiffs argue that Hobby Lobby and Mardel qualify as "persons" based on the general definition included in 1 U.S.C. § 1. That section provides: "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' includes corporations . . . as well as individuals." As used in § 1, "'[c]ontext' . . . means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts, and this is simply an instance of the word's ordinary meaning. . . ." *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 199, 113 S. Ct. 716, 121 L. Ed. 2d 656 (1993). While context "has a narrow compass, the 'indication' contemplated by 1 U.S.C. § 1 has a broader one." *Id.* at 200, 113 S. Ct. 716. The qualification "unless the context indicates otherwise," is intended to assist the court "in the awkward case where Congress provides no particular definition, but the definition in 1 U.S.C. § 1 seems not to fit." *Id.* That is the situation here. General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors. Religious exercise is, by its nature, one of those "purely personal" matters referenced in *Bellotti* which is not the province of a general business corporation. As applied to 1 U.S.C. § 1 and the question of whether these corporations are "persons" within the meaning of RFRA, the context "indicates otherwise."

"Plaintiffs assert that "[i]t is settled law that corporations may exercise religion." Plaintiffs' reply, p. 8. However, the cases they cite, *Gonzales* and *Luku-*

mi involved religious organizations, not general business corporations.[12] The same reasons behind the court's conclusion that secular, for-profit corporations do not have First Amendment rights under the Free Exercise Clause support a determination that they are not "persons" for purposes of the RFRA.[13] This conclusion is buttressed by RFRA's reference to principles of standing: "Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution." 42 U.S.C. § 2000bb-1(c).

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[12] Centro Espirita Beneficiente Uniao do Vegetal is described in *Gonzales* as a religious sect. There is no indication it was incorporated. The church in *Lukumi* was a non-profit corporation, 508 U.S. at 525, 113 S. Ct. 2217, and nothing in *Gonzales* indicates the religious sect operated a secular, for profit business. Plaintiffs also cite *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295 (11th Cir. 2006) for the proposition that a commercial corporation's rights can include religious exercise. However, in resolving the issue of whether the plaintiff had standing to assert a violation of free exercise rights under the First Amendment, the Eleventh Circuit stated: "we easily conclude that Primera, as an incorporated religious organization, stated a section 1983 claim for the alleged violation of its . . . free exercise rights." *Id.* at 1306.

[13] Plaintiffs argue that "the Supreme Court has at least twice allowed commercial proprietors to assert religious exercise claims against regulations impacting their businesses," citing *United States v. Lee*, 455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127 (1982) and *Braunfeld v. Brown*, 366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961). Plaintiffs' reply, p. 4. However, neither case appears to have involved a corporation and, in any event, it is clear that the religious beliefs that were allegedly being interfered with were those of the owners. *Braunfeld*, 366 U.S. at 601, 81 S. Ct. 1144 ("[T]he only question for consideration is whether the statute interferes with the free exercise of appellants' religion. . . . Each of the appellants is a member of the Orthodox Jewish faith."). Plaintiffs also rely on two Ninth Circuit cases, *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009) and *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988). Neither supports their

In any event, the court concludes that plaintiffs have not established a likelihood of success as to any claims asserted by Hobby Lobby and Mardel under RFRA. The question then becomes whether plaintiffs have established a likelihood of success as to the RFRA claims of the Greens.

"[A] plaintiff establishes a prima facie claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion."[14] *Kikumura*

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argument. In *Stormans*, 586 F.3d at 1119, the Ninth Circuit stated "We decline to decide whether a for-profit corporation can assert its own rights under the Free Exercise Clause and instead examine the rights at issue as those of the corporate owners." Similarly, in *Townley*, 859 F.2d at 619-20, the court stated: ("Because *Townley* is merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs, it is unnecessary to address the abstract issue whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers. Townley presents no rights of its own different from or greater than its owners' rights.").

[14] The term "religious exercise" is broadly defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A); 42 U.S.C. § 2000bb-2(4); see generally *Smith*, 494 U.S. at 877, 110 S. Ct. 1595 ("But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from)

v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001). Once the plaintiff establishes these elements, "the burden shifts to the government to demonstrate that 'application of the burden' to the claimant 'is in furtherance of a compelling governmental interest' and 'is the least restrictive means of furthering that compelling governmental interest.'" *Id.* at 961-62 (quoting 42 U.S.C. § 2000bb-1(b)); *Gonzales,* 546 U.S. at 428-30, 126 S. Ct. 1211.

The second and third elements of plaintiffs' prima facie case are not in dispute. No one questions that the Greens' beliefs are sincerely held or that the mandate burdens, at least indirectly, the Greens' "own exercise of [their] sincerely held religious beliefs."[15] *Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1314 (10th Cir. 2010), *cert. denied,* — U.S. —, 131 S. Ct. 469, 178 L. Ed. 2d 298 (2010). The critical question is whether the mandate imposes a "substantial" burden on the Greens for purposes of the RFRA. Defendants contend that any burden the mandate imposes on the Greens is indirect, "result[ing]s from obligations that the preventive services coverage regulations impose on a legally separate, secular entity." Defendants' response, pp. 18-19. They argue that "[t]his type of attenuated burden is not cognizable under the RFRA."

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physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.").

[15] Plaintiffs assert that they "exercise religion by avoiding participation in abortion, an act forbidden by their faith. Plaintiffs' reply, p. 3.

Id. at p. 19. Plaintiffs counter that defendants' "attenuation argument rewrites their faith. The government may not, they contend "re-draw the theological lines in religious belief systems." Plaintiffs' reply, p. 13. They contend the mandate substantially burdens their religious exercise "by forcing them to choose between following their convictions and paying enormous fines." Plaintiffs' motion, p. 9.

The present circumstances require charting a course through the "treacherous terrain" at the intersection of the federal government's duty to avoid imposing burdens on the individual's practice of religion and the protection of competing interests. *See Wilgus,* 638 F.3d at 1281. No Supreme Court or Tenth Circuit authority applying or discussing RFRA's "substantial burden" requirement does so in circumstances like those present here—where regulatory requirements applicable to a general business corporation are alleged to infringe on the religious exercise rights of the corporation's owners or officers. Similarly, the cases decided under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc-2000cc-5, which applies essentially the same standard,[16] do not provide specific guidance. However, certain principles emerge from the cases which guide the court's determination.

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[16] RLUIPA cases are instructive as "RLUIPA's legislative history reveals that 'substantial burden' is to be interpreted by reference to the Religious Freedom Act of 1993 . . . and First Amendment jurisprudence." *Grace*, 451 F.3d at 661 (citing 146 Cong. Rec. 7774-01, 7776).

First, it is clear, as plaintiffs argue, that it is not the province of the court to tell the plaintiffs what their religious beliefs are, i.e. whether their beliefs about abortion should be understood to extend to how they run their corporations or the like, or to decide whether such beliefs are fundamental to their belief system or peripheral to it. RFRA makes clear it does not matter whether the particular exercise of religion at issue is or is not central to the individual's religious beliefs. 42 U.S.C. § 2000cc-5(7)(A); *see Abdulhaseeb*, 600 F.3d at 1314 at n.6. Nonetheless, even assuming, as appears to be the case with plaintiffs, that they object as a matter of religious faith to any act supporting or facilitating abortion, no matter how indirect, that does not end the issue. RFRA's provisions do not apply to *any* burden on religious exercise, but rather to a "substantial" burden on that exercise. As the Seventh Circuit observed in *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752 (7th Cir. 2003):

> Application of the substantial burden provision to a regulation inhibiting or constraining *any* religious exercise, including the use of property for religious purposes, would render meaningless the word "substantial," because the slightest obstacle to religious exercise incidental to the regulation of land use—however minor the burden it were to impose—could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance

> a compelling governmental interest by the least restrictive means.[17]

342 F.3d 752, 761. Recognizing that the word "substantial" must have some meaning, the *Civil Liberties* court went on to conclude that

> [I]n the context of RLUIPA's broad definition of religious exercise, a . . . regulation that imposes a substantial burden on religious exercise is one that *necessarily bears direct, primary and fundamental* responsibility for rendering religious exercise . . . impracticable.

Id. (emphasis added). *Civil Liberties* thus concludes, in general, that a "substantial burden" on religious exercise is one that bears in some relatively direct manner on it.

The view of substantial burden adopted by the Seventh Circuit in *Civil Liberties* is not the only approach that has emerged. *See Adkins v. Kaspar*, 393 F.3d 559, 567-71 (5th Cir. 2004) (discussing cases); *Living Water Church of God v. Charter Twp. of Meridian*, 258 Fed. Appx. 729, 735-38 (6th Cir. 2007) (unpublished) (discussing cases). However, the Tenth Circuit has cited *Civil Liberties* with approval in the context of determining what constitutes a "substantial burden," *Grace*, 451 F.3d at 661, suggesting that it shares the view that some level of "directness" must be present. The Tenth Circuit has, of course, also noted that a substantial burden may, in some circumstances, be based on compulsion that is indirect. *Abdulhaseeb*, 600 F.3d at 1315; *see also Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981). Giving effect to both principles, the result appears to be that, while no bright line rule has been stated by the Supreme Court or the Tenth Circuit (or perhaps could be, in this context), the degree to which the challenged government action operates directly and primarily on the individual's religious exercise is a significant factor to be evaluated in determining whether a "substantial burden" is present.

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[17] *Civil Liberties* was decided under RLUIPA but, as noted above, RLUIPA's standards for what constitutes a "substantial burden" are the same as RFRA's.

Evaluating the "directness" factor here, the court concludes the Greens are unlikely to be able to establish a "substantial burden" on them within the meaning of RFRA. The mandate in question applies only to Hobby Lobby and Mardel, not to its officers or owners. Further, the particular "burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [Hobby Lobby's] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff's religion." *O'Brien*, — F. Supp. 2d at —, 2012 WL 4481208, at *6. Such an indirect and attenuated relationship appears unlikely to establish the necessary "substantial burden."

Other cases decided by the Tenth Circuit under RFRA/RLUIPA are consistent with the view that some reasonably direct and personal connection between the religious exercise and the restraint in question must be present. In *Abdulhaseeb,* the restriction in question directly impacted the religious exercise of the plaintiff by denying him the diet that was necessary to his religious beliefs. In *Wilgus,* the defendant personally possessed the eagle feathers. In *Kikumura,* the prisoner was denied pastoral visits by a minister he claimed was particularly well suited to provide him with spiritual guidance.

Similarly, the principal Supreme Court case construing RFRA, *Gonzales,* also involved a close or personal connection between the religious exercise and the infringing government action. The religious sect in *Gonzales* was prohibited from engaging in communion. Its members were faced with the choice of foregoing a religious sacrament or violating the Controlled Substances Act.

Consideration of Supreme Court decisions addressing the constitutional standard in this area also provides some support for the view that the necessary "substantial burden" is unlikely to be established here. *Grace* notes that the legislative history of RFRA and RLUIPA indicates that the term "substantial burden" should not be given a broader interpretation that the Supreme Court's articulation of the concept. *Grace,* 451 F.3d at 661. *See O'Brien,* — F. Supp. 2d at —, 2012 WL 4481208 at *5 ("Courts frequently look to free exercise cases predating *Employment Div. v. Smith* to determine which burdens cross the threshold of substantiality"); *Anselmo,* 873 F. Supp. 2d at 1258, 2012 WL 2090437, at *8 ("The Ninth Circuit has explained that the Supreme Court's free exercise jurisprudence . . . is instructive in defining a substantial burden under RLUIPA . . . .") (quoting *Guru Nanak Sikh Soc. of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006)). As with the Tenth Circuit cases, the Supreme Court decisions have also involved situations where the restraint in question operated with some level of directness on the individual. For example, the plaintiff in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), was forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404, 83 S. Ct. 1790. The compulsory attendance law at issue in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), required the Amish plaintiffs to elect between "abandon[ing] belief and be[ing] assimilated into society at large, or be[ing] forced to migrate to some other and more tolerant region." 406 U.S. at 218, 92 S. Ct. 1526. In *Thomas*, the employee's personal participation in activity to which he objected was involved.

Finally, the court notes the Supreme Court's approach in *Lee*. Although *Lee* was a free exercise case and focused principally on the nature and application of the compelling interest test, its discussion of the impact of commercial activity provides some guidance on the issue of what constitutes a "substantial burden." The Court noted that "every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." *Lee,* 455 U.S. at 261, 102 S. Ct. 1051. The plain import is that there must be more than some burden on religious exercise. The burden must be substantial. The Court then went on to state that

> [w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. Congress drew a line in § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer.

455 U.S. at 261, 102 S. Ct. 1051. The Court's discussion reflected a concern with the impact of the employer's faith-based decisions on his employees. While that appears not to have been a matter critical in *Lee,* as Lee's employees were also Amish, it would be potentially significant here. Hobby Lobby and Mardel employ over 13,500 people and "welcome[] employees of all faiths or no faith." Complaint, ¶ 51. Many of those employees are likely to have different religious views. Moreover, the employees' rights being affected are of constitutional dimension—related to matters of procreation, marriage contraception, and abortion.[18] While such considerations (and the dis-

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[18] The matter of a constitutional right to abortion has been highly controversial since the right was discovered among the pen-

cussion in *Lee* referenced above) go most directly to a determination of whether a compelling governmental interest is shown in a particular circumstance, rather than to what is here the determinative issue—what constitutes a "substantial burden"—they nonetheless suggest that term should be given meaningful application.

In sum, while the meaning and reach of the term "substantial burden" in this context is considerably less than crystal clear, it appears to impose a requirement that the burden on religious exercise be more direct and personal than has been shown here as to the Greens and their management of nationwide general business corporations.

Conclusion

Plaintiffs have not shown a "clear and unequivocal" right to injunctive relief in light of the standards applicable to their request. *Heideman*, 348 F.3d at 1188 (internal quotations omitted). The court is not unsympathetic to plaintiffs' circumstances and recognizes that the ACA's substantial expansion of employer obligations results in concerns and issues not previously confronted by companies or their owners. However,

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umbras of the Due Process Clause some forty years ago. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). Nonetheless, the right is now clearly established and necessarily shapes the nature of the rights and interests of plaintiffs' employees. See *Gonzales v. Carhart*, 550 U.S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

for the reasons previously stated, the court concludes plaintiffs have not made the necessary showing of a likelihood of success on the merits to warrant a preliminary injunction in the circumstances existing here.

Plaintiffs have not demonstrated a probability of success on their First Amendment claims. Hobby Lobby and Mardel, secular, for-profit corporations, do not have free exercise rights. The Greens do have such rights, but are unlikely to prevail as to their constitutional claims because the preventive care coverage regulations they challenge are neutral laws of general applicability which are rationally related to a legitimate governmental objective.

Plaintiffs also have failed to demonstrate a probability of success on their Religious Freedom Restoration Act claims. Hobby Lobby and Mardel are not "persons" for purposes of the RFRA and the Greens have not established that compliance with the preventive care coverage regulations would "substantially burden" their religious exercise, as the term "substantially burdened" is used in the statute. Therefore, plaintiffs have not met their prima facie burden under RFRA and have not demonstrated a probability of success as to their RFRA claims.[19] Accordingly, the motion for preliminary injunction [Doc. # 6] is **DENIED.**

IT IS SO ORDERED.

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[19] Because plaintiffs have not demonstrated a substantial likelihood of success on the merits, it is unnecessary to determine whether the three other factors tip in their favor.

APPENDIX C

1. 42 U.S.C 300gg-13 (Supp. V 2011) provides:

Coverage of preventive health services

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

(1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;

(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[1]

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[2]

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guide-

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[1] So in original. The word "and" probably should not appear.

[2] So in original. The period probably should be a semicolon.

lines supported by the Health Resources and Services Administration for purposes of this paragraph.[2]

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009.

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

(b) Interval

(1) In general

The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) or (a)(2) or a guideline under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.

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[2] So in original. The period probably should be a semicolon.

(2) Minimum

The interval described in paragraph (1) shall not be less than 1 year.

(c) Value-based insurance design

The Secretary may develop guidelines to permit a group health plan and a health insurance issuer offering group or individual health insurance coverage to utilize value-based insurance designs.

2. 42 U.S.C. 2000bb provides:

Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify bur-

dens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

3. 42 U.S.C. 2000bb-1 provides:

Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

4. 42 U.S.C. 2000bb-2 provides:

Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

5. 42 U.S.C. 2000bb-3 provides:

Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

6. 42 U.S.C. 2000bb-4 provides:

Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

OPPOSITION BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 13-354

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF
HEALTH AND HUMAN SERVICES, *ET AL*.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., MARDEL, INC.,
DAVID GREEN, BARBARA GREEN, STEVE GREEN,
MART GREEN, AND DARSEE LETT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, provides that the government "shall not substantially burden a person's exercise of religion" unless that burden satisfies strict scrutiny. *Id.* § 2000bb-1(a), (b). Respondents are a family and their closely held businesses, which they operate according to their religious beliefs. A regulation under the Patient Protection and Affordable Care Act requires Respondents to provide insurance coverage for all FDA-approved "contraceptive methods [and] sterilization procedures." 78 Fed. Reg. 39870, 39870 (July 2, 2013) (citing 42 U.S.C. § 300gg-13(a)(4)). Respondents' sincere religious beliefs prohibit them from covering four out of twenty FDA-approved contraceptives in their self-funded health plan. If Respondents do not cover these contraceptive methods, however, they face severe fines.

The question presented is whether the regulation violates RFRA by requiring Respondents to provide insurance coverage for contraceptives in violation of their religious beliefs, or else pay severe fines.

RULE 29.6 DISCLOSURE

Respondent Hobby Lobby Stores is a privately held Oklahoma corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Mardel is a privately held Oklahoma corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondents David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett are individual persons.

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BRIEF FOR RESPONDENTS

The government's petition contends that 1) the issues presented here are important, 2) the lower federal courts are divided, and 3) the decision below is incorrect. The government is correct on two out of its three contentions. The issues presented in the government's petition are indeed important, and the circuits are now hopelessly divided on critical questions of standing and religious liberty. However, Respondents respectfully suggest that the considered decision of the en banc Tenth Circuit Court of Appeals is correct. Nonetheless, Respondents agree with the government that, in light of the importance of the issues and the division in the circuits, plenary review by this Court is warranted.

STATEMENT

1. Respondents are David and Barbara Green; their children, Steve Green, Mart Green, and Darsee Lett; and their family businesses: Hobby Lobby Stores, an arts-and-crafts chain, and Mardel, a chain of Christian bookstores.[1]

a. Founded in 1970 by David Green, Hobby Lobby has grown from a single arts-and-crafts store in Oklahoma City into a nationwide chain with over 500 stores and more than 13,000 full-time employees. In 1981, Mart Green founded Mardel, an affiliated chain of Christian bookstores with thirty-five stores and about 400 full-time employees. Hobby Lobby and Mardel remain closely held family businesses, organized as general corporations under Oklahoma law, and exclusively controlled by the Greens. App. 7a-8a, Verified Compl. ("VC"), ¶¶ 23, 24, 32-38.[2]

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[1] The undisputed material facts are taken from Respondents' Verified Complaint. App. 64a.

b. "The Greens have organized their businesses with religious principles in mind." App. 8a. In Hobby Lobby's official statement of purpose, the Greens commit to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." *Id.* Mardel primarily sells Christian materials and describes itself as "a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support." *Id.* The Greens each sign a Statement of Faith and a Trustee Commitment obligating them to conduct the businesses according to their religious beliefs and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries." JA 21a.[3]

"[T]he Greens allow their faith to guide business decisions for both companies." App. 8a. For example, all stores close on Sundays, at a cost of millions per year, to allow employees a day of rest. Each Christmas and Easter, Hobby Lobby buys hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior."[4] Store music features

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[2] For federal tax purposes, Hobby Lobby is a subchapter-S corporation. App. 7a-8a.

[3] As the court of appeals explained, "[t]he Greens operate Hobby Lobby and Mardel through a management trust (of which each Green is a trustee), and that trust is likewise governed by religious principles." App. 8a.

[4] A recent ad invites readers to "call Need Him Ministry at 1-888-NEED-HIM" if they "would like to know Jesus as Lord and

Christian songs. Employees have cost-free access to chaplains, spiritual counseling, and religiously-themed financial courses. Company profits provide millions of dollars every year to ministries. App. 8a; VC ¶¶ 39-43, 45, 47, 51.

The Greens and their businesses also refrain from business activities forbidden by their religious beliefs. For example, to avoid promoting alcohol, Hobby Lobby does not sell shot glasses. The Greens once declined a liquor store's offer to take over one of their building leases, costing them hundreds of thousands of dollars a year. Similarly, the Greens do not allow their trucks to "back-haul" beer and so lose substantial profits by refusing offers from distributors. App. 8a; VC ¶44.

c. In the same way, the Greens' faith affects the insurance they offer in Hobby Lobby's self-funded health plan. The Greens believe that human beings deserve protection from the moment of conception, and that providing insurance coverage for items that risk killing an embryo makes them complicit in the practice of abortion. App. 50a-51a. Hobby Lobby's health plan therefore excludes drugs that can terminate a pregnancy, such as RU-486. The plan also excludes four drugs or devices that can prevent an embryo from implanting in the womb—namely, Plan B, Ella, and two types of intrauterine devices. Indeed, when the Greens discovered that two of these drugs had been included—without their knowledge—

Savior." *See* http://www.hobbylobby.com/assets/images/holiday_messages/messages/2013e.jpg (last visited Oct. 21, 2013).

in the plan formulary, they immediately removed them.[5]

2. The Patient Protection and Affordable Care Act ("ACA") requires non-grandfathered group health plans to cover without cost-sharing a variety of preventive services, including "preventive care and screenings" for women. 42 U.S.C. § 300gg-13(a)(1)-(4); Pet. 3-8. That latter category has been defined by regulation to include items such as well-woman visits, gestational diabetes screening, testing and counseling for certain sexually-transmitted diseases, and breastfeeding support, supplies, and counseling. *See* Health Resources and Services Administration, ***Women's Preventive Services Guidelines***, http://www.hrsa.gov/womensguidelines/ (last visited Oct. 21, 2013) ("HRSA Guidelines"). As relevant here, the regulation also requires plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA Guidelines; *see also* 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011). The government refers to this as the "contraceptive-coverage requirement." Pet. 8.

a. The contraceptive-coverage requirement includes drugs and devices—namely, Plan B, Ella, and two intrauterine devices—which, the government concedes, may prevent an embryo from implanting in the womb. Pet 10 n.5 (noting, by reference to the FDA *Birth Control Guide*, that these drugs and devices may prevent "attachment" or "implantation" of an embryo "in the womb"); App. 10a. Given the government's concession and the FDA's guidance, the court of appeals found "no material dispute" over how these drugs and devices function. App. 10a n.3. And given their beliefs, Respondents cannot cover them without facilitating what they believe to be an abortion. App. 50a-51a. Respondents do not object to covering any of the sixteen other forms of FDA-approved contraceptives,[6] but they cannot cover these four methods without violating their faith. App. 14a-15a.

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[5] The district court found this was not "due to anything other than a mistake. Upon discovery of the coverage, Hobby Lobby immediately excluded the two drugs, Plan B and Ella, from its prescription drug policy. [The government does] not dispute that the company's policies have otherwise long excluded abortion-inducing drugs." App. 174a.

Noncompliance, however, would expose Respondents to severe fines, regulatory action, and lawsuits. 26 U.S.C. §§ 4980D, 4980H; 29 U.S.C. § 1185d, 1132; *see also* Pet. 3 n.3 (noting enforcement mechanisms). Continuing to offer a health plan without the four objectionable items would subject Hobby Lobby to a fine of $100 per day for each

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[6] Those methods include male and female condoms, diaphragms, sponges, cervical caps, spermicides, the pill, the mini-pill, the continuous-use pill, patches, vaginal rings, progestin shots, implantable rods, sterilization surgery for men and women, and sterilization implants for women. *See* FDA *Birth Control Guide* (May 2013), http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm. The contraceptive-coverage requirement does not include contraceptive methods used by men. *See* 78 Fed. Reg. 39870, 39870 & n.1 (July 2, 2013) (noting "HRSA Guidelines exclude services relating to a man's reproductive capacity, such as vasectomies and condoms").

"individual to whom such failure relates." 26 U.S.C. § 4980D. Given that over 13,000 individuals are insured under Hobby Lobby's plan, this fine could total "at least $1.3 million per day, or almost $475 million per year." App. 15a. If Hobby Lobby instead drops employee insurance altogether, it will face severe disruption to its business, significant competitive disadvantages in hiring and retaining employees, as well as penalties totaling $26 million per year. *Id.*; VC ¶ 144; 26 U.S.C. § 4980H.

b. "A number of entities"—both religious and non-religious—"are partially or fully exempted from the contraceptive-coverage requirement." App. 11a.

First, the regulation recognizes the religious sensitivity of contraceptive coverage by providing that HHS "may establish exemptions" for plans "established or maintained by religious employers * * * with respect to any requirement to cover contraceptive services." 45 C.F.R. § 147.130(a)(iv)(A); App. 11a. Consequently, HHS has exempted "churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order." App. 11a-12a. Other religious groups who object to insurance on principle and members of "health care sharing ministries" are exempt from the ACA altogether, and therefore by definition are not subject to the contraceptive-coverage requirement. 26 U.S.C. § 5000A (d)(2)(A), (B), (ii).

Second, HHS recently finalized an "accommodation" for certain non-exempt religious organizations allowing them to route contraceptive payments through their insurer or plan administrator. Pet. 8 (citing 45 C.F.R. § 147.131(b); 78 Fed. Reg. 39870); App. 12a. Through this alternative mechanism, HHS seeks to "protect[ ] certain nonprofit religious organizations with religious objections to providing contraceptive coverage from having to contract, arrange, pay, or refer for such coverage." 78 Fed. Reg. at 39872. The accommodation, however, "does not extend to for-profit organizations." *Id.* at 39875.

Third, wholly apart from any religious concerns, "grandfathered" plans may indefinitely avoid the contraceptive-coverage requirement by not making certain changes after the ACA's effective date. *See* 42 U.S.C. § 18011 (a)(2) ("Preservation of right to maintain existing coverage"); App. 12a-13a. While they must comply with other ACA requirements—such as covering dependents to age 26, covering preexisting conditions, and reducing waiting periods (42 U.S.C. § 18011(a)(4); *see* 75 Fed. Reg. 34538, 34542 Tbl. 1 (June 17, 2010))—grandfathered plans need not cover contraceptives or any other women's preventive services. 75 Fed. Reg. 34540. When promulgating the current grandfathering regulations in 2010, HHS estimated that 34% of small employer and 55% of large employer plans would retain grandfathered status in 2013. *See id.* at 34552 Tbl. 3.

Fourth, "small employers"—that is, those with fewer than 50 employees, who collectively employ over 34 million people—need not offer health insurance at all. 26 U.S.C. § 4980H(c)(2); WhiteHouse.Gov, *The Affordable Care Act Increases Choice and Saving Money for Small Business* 1 ("*ACA Small Business*"), http://www.whitehouse

.gov/files/documents/health_reform_for_small_businesses.pdf (last visited Oct. 21, 2013). To that extent, small employers "do not have to comply with any aspect of the shared responsibility health coverage requirements, including the contraceptive-coverage requirement." App. 13a.

As a result of these various exemptions, the contraceptive-coverage requirement does not apply to a large percentage of the American workforce. *See, e.g.*, App. 58a (finding "the contraceptive-coverage requirement presently does not apply to tens of millions of people"); Appellees' Br. at 40 n.11 (conceding that "48 percent" of all Americans who receive health coverage through their employers "were in grandfathered health plans in 2012"); *see also, e.g., Beckwith Elec. Co.* v. *Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *17 (M.D. Fla. June 25, 2013) (noting that, with respect to grandfathered plans, "[t]he government's best case scenario * * * still leaves roughly a third of America's population (i.e., 100 out of 313.0 million) exempt from the contraceptive mandate").

c. Despite their sincere religious objections to facilitating the provision of abortifacients, Respondents do not qualify for any of these exceptions. Hobby Lobby's health plan is not grandfathered,[7] and, having more than 50 employees, it must offer insurance covering all mandated services. 26 U.S.C. § 4980H. As for-profit businesses, neither Hobby Lobby nor Mardel is covered by the religious employer exemption or the accommodation. App. 13a-14a. Consequently, Respondents must either violate their faith by covering the mandated contraceptives, or pay crippling fines that would destroy their livelihood.

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[7] The plan lost grandfather status due to changes made before the contraceptive-coverage requirement was proposed. VC ¶59; App. 14a.

3. Petitioners accurately set forth the procedural history of this case. Pet. 10-11. In brief: Respondents sued under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, which provides that the government "shall not substantially burden a person's religious exercise" unless that burden satisfies strict scrutiny. *Id.* § 2000bb-1(a), (b).[8] After being denied a preliminary injunction and emergency appellate relief, Respondents were granted initial en banc review by the Tenth Circuit, which heard argument before eight judges on May 23, 2013. App. 15a-16a. On June 27, the en banc court reversed the district court. *Id.* 5a-7a.

a. As a preliminary matter, the court unanimously concluded that Hobby Lobby and Mardel have Article III standing and that their claims are not barred by the Anti-Injunction Act, 26 U.S.C. § 7421. App. 17a-18a, 18a-21a; *see* Pet. 12 (noting government's agreement with both conclusions). The court therefore did not address whether the Greens could sue individually under RFRA, although that issue was thoroughly briefed and argued. App. 18a n.4.

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[8] Respondents also sued under the First Amendment and the Administrative Procedure Act. App. 15a-16a.

On the merits, in an opinion by Judge Tymkovich, a five-judge majority ruled that Hobby Lobby and Mardel had demonstrated a likelihood of success on their RFRA claims.

i. The majority first addressed the question of whether Hobby Lobby and Mardel are "persons" capable of engaging in the "exercise of religion" under RFRA. App. 23a. Because RFRA does not define "person," the court turned to the Dictionary Act, which provides that "unless the context indicates otherwise," the word "person" in federal law "includes corporations * * * as well as individuals." 1 U.S.C. § 1; App. 24a. Thus, the majority concluded that "the plain language of the text encompasses 'corporations,' including ones like Hobby Lobby and Mardel." App. 24a. The court rejected the government's "strained" argument that RFRA silently "carried forward" an exclusion of for-profit entities found in other statutes, such as the exemptions in Title VII and the ADA. App. 26a-27a; *cf, e.g.,* 42 U.S.C. § 2000e-1(a) (exempting "a religious corporation, association, educational institution, or society").

The court also rejected the government's argument that RFRA silently includes a background principle, supposedly found in the First Amendment, which distinguishes "non-profit, religious organizations [from] for-profit, secular companies." App. 33a. After extensive analysis, *see id.* 34a-43a, the majority concluded that the government's "position is not 'rooted in the text of the First Amendment,' and therefore could not have informed Congress's intent when enacting RFRA." *Id.* 36a (internal citation omitted). Moreover, excluding

Hobby Lobby and Mardel from RFRA would be particularly inappropriate, since the companies publicly "express themselves for religious purposes," are "closely held family businesses with an explicit Christian mission as defined in their governing principles," "ma[k]e business decisions according to [religious] standards," and (in Mardel's case) "directly serve a religious community." *Id.* 37a, 39a, 42a.

ii. The court next considered whether the contraceptive-coverage requirement imposed a "substantial burden" on Hobby Lobby and Mardel's exercise of religion. App. 44a-56a. Drawing on this Court's decisions in *Thomas* v. *Review Bd.*, 450 U.S. 707, 717-18 (1981), and *United States* v. *Lee*, 455 U.S. 252, 257 (1982), the court held that it must consider three questions: first, it must "identify the religious belief" in question; second, it "must determine whether this belief is sincere"; third, it must determine "whether the government places substantial pressure on the religious believer" to act contrary to those beliefs. *Id.* 50a-51a.

In this case, the religious belief in question was Respondents' belief that by providing insurance coverage for contraceptives that could prevent a human embryo from implanting in the uterus, they themselves would be morally complicit in "the death of [an] embryo." *Ibid.* Because "[t]he government d[id] not dispute the corporations' sincerity," the court saw "no reason to question it either." *Ibid.* And given the fact that Hobby Lobby and Mardel were faced with the choice of "compromis[ing] their religious beliefs, pay[ing] close to $475 million more in taxes every year, or pay[ing] roughly $26 million more in annual taxes and drop[ping] health-insurance benefits for all employees," the court found it "difficult to characterize the pressure as anything but substantial." *Id.* 51a-52a.[9]

The court rejected the government's argument that the burden was too attenuated, and therefore insubstantial, because an employee's decision to use contraception could not properly be attributed to her employer. *Id.* 44a; Pet 26-27. Such reasoning is "fundamentally flawed," the court said, because it "requires an inquiry into the theological merit of the belief in question rather than the intensity of the coercion applied by the government to act contrary to those beliefs." App. 44a (emphasis omitted).

iii. Having found a substantial burden, the court then applied strict scrutiny. *Id.* 56a-61a. As to whether the contraceptive-coverage requirement furthered a compelling interest, the court reasoned that the government's asserted interests in "public health and gender equality," were not compelling "because they are broadly formulated," and because the government offered "almost no justification for not 'granting specific exemptions to particular religious claimants.'" *Id.* 57a-58a (quoting *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)). Additionally, the government's interests could not be compelling because, under various exemptions and accommodations, "the contraceptive-coverage requirement presently does not apply to tens of millions of people." App. 58a.

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[9] Judge Hartz concurred on the substantial burden point. He found that the contraceptive-coverage requirement imposes a substantial burden simply because it "compels the corporations to act contrary to their religious beliefs." App. 75a-76a.

Finally, the court found that requirement failed the least restrictive means test because—in light of the fact that Hobby Lobby and Mardel "ask only to be excused from covering four contraceptive methods out of twenty"—the government "does not articulate why accommodating such a limited request fundamentally frustrates its goals." *Id.* 59a-60a.[10]

b. In a separate concurrence, Judge Gorsuch, joined by Judges Kelly and Tymkovich, would have found that the Greens themselves, and not just Hobby Lobby and Mardel, were entitled to an injunction under RFRA. As Judge Gorsuch explained, given that Hobby Lobby and Mardel are controlled exclusively by the Greens, it is undisputed "that Hobby Lobby and Mardel cannot comply with the mandate unless and until the Greens direct them to do so." App. 78a. Judge Gorsuch rejected the government's argument that, under the rules of prudential standing, the Greens were barred as shareholders from asserting claims belonging to the corporation. *Id.* 83a-86a. As he explained, the prudential standing rule "does not bar corporate owners from bringing suit if they have 'a direct, personal interest in a cause of action.'" *Id.* 86a (quoting *Franchise Tax Bd. of Cal.* v. *Alcan*

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[10] Subsequently, the district court entered a preliminary injunction. Pet. 15. All lower court proceedings have been stayed by agreement of the parties pending this Court's disposition of the government's petition.

Aluminum Ltd., 493 U.S. 331, 336 (1990)).[11] Here, given that the Greens would be personally required to "direct the corporations to comply with the mandate and do so in defiance of their faith," they have "a quintessentially 'direct' and 'personal' interest protected even under the shareholder standing rule." *Ibid.*[12]

c. In dissent, Chief Judge Briscoe (joined by Judge Lucero) expressed the view that for-profit corporations like Hobby Lobby and Mardel are not "persons" capable of exercising religion under RFRA. App. 118a. Judge Matheson was not convinced that RFRA categorically excluded for-profit corporations, but would have affirmed on the ground that it was a "novel and significant question" which required further development. App. 140a.

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[11] Additionally, Judge Gorsuch suggested that the government waived prudential standing by not raising it below, and also that RFRA's "plain text" excludes prudential standing doctrines. App. 83a-86a; *see* 42 U.S.C. § 2000bb-1(c) (RFRA is "governed by the general rules of standing under Article III").

[12] In a partial concurrence, Judge Matheson agreed that the Greens had standing as the people who "own and manage Hobby Lobby and Mardel," and who are "directly and personally involved in implementing" the [contraceptive-coverage requirement]. App. 162a. Three other judges, however, disagreed. *See* App. 99a-103a (op. of Bacharach, J.); *id.* 135a-136a (op. of Briscoe, C.J., joined by Lucero, J.); *see also id.* 71a n.1 (op. of Hartz, J.) (expressing doubts about the Greens' standing).

REASONS FOR GRANTING THE PETITION

The case for plenary review of the critically important issues presented by the government's petition could hardly be clearer. As the federal government embarks on an unprecedented foray into health care replete with multiple overlapping mandates, few issues are more important than the extent to which the government must recognize and accommodate the religious exercise of those it regulates. And the issues are not just surpassingly important; they also have divided the courts of appeals. Thus, Respondents agree with the government that this Court should grant the petition.

Needless to say, Respondents part company with the government when it comes to the merits of the decision below. While those issues should be fully explored in merits briefing, the decision below is manifestly correct. The corporate and individual Respondents both have standing to press their RFRA claims, and the RFRA question on the merits is not particularly close. The government does not doubt the sincerity of the religious beliefs at issue here and indeed accommodates those beliefs for others. And whatever questions may arise about the substantiality of certain government burdens on religious exercise in other contexts, the crippling fines at issue clearly suffice to trigger RFRA and strict scrutiny. The government cannot remotely satisfy that demanding standard. Its asserted interests are not compelling, the massive exemptions granted to others based on both religious and non-religious grounds defeat any claim to narrow tailoring, and less-restrictive alternatives abound.

This Court should grant plenary review and vindicate the religious exercise rights of Respondents.

A. This case is an excellent vehicle for resolving an exceptionally important question on which the circuits are split.

1. Respondents agree with the government that the Tenth Circuit's en banc decision presents a question of "exceptional importance." Pet. 32. Throughout this litigation, the government has taken the unprecedented position that commercial businesses and their owners—simply because they make profits—cannot exercise religion under the Constitution or federal law. *See, e.g.*, Pet. 20 (asserting that this Court's jurisprudence has "confined" free exercise rights "to individuals and non-profit religious organizations"). The court of appeals properly rejected the government's narrow view, although other courts of appeals have accepted it. When the federal government, bound by both RFRA and the First Amendment to respect religious liberty, takes a miserly view of the scope of religious exercise, the question is undeniably important. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, 565 U.S. __, 132 S. Ct. 694 (2012). But such questions assume even larger significance insofar as they arise under the Affordable Care Act, which imposes massive obligations on individuals and corporations alike in the process of attempting to fundamentally re-order the Nation's health care system. *See, e.g., Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, __ U.S. __, 132 S. Ct. 2566, 2609, 2624 (2012) (op. of Ginsburg, J., joined by

Sotomayor, Breyer, and Kagan, JJ.) (observing that "the provision of health care is today a concern of national dimension," but cautioning that "[a] mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly * * * interfered with the free exercise of religion").

2. Respondents also agree with the government that the Tenth Circuit's decision "directly conflicts with subsequent decisions by the Third and Sixth Circuits, both of which expressly rejected the court of appeals' reasoning in this case." Pet. 32-33 (citing *Conestoga Wood Specialties Corp.* v. *HHS*, 724 F.3d 377, 384 n.7 (3d Cir. 2013), *petition for cert. filed*, Sept. 19, 2013 (No. 13-356); *Autocam Corp.* v. *Sebelius*, No. 12-2673, 2013 WL 5182544, at *1 & n.1, *7 (6th Cir. Sept. 17, 2013), *petition for cert. filed*, Oct. 15, 2013 (No. 13-482)). The conflict is square. The Third and Sixth Circuits would categorically exclude Hobby Lobby, Mardel, and the Greens from RFRA's protection. *See, e.g.*, *Conestoga Wood*, 724 F.3d at 381 (concluding that "for-profit, secular corporations cannot engage in religious exercise" and rejecting the owners' free exercise and RFRA claims). By contrast, the Tenth Circuit has ruled that RFRA protects them from being coerced by the contraceptive-coverage requirement to violate their faith or pay ruinous fines.

These issues need to be settled now by this Court. The existing conflict is likely to deepen rapidly, with the same issues pending in some thirty-five other cases around the country.[13]

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[13] *See* Pet. 35 & n.12 (observing that "comparable RFRA claims are pending in many other courts, including the Seventh, Eighth, Eleventh, and D.C. Circuits") (citing *O'Brien* v. *HHS*, 894 F. Supp. 2d 1149 (E.D. Mo. 2012), *appeal docketed*, No. 12-3357 (8th Cir. Oct. 4, 2012) (argument scheduled for Oct. 24, 2013); *Korte* v. *Sebelius*, 912 F. Supp. 2d 735 (S.D. Ill. 2012), *appeal docketed*, No. 12-3841 (7th Cir. Dec. 18, 2012) (argued May 22, 2013); *Grote* v. *Sebelius*, 914 F. Supp. 2d 943 (S.D. Ind. 2012), *appeal docketed*, No. 13-1077 (7th Cir. Jan. 9, 2013) (argued May 22, 2013); *Gilardi* v. *Sebelius*, 926 F. Supp. 2d 273 (D.D.C. 2013), *appeal docketed*, No. 13-5069 (D.C. Cir. Mar. 5, 2013) (argued Sept. 24, 2013); *Beckwith Elec. Co.*, v. *HHS*, No. 8:13-cv-0648, 2013 WL 3297498 (M.D. Fla. June 25, 2013), *appeal docketed*, No. 13-13879 (11th Cir. Aug. 28, 2013)); *see also Annex Med., Inc.* v. *Sebelius*, No. 1:12-cv-2804, 2013 WL 101927 (D. Minn. Jan. 8, 2013), *appeal docketed*, No. 13-1118 (8th Cir. Jan. 14, 2013) (argument scheduled for Oct. 24, 2013).

In addition to those six cases, eight others are currently proceeding through the courts of appeals. *Mersino Mgmt. Co.* v. *Sebelius*, No. 2:13-cv-11296, 2013 WL 3546702 (E.D. Mich. July 11, 2013), *appeal docketed*, No. 13-1944 (6th Cir. July 17, 2013); *Eden Foods, Inc.* v. *Sebelius*, No. 2:13-cv-11229 (E.D. Mich. May 21, 2013), *appeal docketed*, No. 13-1677 (6th Cir. May 22, 2013); *Geneva Coll.* v. *Sebelius*, No. 2:12-cv-207, 2013 WL 1703871 (W.D. Pa. Apr. 19, 2013), *appeal docketed*, No. 13-3536 (3d. Cir. Aug. 22, 2013); *Monaghan* v. *Sebelius*, 931 F. Supp. 2d 794 (E.D. Mich. 2013), *appeal docketed*, No. 13-1654 (6th Cir. May 17, 2013); *Triune Health Group* v. *HHS*, No. 1:12-cv-6756 (N.D. Ill. Jan. 3, 2013), *appeal docketed*, No. 13-1478 (7th Cir. Mar. 5, 2013); *Am. Pulverizer Co.* v. *HHS*, No. 6:12-cv-3459, 2012 WL 6951316 (W.D. Mo. Dec. 20, 2012), *appeal docketed*, No. 13-1395 (8th Cir. Feb. 26, 2013); *Legatus* v. *Sebelius*, 901 F. Supp. 2d 980 (E.D. Mich. 2012), *appeal docketed*, No. 13-1092 (6th Cir. Jan. 24, 2013); *see also Newland* v. *Sebelius*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013) (relying on *Hobby Lobby* to affirm preliminary injunction).

3. This case presents an excellent vehicle for resolving these questions.

a. The Tenth Circuit's en banc decision comprehensively addressed the application of RFRA. It reached not only the threshold issue of whether

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Eighteen additional cases are still in the district courts because the government has either not appealed or has voluntarily dismissed its appeal. *See Tyndale House Publishers, Inc.* v. *Sebelius*, No. 13-5018, 2013 WL 2395168 (D.C. Cir. May 3, 2013) (granting government's motion to dismiss appeal from grant of preliminary injunction); *see also Midwest Fastener Corp.* v. *Sebelius*, No. 1:13-cv-1337 (D.D.C. Oct. 16, 2013); *Barron Indus.* v. *Sebelius*, No. 1:13-cv-1330 (D.D.C. Sept. 25, 2013); *Armstrong* v. *Sebelius*, No. 1:13-cv-563, 2013 WL 5213640 (D. Colo. Sept. 17, 2013); *Briscoe* v. *Sebelius*, No. 1:13-cv-285, 2013 WL 4781711 (D. Colo. Sept. 6, 2013); *QC Group* v. *Sebelius*, No. 0:13-cv-1726 (D. Minn. Aug. 30, 2013); *Willis & Willis, P.L.C.* v. *Sebelius*, No. 1:13-cv-1124 (D.D.C. Aug. 23, 2013); *Trijicon, Inc.* v. *Sebelius*, No. 1:13-cv-1207 (D.D.C. Aug. 14, 2013); *Ozinga* v. *HHS*, No. 1:13-cv-3292 (N.D. Ill. July 16, 2013); *SMA, L.L.C.* v. *Sebelius*, No. 0:13-cv-1375 (D. Minn. July 8, 2013); *Sharpe Holdings, Inc.* v. *HHS*, No. 2:12-cv-92 (E.D. Mo. June 28, 2013); *Johnson Welded Prods.* v. *Sebelius*, No. 1:13-cv-609 (D.D.C. May 24, 2013); *Hartenbower* v. *HHS*, No. 1:13-cv-2253 (N.D. Ill. Apr. 18, 2013); *Hall* v. *Sebelius*, No. 0:13-cv-295 (D. Minn. Apr. 2, 2013); *Bick Holdings, Inc.* v. *Sebelius*, No. 2:13-cv-462 (E.D. Mo. Apr. 1, 2013); *Tonn and Blank Constr.* v. *Sebelius*, No. 1:12-cv-325 (N.D. Ind. Apr. 1, 2013); *Lindsay* v. *HHS*, No. 1:13-cv-1210 (N.D. Ill. Mar. 20, 2013); *Sioux Chief Mfg. Co.* v. *Sebelius*, No. 4:13-cv-36 (W.D. Mo. Feb. 28, 2013).

Finally, three additional cases remain in district court either because the plaintiffs have not yet appealed an adverse decision or the district court has not yet ruled. *See M.K. Chambers* v. *HHS*, No. 2:13-cv-11379, 2013 WL 5182435 (E.D. Mich. Sept. 13, 2013); *Infrastructure Alternatives, Inc.* v. *Sebelius*, No. 1:13-cv-31 (W.D. Mich. Sept. 30, 2013); *Holland* v. *HHS*, No. 2:13-cv-15487 (S.D. W.Va. filed June 24, 2013).

for-profit corporations may sue under RFRA, *see* App. 23a-43a, but the merits as well. *See id.* 44a-56a (substantial burden); *id.* 56a-61a (strict scrutiny).[14] By contrast, the Third and Sixth Circuits addressed only the threshold issue. *See* Pet. 33-34 (noting *Conestoga Wood* and *Autocam* held that "a for-profit corporation and its controlling shareholders" have no RFRA claims). Since the government's petition encompasses all RFRA issues, and this Court should be in a position to address all three issues, this case is a better vehicle for addressing the basic, recurring and fundamentally important questions about the government's ability to force for-profit businesses and their owners to sacrifice their religious beliefs. *See* Pet. i (asking "whether RFRA allows a for-profit corporation" an exemption "based on the religious objections of the corporation's owners").

b. Factually, this case is an ideal vehicle for addressing whether a for-profit business and its owners can exercise religion. "Hobby Lobby and Mardel * * * are closely held family businesses with an explicit Christian mission as defined in their governing principles." App. 42a. One of the co-plaintiffs, Mardel, is a "Christian bookstore chain" App. 4a. And, in adherence to their companies' religious mission, the Greens "have made business decisions according to * * * [religious] standards," App. 42a—including closing stores on Sunday, taking out evangelical ads in newspapers, providing cost-free spiritual counseling for employees, and avoiding business practices contrary to their beliefs. App. 7a-9a.

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[14] Four judges also concluded that the Greens have Article III and prudential standing to bring RFRA claims. *See* App. 82a-87a (op. of Gorsuch, J., joined by Kelly and Tymkovich, JJ.); *id.* 152a-162a (op. of Matheson, J.).

Moreover, "the Greens are unanimous in their belief that the contraceptive-coverage requirement violates the religious values they attempt to follow in operating Hobby Lobby and Mardel." App. 42a. Since the Greens alone control Hobby Lobby's self-insured plan, App. 14a, a favorable decision from this Court will unambiguously allow them to continue offering a plan conforming to their religious convictions, without needing to secure the cooperation of a third-party insurer. *Cf.* Petition for Writ of Certiorari at 8, *Conestoga Wood Specialties Corp.* v. *Sebelius*, No. 13-356 (U.S. filed Sept. 19, 2013) ("Lacking injunctive relief, Conestoga's health issuer inserted coverage of the contraceptives into their plan over Petitioners' objection, because the issuer sought to avoid penalties on itself.").[15]

Finally, the magnitude of the potential fines at issue makes resolution of the substantial burden question straightforward. *See* App. 51a (given potential fines of $1.3 million per day, "it is difficult to characterize the pressure as anything but substantial"). Below, "the government did not question the significance of the financial burden" on Respondents. *Id.* 52a. With no "subsidiary factual issues" needing resolution, the Court can decide the substantial burden issue "as a matter of law." App. 52a.

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[15] The petitioners in *Autocam Corp.* v. *Sebelius* suggest there is a dispute in this case about how the objectionable drugs operate. Petition for Writ of Certiorari at 37, *Autocam Corp.* v. *Sebelius*, No. 13-482 (U.S. filed Oct. 15, 2013). They are mistaken. The government concedes in its petition, as it has throughout this litigation, that the drugs to which Respondents object can prevent an embryo's "implantation" in the womb. *See* Pet. 10 n.5. Based on that concession, the en banc court found "no material dispute" on the issue and, thus, that the court "need not wade into scientific waters here." App. 10a n.3.

c. This Court's review is urgently needed. As Petitioners point out, "[a]lthough the decision addressed a preliminary injunction, the court definitively decided the legal questions at the heart of the case, making it unnecessary to await further proceedings before granting review." Pet. 32; *see also, e.g., Pleasant Grove City, Utah* v. *Summum*, 555 U.S. 460, 466 (2009); *O Centro,* 546 U.S. at 423 (reviewing preliminary injunctions).[16] Challenges to the contraceptive-coverage requirement are proliferating. *See supra* note 13. And the extent of religious freedom is simply too important to be clouded with uncertainty and left to vary among the Circuits.

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[16] The government took the same position on remand to the district court in this case, where it declined to introduce additional evidence and agreed that "there are no factual disputes" precluding the district court from entering a preliminary injunction. Prelim. Inj. Hr'g Tr. at 6 (July 19, 2013). Moreover, when the district court asked counsel for the government whether this case was expected to require a trial, counsel stated she thought the case "would likely involve mostly questions of law," and that "at this point [we] do not intend to seek" any "discovery period." *Id.* at 7.

B. The Tenth Circuit correctly decided that the contraceptive-coverage requirement violates RFRA.

1. While the parties agree on the importance of the issues, the intractable nature of the division among the Circuits, and the need for this Court's plenary review, they obviously disagree on the merits. There will be time enough to explore the merits if this Court grants plenary review. That said, Respondents respectfully submit that the court of appeals correctly decided that Hobby Lobby and Mardel may assert religious exercise claims under RFRA. App. 24a-43a.

a. The ability of the corporate Respondents to assert rights under RFRA should not be open to serious debate. RFRA's plain text protects "a *person's* exercise of religion." 42 U.S.C. § 2000bb-1(a) (emphasis added). The Dictionary Act provides that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise * * * the word[ ] 'person' * * * include[s] *corporations*, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (emphasis added). The court of appeals correctly noted that "we could end the matter here since the plain language of the text encompasses 'corporations,' including ones like Hobby Lobby and Mardel." App. 24a.

Furthermore, nothing in RFRA's "context" suggests it silently excludes some corporations, while including others. *See* App. 26a ("context" under the Dictionary Act "means the text of the Act of Congress surrounding the word at issue, or the text of other related congressional Acts") (quoting *Rowland* v. *Cal. Men's Colony*, 506 U.S. 194, 199 (1993)). The text makes no distinction between non-profit and for-profit corporations. Nor is there any indication that RFRA adopted the limited exemptions from statutes like Title VII and the ADA, thereby incorporating "[a] distinction between non-profit, religious organizations and for-profit secular companies." App. 27a. The Title VII and ADA exemptions are worded to exempt only "a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a) (Title VII); *id.* § 12113(d)(1), (2) (ADA). RFRA does not use that language. Instead, RFRA protects any "person's" religious exercise, and broadly defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4); *id.* § 2000cc-5(7)(A). The Title VII and ADA exemption language was available to Congress as a model when it composed RFRA, but Congress did not adopt it. The notion that Congress nonetheless incorporated those unusual limitations when it used language including all persons broadly defined strains credulity.

b. Nothing in the jurisprudence preceding RFRA suggests Congress meant to exclude for-profit corporations. App. 34a-43a.

Congress enacted RFRA against the backdrop of over a century of jurisprudence recognizing that corporations exercise a broad range of constitutional rights. As this Court said in *Monell* v. *Department of Social Services*, "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." 436 U.S. 658, 687 (1978). Thus, corporations have long been treated as "persons" under the Equal Protection Clause, the Due Process Clause and section 1983,[17] and recognized as capable of exercising rights under the First, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments.[18]

This Court has rejected the government's approach to limiting rights based on their corporate origin. In *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978), the Court explained that "[t]he proper question * * * is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect." *See also Citizens United* v. *FEC*, 558 U.S. 310, 342-43 (2010) (explaining that "political speech does not lose

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[17] *See Power Mfg. Co.* v. *Saunders*, 274 U.S. 490, 493 (1927) (Equal Protection Clause) (collecting cases); *Minneapolis & St. Louis Ry. Co.* v. *Beckwith*, 129 U.S. 26, 28 (1889) (Due Process Clause); *Monell*, 436 U.S. at 687-88 (section 1983).

[18] *See, e.g.*, *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Utils. Comm'n*, 447 U.S. 557, 566-68 (1980) (commercial speech); *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906) (unreasonable search); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977) (double jeopardy); *Pa. Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922) (takings); *Armour Packing Co.* v. *United States*, 209 U.S. 56, 76-77 (1908) (right to criminal jury); *Ross* v. *Bernhard*, 396 U.S. 531, 532-33 (1970) (right to civil jury); *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001) (protection from excessive fines).

First Amendment protection 'simply because its source is a corporation'") (quoting *Bellotti*, 435 U.S. at 784). Just as it is wrong to ask whether "corporations have speech rights," it is also wrong to ask whether "corporations exercise religion." The right question, per *Bellotti*, is whether the law abridges religious activity that RFRA and the First Amendment protect. Here the answer is plainly yes.

To be sure, this Court has noted a category of "purely personal" rights only natural persons may exercise. *See Bellotti*, 435 U.S. at 778 n.14 (suggesting that "purely personal guarantees," like the privilege against compulsory self-incrimination, are "unavailable to corporations and other organizations"). But "[i]t is beyond question that associations—not just individuals—have Free Exercise rights." App. 34a (citing *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984)). And, "[a]s should be obvious," the right of religious exercise extends to all manner of religious associations—"including those that incorporate." App. 35a (citing *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 525 (1993); *Terrett* v. *Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815) (Story, J.)).

Moreover, this Court has long held that "*individuals* have Free Exercise rights with respect to their *for-profit businesses*." App. 35a-36a (citing *Lee*, 455 U.S. 252); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961)) (emphasis in original); *see also* App. 68a (Hartz, J., concurring) (noting that "the Supreme Court has already recognized that profit-seekers have a right to the free exercise of religion"). It makes no sense to say that "an individual operating for-profit retains Free Exercise protections but an individual who incorporates * * * does not, even though he engages in the exact same activities as before." App. 38a. This Court has expressly rejected the notion that the profit motive negates the exercise of constitutional rights. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265-66 (1964) (holding that "constitutionally protected" statements "do not forfeit that protection because they were published in the form of a paid advertisement").

In light of all this, it is impossible to read RFRA to contain a secret background principle that, "when individuals incorporate" a for-profit business, their "Free Exercise rights somehow disappear." App. 36a. Below, the government identified "no principled reason why an individual who uses the corporate form in a business must thereby sacrifice the right to the free exercise of religion." *Id.* 68a (Hartz, J., concurring). Nor is there any principled reason to believe that individuals forming corporations can exercise religion unless and until they earn profits. Such a position "is not 'rooted in the text of the First Amendment,' and therefore could not have informed Congress's intent when enacting RFRA." App. 36a.

2. Alternatively, the Greens themselves have an independently valid claim under RFRA. As four judges below correctly found, Hobby Lobby and Mardel cannot comply with the contraceptive-coverage requirement unless the Greens, "as the controlling owners and operators," personally "direct the corporations to [do so]." App. 86a. It is undisputed that the Greens would be acting "in defiance of their faith" if they comply, and that their

businesses would suffer crippling fines if they do not comply. *Ibid.* Thus, whether the Greens raise their claims independently or through their family businesses, there is not even a "colorable question that the Greens face a 'substantial burden' on their 'exercise of religion.' " *Id.* 87a; *see, e.g., Stormans, Inc.* v. *Selecky,* 586 F.3d 1109, 1120-21 (9th Cir. 2009) (relying on *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619-20 (9th Cir. 1988)) (holding that "a corporation has standing to assert the free exercise right of its owners").

The government's only argument in response is that the Greens' claims are barred by the prudential "shareholder standing" rule, which bars shareholder claims that are purely derivative of a corporation's claims. *See, e.g., Alcan,* 493 U.S. at 336; App. 157a-159a. This argument is doubly flawed.

First, as Judges Gorsuch, Kelly, Tymkovich, and Matheson explained, the shareholder standing argument is meritless, because it is "well-established * * * that 'a shareholder with a direct, personal interest in a cause of action [may] bring suit even if the corporation's rights are also implicated.' " *Id.* 159a (quoting *Alcan,* 493 U.S. at 336); *see also id.* 86a. Here, because the mandate "requires [the Greens] * * * directly and personally to take *affirmative action* contrary to their religious beliefs," "their core alleged injury is religious," and not derivative of their companies' injuries. *Id.* 161a (emphasis in original).

Second, a prudential standing argument is just that, prudential. Congress is free to override any non-Article III limitation on standing and Congress clearly did that in RFRA. *See, e.g., Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1982) (where "Congress intended standing * * * to extend to the full limits of Art[icle] III," courts "lack the authority to create prudential barriers to standing") (internal quotation marks omitted); 42 U.S.C. § 2000bb-1(c) (providing that "[s]tanding to assert a claim or defense under [RFRA] shall be governed by the general rules of standing under article III of the Constitution"). RFRA affirmatively protects the religious exercise rights of persons broadly defined. There is absolutely no basis in RFRA for the government's divide-and-conquer strategy where corporations have standing but no rights, and individuals who direct and control closely-held corporations have rights but no standing. Such a doctrine would defeat Congress' evident demand that the federal government respect the religious exercise rights of those it regulates.[19]

Because the Greens "assert rights * * * independent of their shareholder status," App. 162a, they have standing to assert their individual RFRA claims against the contraceptive-coverage requirement.

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[19] The weakness of the government's prudential standing argument is underscored by the fact that it did not even raise the argument until prompted by the en banc court. *See* App. 83a (op. of Gorsuch, Kelly, and Tymkovich, JJ.) (explaining that prudential standing was forfeited, because the government "did not raise [it] as a defense in the district court" or in its principal appellate brief, but only "took up that cudgel when [the en banc court] *asked* for supplemental briefing on the issue").

3. On the merits, the court of appeals correctly concluded that the contraceptive-coverage requirement substantially burdens Respondents' religious exercise. Indeed, the government essentially recognizes as much by exempting certain religious organizations from this very requirement. Moreover, as the Tenth Circuit recognized, the substantial nature of the burden is made clear by "the *intensity of the coercion* applied by the government to act contrary to [Respondents' religious] beliefs." App. 44a (emphasis in original). This understanding of substantial burden "rests firmly" on this Court's free exercise cases. *See id.* 46a-50a (relying on *Thomas*, 450 U.S. at 717-18; *Lee*, 455 U.S. at 256-57). It focuses "on the coercion" imposed by the government on the claimant "to violate his beliefs." App. 48a (citing *Lee*, 455 U.S. at 256-57).

The court of appeals properly applied that standard to find Hobby Lobby and Mardel's religious exercise substantially burdened by the contraceptive-coverage requirement. First, the court accurately identified the religious exercise at issue as Respondents' "object[ion] to 'participating in, providing access to, paying for, training others to engage in, or otherwise supporting'" the mandated contraceptives. App. 50a-51a. Second, the court found the sincerity of Respondents' beliefs was undisputed. App. 51a. Finally, the court found it "difficult to characterize the pressure as anything but substantial," given the stark choices facing Hobby Lobby and Mardel—namely, either to "compromise their religious beliefs," pay nearly "$475 million more" in annual taxes, or drop employee health benefits and "pay roughly $26 million more in annual taxes." App. 51a-52a. Given that the government "did not question the significance of [this] financial burden" below, the court correctly concluded that "Hobby Lobby and Mardel have established a substantial burden as a matter of law." App. 52a.[20]

The court properly rejected the government's substantial burden arguments. *See* App. 44a, 52a-56a. For instance, the government contended that any burden was not "substantial" because 1) use of the drugs depended on "[a]n employee's decision" that "cannot properly be attributed to her employer," and 2) insurance is "just another form of non-wage compensation * * * supposedly the equivalent of money." App. 44a, 52a-53a. Both arguments failed for the same reason: they asked the court to second-guess the theology of Respondents' religious exercise. As the Tenth Circuit properly found, Respondents "have drawn a line at providing coverage for drugs and devices they consider to induce abortions" and it was not the court's "prerogative to determine whether [that] line * * * 'was an unreasonable one.'" App. 53a (quoting *Thomas*, 450 U.S. at 715). Doing so would improperly require "an inquiry into the theological merit of the belief in question." App. 44a. Further, as the court explained, it was not the "employees' health care decisions" that burdened the companies' religious exercise, but rather "the government's demand that Hobby Lobby and Mardel enable access to contraceptives that [they] deem morally problematic." App. 53a.

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[20] Alternatively, the court could have resolved the question as Judge Hartz did. *See* App. 76a (op. of Hartz, J.) (reasoning that Hobby Lobby and Mardel are substantially burdened simply because the regulation "compels [them] to act contrary to their religious beliefs").

4. Finally, the court of appeals correctly concluded that the government did not carry its burden of proving that the contraceptive-coverage requirement meets strict scrutiny. *See O Centro*, 546 U.S. at 429 (explaining that "the burden [of strict scrutiny] is placed squarely on the [g]overnment by RFRA * * * including at the preliminary injunction stage") (citing 42 U.S.C. § 2000bb-1(b), 2000bb-2(3)).

a. The government did not demonstrate that applying the requirement to Respondents furthers any compelling interest. Below, the government articulated only "broadly formulated interests" in public health and gender equality, but "offer[ed] almost no justification for not 'granting specific exemptions to particular religious claimants.'" App. 57a-58a (quoting *O Centro*, 546 U.S. at 431); *see also* Pet. 27-28 (reiterating interests in "promotion of public health" and "assuring [women's] equal access to health-care services"). That lack of specificity dooms a compelling interest claim under RFRA. *See, e.g., O Centro*, 546 U.S. at 430-31 (RFRA requires government to "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the *particular claimant* whose sincere exercise of religion is being substantially burdened") (quoting 42 U.S.C. § 2000bb-1(b)) (emphasis added). The government failed to show with any "particularity" how its interests would be "adversely affected" by granting a limited four-drug exemption to Hobby Lobby and

Mardel. App. 57a (quoting *Wisconsin* v. *Yoder*, 406 U.S. 205, 236 (1972)).

That failure is particularly glaring here. For instance, the government has offered religious exemptions and "religion-related accommodations" to thousands of non-profit employers, Pet. 8, which, in the government's own words, are necessary to "protect[ ]" objecting organizations from "having to contract, arrange, pay, or refer for [contraceptive] coverage," 78 Fed. Reg. 39870, 39872 (July 2, 2013). But the government failed to explain why Hobby Lobby and Mardel do not deserve the same "protection"—beyond the bald statement that they are "for-profit organizations." Pet. 9.

Worse still, the government exempts countless employers without any religious scruples based on nothing more than its interests in administrative convenience and appropriate "transition" rules. As the court of appeals properly concluded, the government's interests "cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." App. 58a. Numerous employers are not required to offer employees any contraceptive coverage, such as employers with "grandfathered" plans,[21] employers with fewer than fifty employees (who are not required to offer health insurance at all), and employers eligible for religious exemptions. *Id.* Given these enormous gaps, the government cannot plausibly maintain its interests are compelling. *See, e.g., Lukumi*, 508 U.S. at 547 (explaining that "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited") (internal citation omitted).

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[21] The government insists that grandfathering is "transitional," Pet. 30, but, as the court of appeals pointed out, plans may remain grandfathered "indefinitely," App. 13a.

Finally, in its petition the government proposes a new interest in "ensuring a 'comprehensive insurance system with a variety of benefits available to all participants.'" Pet. 29 (quoting *Lee*, 455 U.S. at 258). But that interest—raised for the first time in this Court—cannot be compelling here. Unlike the social security system at issue in *Lee*, in which "mandatory participation [was] indispensable to [the system's] fiscal vitality" and to its ability to function (*see, e.g., O Centro*, 546 U.S. at 435), the contraceptive-coverage requirement cannot possibly demand "mandatory participation" because it expressly contemplates a system of widespread exemptions. *See, e.g.*, 45 C.F.R. § 147.131(a) (providing for exemptions for "religious employer[s] * * * with respect to any requirement to cover contraceptive services"). And, as already discussed, the requirement is honeycombed with religious and secular exemptions for thousands of employers and tens of millions of employees.

b. Even assuming a compelling interest, the contraceptive-coverage requirement still fails strict scrutiny because the government did not prove it is the least restrictive means of furthering its interests.

Below, the government offered no evidence explaining why it could not increase contraceptive access and use by other readily available means. *See, e.g.*, *Korte* v. *Sebelius*, No. 12-3841, 2012 WL 6757353, at *4 (7th Cir. Dec. 28, 2013) (noting "the government has not advanced an argument that the contraception mandate is the least restrictive means of furthering" its "generalized interest[s]"). For instance, the government spends hundreds of millions a year through Title X of the Public Health Service Act to "[p]rovide a broad range of acceptable and effective medically approved family planning methods * * * and services." 42 C.F.R. § 59.5(a)(1).[22] The government did not explain why it could not use a pre-existing program like this to redress genuine economic barriers to contraceptive access. *See, e.g.*, 42 C.F.R. § 59.5(a)(7) (providing family-planning services for "persons from a low-income family"); *see also, e.g.*, *Newland* v. *Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) (noting such "analogous programs" and lack of proof that providing contraceptives would "entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women"), *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013). Such alternative means would be far less restrictive of employers' religious freedom than the contraceptive-coverage requirement, which directly conscripts employer health plans. That intrusive approach is particularly unjustified for employers like Hobby Lobby and

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[22] *See also, e.g.*, RTI International, *Title X Family Planning Annual Report: 2011 National Summary* 1 (2013), http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf ("In fiscal year 2011, the [Title X] program received approximately $299.4 million in funding.").

Mardel, who already provide employees with generous wages and benefits and who "ask only to be excused from covering four contraceptive methods out of twenty, not to be excused from covering contraception altogether." App. 60a. As the court of appeals observed, "[t]he government does not articulate why accommodating such a limited request fundamentally frustrates its goals." *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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REPLY
BRIEF

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No. 13-354

In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

No. 13-354

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND
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v.

HOBBY LOBBY STORES, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

In a divided decision, the en banc court of appeals held that the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, allows respondent for-profit corporations to deny employees the health coverage to which they are otherwise entitled by federal law, based on the religious objections of the respondent individuals who own a controlling stake in the corporations. As the government explains in its petition for a writ of certiorari (at 16-35), that unprecedented decision merits review because it raises important questions about RFRA's application to regulation of commercial enterprises and because there is an acknowledged conflict in the courts of appeals on the question presented.

1. The conflict in the circuits has deepened since the petition for a writ of certiorari was filed. On November 1, 2013, a divided panel of the D.C. Circuit

affirmed in part and reversed in part a district court's denial of a preliminary injunction against enforcement of the contraceptive-coverage requirement. See *Gilardi* v. *United States Dep't of Health & Human Servs.*, No. 13-5069, 2013 WL 5854246, at *15. The court of appeals rejected the claims asserted by the corporate plaintiffs, which are two for-profit corporations that package and distribute fresh produce, on the ground that such "secular corporations" are not persons exercising religion for purposes of RFRA. *Id.* at *5; see *id.* at *2-*6. In reaching that conclusion, the court rejected the Tenth Circuit's contrary determination in this case. See *id.* at *2.

The D.C. Circuit, however, concluded that the corporations' individual owners could assert a RFRA challenge to regulations that apply only to the corporations. See *Gilardi*, 2013 WL 5854246, at *6-*10. That separate ruling conflicts with contrary holdings by the Third and Sixth Circuits. See *Conestoga Wood Specialtics Corp.* v. *Secretary of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 386-389 (3d Cir. 2013), petition for cert. pending, No. 13-356 (filed Sept. 19, 2013) (*Conestoga Wood*); *Autocam Corp.* v. *Sebelius*, No. 12-2673, 2013 WL 5182544, at *3-*5 (6th Cir. Sept. 17, 2013), petition for cert. pending, No. 13-482 (filed Oct. 15, 2013) (*Autocam*).

Finally, the D.C. Circuit held in *Gilardi* that the individual owners were likely to succeed on the merits of their RFRA claim. 2013 WL 5854246, at *10-*14. The court remanded to the district court for consideration of the other preliminary injunction factors. *Id.* at *15.

In partial dissent, Judge Edwards disagreed with the majority that regulation of the corporations "*sub-*

stantially burden[ed]" the individual owners' religious exercise. *Gilardi*, 2013 WL 5854246, at *28 (Edwards, J., concurring in part and dissenting in part); see *id.* at *28-*31. He noted that the mandate does not require the owners to use contraceptives or to "encourage [the corporations'] employees to use contraceptives any more directly than they do by authorizing [the corporations] to pay wages." *Id.* at *29. Judge Edwards explained that none of this Court's free-exercise decisions "has recognized a substantial burden on a plaintiff's religious exercise where the plaintiff is not *himself* required to take or forgo action that violates his religious beliefs, but is merely required to take action that *might* enable other people to do things that are at odds with the plaintiff's religious beliefs." *Ibid.* Judge Edwards also disagreed with the majority's holding that the mandate could not survive scrutiny under RFRA, concluding that the mandate "satisfies the compelling interest test." *Id.* at *31; see *id.* at *31-*34.[1]

2. Respondents in this case agree that certiorari should be granted, stating that "[t]he case for plenary review of the critically important issues presented by the government's petition could hardly be clearer." Br. 15. In particular, respondents recognize the im-

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[1] In another decision issued after the filing of the petition for a writ of certiorari in this case, the Sixth Circuit affirmed the denial of a preliminary injunction sought by a for-profit corporation and its sole shareholder advancing the same type of RFRA claim as respondents here. See *Eden Foods, Inc.* v. *Sebelius*, No. 13-1677, 2013 WL 5745858, at *1 (Oct. 24, 2013). The Sixth Circuit panel explained that the plaintiffs' claims were foreclosed by *Autocam*, but stated that "even if the *Autocam* decision had not been issued, [it] would not have ruled differently on [the shareholder's] claims." *Id.* at *5; see *id.* at *5-*6 (rejecting corporation's claims).

portance of the question presented (*id.* at 16-17), and the circuit conflict (*id.* at 17-18).

In addition, respondents explain that "[t]his case presents an excellent vehicle" for addressing this issue. Br. 19. The government agrees with that assessment. In particular, the court of appeals here addressed "not only the threshold issue of whether for-profit corporations may sue under RFRA, but the merits as well." *Id.* at 19-20 (citing Pet. App. 23a-43a, 44a-56a, 56a-61a). By contrast, the courts of appeals in *Autocam* and *Conestoga Wood* "addressed only the threshold issue." *Id.* at 20; see Gov't Br. at 13-15, *Conestoga Wood Specialties Corp.* v. *Sebelius*, No. 13-356 (Oct. 21, 2013); Gov't Br. at 16-17, *Autocam Corp.* v. *Sebelius*, No. 13-482 (Oct. 21, 2013).[2]

While the court of appeals in this case did not address the separate RFRA claims of the individual respondents, those claims were preserved below, were addressed by several court of appeals judges in separate opinions, and have been advanced by respondents as an alternative ground for affirmance. See Resp. Br. 27-29; see also Gov't Br. at 15-16, *Conestoga Wood Specialties Corp.*, *supra*, (No. 13-356). The government agrees that those claims would be appropriately addressed in the context of this case.[3]

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[2] In addition, as the government has explained, the petition in *Autocam* should be denied because the challenge by petitioners there to the denial of a preliminary injunction is now moot in light of the final judgment of dismissal entered in that case. See Gov't Br. at 14-16, *Autocam*, *supra* (No. 13-482).

[3] Contrary to the contention of petitioners in *Conestoga Wood* (Reply Br. at 6, *Conestoga Wood Specialties Corp.*, *supra*, No. 13-356 (Nov. 4, 2013)), the district court on remand in this case did not take any "evidence." Moreover, the district court on remand did not readdress the merits of respondents' claims, which had already

3. Respondents also defend the court of appeals' decision on the merits. Br. 23-36. The government obviously disagrees for the reasons stated in its petition for a writ of certiorari, but, as respondents recognize, "[t]here will be time enough to explore the merits if this Court grants plenary review." *Id.* at 23.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2013

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been decided by the court of appeals. Instead, the district court simply heard oral argument on the legal issues surrounding the additional preliminary injunction factors. See Resp. Br. 22 n.16.

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

Nos. 13-354; 13-356

IN THE

Supreme Court of the United States

◆

KATHLEEN SEBELIUS, SECRETARY OF HEALTH
AND HUMAN SERVICES, *et al*,
Petitioners,

—v.—

HOBBY LOBBY STORES, INC., *et al*,
Respondents.

—and—

CONESTOGA WOOD SPECIALTIES CORP., *et al*,
Petitioners,

—v.—

KATHLEEN SEBELIUS, *et al*,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

AMICUS CURIAE BRIEF OF AJC (AMERICAN JEWISH COMMITTEE) IN SUPPORT OF NEITHER PARTY

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AMICUS CURIAE BRIEF OF THE AMERICAN JEWISH COMMITTEE

INTEREST OF THE *AMICUS*

The American Jewish Committee (AJC), a national organization of more than 125,000 members and supporters with 26 regional offices, was founded in 1906 to protect the rights of American Jews.

AJC has a long-standing commitment to both religious liberty and equality for women. Ordinarily, these twin commitments are either entirely complementary. In rare cases—and these cases are such an instance—they clash. AJC supports judicial and legislative approaches which strive to resolve such conflicts in ways that minimize or eliminate those conflicts. Only if no such recourse exists, should the Court decide which right prevails in a particular case. AJC has as of now no position on the correct result should that clash need to be decided.

ARGUMENT[1]

I. ALTHOUGH THE PETITIONS MEET THE CRITERIA FOR REVIEW, IT WOULD BE PREMATURE TO GRANT REVIEW ON THE PRESENT RECORDS

The mirror image petitions for *certiorari* filed in these largely identical cases present a circuit conflict on an important open question of federal statutory and constitutional law: do for-profit corporations possess religious liberty rights? The Third and Tenth Circuits supplied conflicting answers. This makes for a textbook case for *certiorari* under Supreme Court Rule 10 and immediate plenary review. However, for reasons this Court has often articulated, it would be premature and imprudent for the Court to grant such review in the present posture of these cases.

Each Petition arises in connection with the mandate of the Patient Protection and Affordable Care Act, Pub.L. 111-148, that certain services, including all government approved methods of contraception, be covered by employer-subsidized health insurance policies. The corporate parties are owned by individuals or families with religious objections to some forms of birth control.

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[1] This brief was prepared entirely by *amicus* and its counsel. No person other than *amicus* and its counsel made any financial contribution to the preparation or submission of this brief. The parties were notified in timely fashion by letter of AJC's intention to file this brief.

That issue has already generated substantial litigation (and substantial public commentary), and will likely generate still more. The website of the Becket Fund for Religious Liberty[2] lists 39 cases of this sort. By contrast, it lists only 34 lawsuits by not-for-profit religiously affiliated groups challenging the same mandate.

There are appealing arguments on both sides of the question of whether corporations enjoy religious liberty rights. Given that corporations enjoy important rights under other provisions of the First Amendment, *e.g.*, *Citizens United v. Federal Election Commission*, 553 U.S. 310 (2010), the wholesale exclusion of Free Exercise and Establishment Clause claims would lead to a checkerboard reading of the single sentence which is the First Amendment. Corporations would, for example, be proper parties to seek judicial vindication of their right to advertise contraceptives, *Bolger v. Young Drug Products Corp.*, 463 U.S. 60 (1983), but not to challenge requirements that they pay for them.

Nevertheless, a patchwork reading of the First Amendment may well be justified on its own terms, as some lower courts considering corporate claims for exemption have found. Thus, the District Court in the *Hobby Lobby* case wrote eloquently. *Hobby Lobby Stores, Inc. v. Sebelius*, 820 F.Supp.2d 1278, 1291 (W.D. Okla. 2012), rev'd *en banc*, 723 F.3d 1114 (10th Cir. 2013), cited in *Conestoga Wood Specialities v. Sebelius*, 724 F.3d 377, 385 (3rd Cir. 2013), reprinted in Petition for *Certiorari*, No. 13-356 at 20a):

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[2] http://www.becketfund.org/hhsinformationcentral/ (visited October 15, 2013).

> General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion they do now pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.

The Third Circuit (and the dissenters in the Tenth) emphasized that imputing the religious beliefs of the owners to assert religious beliefs runs counter to the central principle of corporation law, which draws a sharp, almost impenetrable, line between shareholders and corporate entities. There is at present no authoritative answer to the question of which of these arguments is more persuasive.

Nevertheless, AJC urges this Court not to grant plenary review now. Instead, it believes that each of these cases should be remanded for the development of a complete record on the issue of whether the mandate is justified by a narrowly drawn compelling interest.

It is premature to address a relatively novel question of the first order of constitutional and statutory magnitude when further litigation might allow resolution of the parties' claims on narrower, long-since settled, principles. This Court's long-standing commitment to avoiding unnecessary constitutional decision-making mandates this result. *Northwest Austin Municipal Utility District v. Holder*, 557 U.S. 193, 206 (2009), citing *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984): "[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." Accord, *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947) (same).

If the Government is able to carry its burden of proving a compelling interest in impinging on Hobby Lobby and Conestoga Corporation's religious liberty interests (if any) sufficient to satisfy the requirements of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1(b) (RFRA) and hence the Free Exercise Clause to the extent it applies, it would obviate the need to answer the sensitive, important and far-reaching question the parties urge this Court to resolve immediately.

Only if the Government fails to satisfy that burden would it be appropriate and essential to answer the question posed to this Court.

Each of these cases comes before this Court on an appeal of a decision granting (*Hobby Lobby*) or denying (*Conestoga Wood-Working*) a preliminary injunction against enforcement of the mandate that employer funded health insurance pay for all government recognized methods of birth control, which includes the handful of forms of contraceptives to which each corporate entity asserts it harbors religious objections (essentially post-intercourse, pre-implantation, methods).

In each case, each party made allegations about the presence or absence of a narrowly drawn compelling interest. The hurried and truncated nature of the proceedings nonetheless left the relevant issues unexplored by the adversary process. Each record falls far short of the detailed and focused inquiry RFRA mandates, 42 U.SC. 2000bb-1(b) (1-2).

This Court has read RFRA's compelling interest test to "require[ ] the Government to demonstrate that the compelling interest is satisfied through application of the challenged law 'to the person' .... [T]his Court look[s] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[s] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzalez v. O'Centro Espirito Beneficiente Uniao Do Vegetal*, 546 U.S. 418, 430-41 (2006).

We are not asserting that Free Exercise or RFRA claims are inevitably an obstacle to enforcement of the contraceptive mandate over employer religious objections. At least two state courts have held that mandatory contraception coverage in employer-sponsored health plans is constitutional even in the face of an employer's religious objections. *Catholic Charities v. Serio*, 7 N.Y.3rd 510, 859 N.E.2d 232 (2006); *Catholic Charities of Sacramento v. Superior Ct.*, 10 Cal.Rptr.3rd 283, 32 Cal.4th 527, 85 P.3d 67 (2004).

But because of the manner in which these cases have been litigated, nothing like the sort of proof this Court insisted on in *O'Centro* has been proffered. No finding of fact has been made by a trial court which would allow for informed review by this Court. Likely because of the speed with which these cases have been litigated, the Government's asserted compelling interests are stated quite generally. They are aimed at those who would refuse to pay for any form of contraception. They do not specifically address claims about a few kinds of contraceptives made by these claimants.

Whether it would be possible to procure insurance policies with such specific exclusions; what the cost to individual employees would be if they had to purchase such contraceptives themselves without the benefit of health insurance; how often such contraceptives are used; and whether there are alternative methods of providing the resisted forms of contraception to employees of objecting corporations are all open questions.

It is also unclear whether different outcomes would arise under compelling interest analysis between employers objecting to all forms of contraception and those objecting only to some, and whether this would put Government in the untenable position of appearing to favor some faiths (*e.g.*, Evangelical Protestants) over others (Catholics) depending on whether they held narrower or broader religious objections to the use of contraceptives, and whether avoiding the appearance of religious favoritism would qualify as a compelling interest.

The Government did not have occasion to address in detail the corporations' claims that there were feasible alternative methods of providing these services, such as free public clinics; tax subsidies and other federal programs. Plaintiffs (who did not have the burden of proof, 42 U.S.C. § 2000bb-1(b) and 2000bb-2(3)) equally had no occasion to flesh out their claims.

There is no reason to rush to judgment in these highly freighted cases, when a settled alternative avenue for deciding them may be available. If there proves to be no compelling interest, the issue presented can be decided later. And the question of corporate religious liberty may also arise in other contexts.

Consider: [3]

•A corporation adversely affected by Sunday Blue Laws, *Braunfeld v. Brown*, 366 U.S. 599 (1961);

•Corporations challenging requirements, allegedly in conflict with their faith, about other employee benefits (*e.g.*, social security) *U.S. v. Lee*, 455 U.S. 252 (1982); *Tony and Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290 (1985) (wage and hour laws);

•A food purveyor challenging a state statute allowing the state to decide that food is (or is not) kosher, *Commack Self Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2nd Cir. 2002); *Ran Dav Kosher, Inc. v. State*, 129 N.J. 141, 608 A.2d 1353 (1992).

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[3] As the Free Exercise Clause appears in a single phrase with the Establishment Clause, and we can think of no reason why the two should be treated differently, we include examples of cases where corporations have raised Establishment Clause as well as Free Exercise claims as well.

•Corporations offering organized prayer meetings, invoking the Free Exercise Clause to resist application of anti-discrimination laws to bar such meetings as inherently discriminatory. *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

The dispute over the contraceptive mandate touches upon several of the most fundamental rights in the hierarchy of rights Americans hold dear: religious liberty; personal autonomy in making reproductive choices; and, of course, equality for women. Each of these enjoys a substantial measure of constitutional and statutory protection. Someone—ultimately this Court—must decide on how an inescapable clash between these rights is to be resolved, and how important segments of society are to be ordered.

If, in the end, those asserting religious rights must yield, it is important for them to know that they have lost because urgent, compelling and unavoidable public needs compel that result. Conversely, if the Government is unable to make out a compelling interest, and RFRA may be invoked by corporations, those pressing to enforce the contraceptive mandate universally need to know that the interests they seek to advance are too weak to override the religious liberty rights of others, and can be effectively pursued through other means.

These outcomes don't cover all eventualities—there may be no compelling interest and the Court might nonetheless hold that corporations cannot invoke RFRA (or Free Exercise Clause) rights. Even if so, there is a good chance that the parties and the public would think differently about the issue if there are judicial findings concerning the presence or absence of compelling interest.

In sum, for all the reasons that this Court has given for avoiding premature and unnecessary constitutional adjudications, see pp. 5-6, *supra*, it would be imprudent to plunge in now and set the cases for immediate plenary review.

CONCLUSION

For the reasons stated, both Petitions should be granted, the judgments vacated and the cases remanded for expedited, but thorough, presentation of evidence to determine where there exists a narrowly drawn compelling interest sufficient to justify coercing these corporate parties to comply with the mandate. [4]

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[4] We recognize that this disposition leaves open what should happen in the interim. The Third Circuit did not address the compelling interest issue at all. The Tenth gave it limited consideration, and found that, in the limited context of a request for preliminary injunction, the Government had failed to show that it had a compelling interest.

Respectfully submitted,

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Neither court (nor the district courts whose judgments were under review) engaged in the detailed fact-specific review contemplated by RFRA. Perhaps, then, the Government should be enjoined from enforcing the mandate, with its attendant penalties for failure to include a few contraceptive services, upon an undertaking by the companies to reimburse employees for actual expenses which would have been reimbursed under compliant insurance policies should the Government ultimately prevail. Perhaps other interim results are more just.

AMICUS
CURIAE
BRIEF

Nos. 13-354 & 13-356

RECORD
AND
BRIEFS

In The
Supreme Court of the United States

◆

KATHLEEN SEBELIUS, SECRETARY OF
HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,

Respondents.

◆

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,

Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF
HEALTH AND HUMAN SERVICES, ET AL.,

Respondents.

◆

**On Petitions For A Writ Of Certiorari
To The United States Courts Of Appeals
For The Tenth And Third Circuits**

◆

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF GOSPEL RESCUE MISSIONS, PRISON FELLOWSHIP MINISTRIES, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, NATIONAL ASSOCIATION OF EVANGELICALS, ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, THE C12 GROUP AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF GRANTING THE PETITIONS

◆

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QUESTION PRESENTED

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, provides that the government "shall not substantially burden a person's exercise of religion" unless that burden satisfies strict scrutiny. *Id.* § 2000bb-1(a), (b). Respondents are a family and their closely held businesses, which they operate according to their religious beliefs. A regulation under the Patient Protection and Affordable Care Act requires Respondents to provide insurance coverage for all FDA-approved "contraceptive methods [and] sterilization procedures." 42 U.S.C. § 300gg-13(a)(4); 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011). Respondents' sincere religious beliefs prohibit them from covering four out of twenty FDA-approved contraceptives in their self-funded health plan. If Respondents do not cover these contraceptive methods, however, they face severe fines.

The question presented is whether the regulation violates RFRA by requiring Respondents to provide insurance coverage for contraceptives in violation of their religious beliefs, or else pay severe fines.

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INTEREST OF *AMICI CURIAE*[1]

The **Association of Gospel Rescue Missions** ("AGRM") was founded in 1913 and has grown to become North America's oldest and largest network of independent crisis shelters and recovery centers offering radical hospitality in the name of Jesus. Last year, AGRM-affiliated ministries served nearly 42 million meals, provided more than 15 million nights of lodging, bandaged the emotional wounds of thousands of abuse victims, and graduated over 18,000 individuals from addiction recovery programs. The ramification of their work positively influences surrounding communities in countless ways.

The first U.S. gospel rescue mission was founded in New York City in the 1870s and has continuously operated as a Christian ministry to the poor and addicted in the Bowery for 134 years. During that time, generations of men and women have followed their Christian calling to found gospel rescue missions and minister to the needs of the hungry, homeless, abused, and addicted in cities and small communities across America. This calling is inseparable from and an outward sign of their faith, as *James* 2:14-17 teaches:

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* and their counsel, make a monetary contribution to the preparation or submission of this brief. The parties consented to this filing. Their letters of consent are on file with the Clerk. As required by Rule 37.2(a), counsel for *amici curiae* provided timely notice of the intent to file this brief to all parties' counsel of record.

> What good is it, my brothers, if someone says he has faith but does not have works? Can that faith save him? If a brother or sister is poorly clothed and lacking in daily food, and one of you says to them, "Go in peace, be warmed and filled," without giving them the things needed for the body, what good is that? So also faith by itself, if it does not have works, is dead.

Prison Fellowship Ministries ("PFM") is the largest prison ministry in the world and partners with thousands of churches and tens of thousands of volunteers to care for prisoners, former prisoners, and their families, regardless of their religious beliefs or lack thereof. With one-on-one mentoring, in-prison seminars and various post-release initiatives, PFM uses religious-based teachings to help guide prisoners when they return to their families and society, and thereby contributes to restoring peace in those communities most endangered by crime.

The **Association of Christian Schools International** is a non-profit, non-denominational, religious association that serves nearly 24,000 Christian schools that educate nearly 5.5 million children in over 100 countries, including nearly 3,800 Christian preschools, elementary, and secondary schools and over 100 post-secondary institutions in the United States.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, non-profits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that human life is sacred, that civil government has no higher duty than to protect human life, and the duty is particularly applicable to the life of unborn children because they are helpless to protect themselves.

The **Ethics & Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 16 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as freedom of speech, religious freedom, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The **Institutional Religious Freedom Alliance** ("IRFA"), founded in 2008, works to protect the religious freedom of faith-based service organizations through a multi-faith network of organizations to educate the public, train organizations and their lawyers, create policy alternatives that better protect religious freedom, and advocate to the federal administration and Congress on behalf of the rights of such faith-based services.

The **Christian Legal Society** ("CLS") is a non-profit, non-denominational association of Christian attorneys, law students, and law professors, with chapters in nearly every state and on many law school campuses. CLS's legal advocacy division, the Center for Law & Religious Freedom, acts to protect all religious citizens' right to be free to exercise their religious beliefs. CLS also offers its members opportunities to provide legal aid to those who cannot afford legal services, regardless of the clients' faith or lack thereof.

The C12 Group is a fee-for-service organization that serves and equips Christian chief executives with more than 1250 members across 30 American states. The C12 Group is distinctive in that it combines business/leadership best practices and MBA-level content from a Biblical worldview perspective to help its members build thriving platforms for ministering to the thousands of stakeholders that a typical, established, small-to-midsized business serves each year. More than ninety percent of The C12 Group's clients are privately-held family businesses run by individuals who view themselves as tending to God's companies as stewards and, therefore, operate according to core principles informed by their deeply-held Christian faith. The HHS Mandate is broadly objectionable to the overwhelming majority of its members as a violation of their Christian consciences.

◆

SUMMARY OF ARGUMENT

Amici share a deep and abiding commitment to religious liberty, not just for themselves, but for Americans of all faith traditions. In the specific context of the HHS Mandate, *amici* may differ in their views regarding the morality of promoting the use of contraceptives in general, or of emergency contraceptives in particular. *Amici*, however, believe that our Nation's historic, bipartisan commitment to religious liberty requires that the government respect the religious beliefs of those faith traditions whose religious beliefs prohibit participating in, funding, or otherwise facilitating the use of contraceptives generally, or abortion-inducing drugs specifically. The Mandate sharply departs from the Nation's bipartisan tradition of respect for religious liberty, especially its deep-rooted protection of religious conscience in the context of abortion.

This brief makes two distinct points. First, *amici* believe that religious liberty protects the individual religious owners and their businesses in both these cases. Christian theology teaches that Christians' faith necessarily should influence how they work because "[w]hatever you do, work at it with all your heart, as working for the Lord, not for men." *Colossians* 3:23.[2] To this end, several of the *amici* have as a primary purpose to assist their members with the integration of their faith and work.[3]

Second, *amici* agree that the Mandate's exemption for a small subset of religious employers is completely inadequate to protect religious liberty. Until the Mandate, *amici* and organizations like them – religious educational institutions and religious social service providers to society's most vulnerable – epitomized the quintessential "religious employer."

But the Mandate unilaterally re-defined most religious employers to be non-religious employers. By administrative fiat, the Mandate deprived religious educational institutions, hospitals, associations, and charities of their religious liberty. Only churches, their integrated auxiliaries, conventions or associations of churches, or religious orders' exclusively religious activities fall within the Mandate's exemption for religious employers. 78 Fed. Reg. 39870 (published July 2, 2013). Many, if not most, religious educational institutions and religious ministries do not qualify for the exemption. The many religious ministries that are independent of, and unaffiliated with, any specific church are not exempt under the government's impoverished, one-size-fits-all misconception of "religious employer."

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[2] Quotations are from the New International Version of *The Bible*.

[3] In speaking of the Christian tradition regarding faith and work, *amici* in no way imply that other faiths do not have their own religious convictions regarding faith and work that are to be respected. *Amici* are simply addressing their faith's teaching. Also, when speaking in terms of religious liberty, "church" should be taken to include other faiths' places of worship. *See generally*, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694 (2012).

Those religious organizations that fall outside of the Mandate's crabbed definition of "religious employer" are forced into a so-called "accommodation" that violates, rather than respects, their religious liberty. Under the so-called accommodation, the government requires religious organizations to facilitate access to the objectionable drugs through their insurers or third party administrators contrary to their sincerely held religious convictions. Indeed, some of the insurers and third party administrators are themselves religious organizations who cannot in good conscience comply with the Mandate.

The government's insistence that religious organizations are not buying objectionable insurance because the government asserts that contraceptive coverage will be "cost-neutral" does not accord with economic, legal, or moral reality. Moreover, in light of the bureaucratic expense and waste that implementation of the "accommodation" will necessarily create for the government and religious organizations, as well as insurers and third-party administrators, it would be more economical and efficient for the government itself to provide contraceptives through direct distribution, tax credits, or other government means.

At the end of the day, this case is not about whether contraceptives will be readily available – access to contraceptives is plentiful and inexpensive – but whether America will remain a pluralistic society that sustains a robust religious liberty for Americans of all faiths. Both the Religious Freedom Restoration Act and the First Amendment require that the government respect religious liberty by protecting all entities with sincerely held religious convictions from providing, or otherwise enabling, the objectionable coverage.

◆

ARGUMENT

I. Christian Theology Teaches that Christians' Faith Necessarily Should Influence Their Work.

The government's argument that religious persons forfeit their free exercise of religion when they enter the marketplace brushes aside two millennia of Christian teaching. The great Christian thinkers historically have urged Christians to incorporate into their daily work the profound conviction that their mundane work matters to God. More than simply earning a living, work is a calling, a vocation, intended to honor God. Contemporary Christian writers continue to invite modern Christians to live lives of integrity in which their workday lives reflect their religious convictions and thereby honor God.

Jesus Himself taught His disciples that how they handled their material possessions was important to God. For example, in the "Parable of the Rich Fool," Jesus told of a prosperous farmer who decided to build bigger barns to store his goods so that he could "[t]ake life easy; eat, drink and be merry," only to be told by God that "[t]his very night your life will be demanded from you." According to Jesus, the parable taught "how it will be with anyone who stores up things for himself but is not rich toward God." *Luke* 12:13-21. Or consider Zaccheus, who had gained great wealth through his career as a chief tax collector. After Jesus visited him, Zaccheus announced that he would repay anyone he had cheated "four times the amount" and give half of his possessions to the poor. *Luke* 19:1-9.[4]

The importance of having a proper understanding of work and its importance to God is deeply rooted in Christian theology. Scripture instructs that "[w]hatever you do, work at it with all your heart, as working for the Lord, not for men." *Colossians* 3:23. *See also*, *I Corinthians* 10:31.

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[4] Tax collectors and soldiers likewise understood that their spiritual conversion should affect their job performance. In response to their queries, John the Baptist told the tax collectors not to collect any more than they were required to collect in taxes and instructed the soldiers not to extort money, accuse people falsely, or be discontent with their pay. *Luke* 3:13-14.

Pope John Paul II declared:

> The vocation of the lay faithful to holiness implies that life according to the Spirit expresses itself in a particular way in their *involvement in temporal affairs* and in their *participation in earthly activities*. Once again the apostle admonishes us: "Whatever you do, in word or deed, do everything in the name of the Lord Jesus, giving thanks to God the Father through him" (*Col.* 3:17). Applying the apostle's words to the lay faithful, the Council categorically affirms: "Neither family concerns nor other secular affairs should be excluded from their religious programme of life." Likewise the Synod Fathers have said: "The unity of life of the lay faithful is of the greatest importance: *indeed they must be sanctified in everyday professional and social life*. Therefore, to respond to their vocation, the lay faithful must see their daily activities as an occasion to join themselves to God, fulfill his will, serve other people and lead them to communion with God in Christ.

Apostolic Exhortation on the Lay Faithful, Chap. 1, n. 17 (1988) (original emphasis), *available at* http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/document/hf_jp_iiexh_30121988_christifideles-laici_en.html (last visited Oct. 21, 2013).

John Calvin set forth a Christian understanding of work as a God-given calling:

> [T]he Lord enjoins every one of us, in all the actions of life, to have respect to our own

> calling. . . . [I]t is enough to know that in everything the call of the Lord is the foundation and beginning of right action. He who does not act with reference to it will never, in the discharge of duty, keep the right path. . . . This, too, will afford admirable consolation, that in following your proper calling, no work, will be so mean and sordid as not to have a splendor and value in the eye of God.

John Calvin, *Institutes of the Christian Religion*, III.X.6 (Henry Beveridge, trans.) (1845).

Martin Luther likewise "rejected the division between sacred and secular spheres" and "broadened the concept of vocation from a narrow ecclesiastical focus to describe the life and work of all Christians in response to God's call." Kathryn Kleinhans, *The Work of a Christian: Vocation in Lutheran Perspective, in Word & World*, Vol. 25, No. 4 at 394, 396 (Fall 2005) (pub. Lutheran Seminary, St. Paul, Minn.). Thus, "[s]een through the lens of vocation, all human work becomes a means to participate in God's creating and sustaining activity on earth." *Id.* at 396. In Luther's own words, "[e]very occupation has its own honor before God, as well as its own requirements and duties." *Id.*, *quoting* Martin Luther, "A Sermon on Keeping Children in School" (1530), *in Luther's Works*, 55 vols., ed. Jaroslav Pelikan and Helmut

Lehmann (Philadelphia and St. Louis: Fortress and Concordia, 1955-1986) 46:246.

Echoing this concept of vocation, C. S. Lewis, perhaps the most widely read twentieth-century Christian writer, urged that:

> The work of a Beethoven, and the work of a charwoman, become spiritual on precisely the same condition, that of being offered to God, of being done humbly "as to the Lord". . . . We are members of one body, but differentiated members, each with his own vocation.

C. S. Lewis, "Learning in War-Time" *in The Weight of Glory* 55-56 (Harper Collins 2001). Lewis observed that "Christianity does not simply replace our natural life and substitute a new one: it is rather a new organization which exploits, to its own supernatural ends, these natural materials. . . . There is no essential quarrel between the spiritual life and the human activities as such." *Id.* at 54-55.

A leading contemporary evangelical pastor, Timothy Keller of Redeemer Presbyterian Church in New York City, devoted an entire book to the topic of faith and work. In *Every Good Endeavor*, Keller posits that God "gives us a clear purpose for our work and faithfully calls us into it." Timothy Keller & Katherine Leary Alsdorf, *Every Good Endeavor* 63 (2012). "Our daily work can be a calling only if it is reconceived as God's assignment to serve others. And that is exactly how the Bible teaches us to view work." *Id.* at 66. In order to "ma[k]e vocational discipleship – helping people integrate their faith and work – a major focus of its overall ministry," Redeemer Presbyterian Church has established a Center for Faith and Work. *Id.* at 242-253. *See* http://www.faithandwork.org/. Many such Christian institutes are exploring the blend of faith and work.

Similarly, *amicus* The C12 Group assists Christian business leaders to apply biblical standards in their daily work. *Amicus* Christian Legal Society challenges attorneys to integrate their faith and legal practice. *See generally*, Michael P. Schutt, *Redeeming Law: Christian Calling and the Legal Profession* (2001). *See also*, Michael W. McConnell, Robert F. Cochran, Jr., and Angela C. Carmella, *Christian Perspectives on Legal Thought* (Yale University 2001). Many other professional organizations also focus on the integration of faith and work. *See, e.g.*, Gene Rudd, M.D. (Senior Vice President of Christian Medical and Dental Associations), and Alan Weir, M.D., *Practicing by the Book: A Christian Doctor's Guide to Living and Serving* (2005).

The family owners of Hobby Lobby, Mardel, and Conestoga Wood Specialties are living consistently with two millennia of teaching that one's faith necessarily should influence one's work. The government's arbitrary line-drawing between non-profit and for-profit work disregards orthodox Christian doctrine regarding the duty to honor God through one's work.

II. The Mandate Fails to Protect the Religious Liberty of Both For-Profit Businesses and Non-Profit Religious Organizations.

While both of these cases involve for-profit businesses owned by religious individuals, the Mandate's suppression of religious liberty extends to non-profit religious organizations. The Mandate infringes the religious liberty of non-profit religious organizations in at least two basic ways: 1) a too narrow exemption for churches but not other religious organizations and 2) a so-called accommodation that promotes the Mandate's unconstitutional requirement that religious organizations facilitate access to drugs which violate their religious convictions. While the exemption and accommodation are not at issue in cases involving for-profits, it is important that the Court understand the coercive impact of the Mandate, as well as the inadequacy of the exemption and so-called accommodation, vis-à-vis religious non-profits' right to freely exercise their religious beliefs.

The Court's resolution of cases involving for-profits necessarily will affect non-profit religious organizations. There is no substantive difference between the Mandate's practical impact on for-profits and non-profit religious organizations. As explained below, despite the so-called accommodation and the too narrow exemption for religious employers, non-profit religious organizations are still required by the Mandate to facilitate access to drugs that violate their religious beliefs. Furthermore, the analyses of the Mandate's substantial burden and the resulting strict scrutiny for religious non-profit organizations likely will parallel those analyses for religious owners and their businesses. As a result, granting the petitions and eventually ruling in favor of Hobby Lobby, Mardel, and Conestoga Wood Specialties and their owners will greatly increase the likelihood that non-profit religious organizations will also secure their religious liberty.

A. The majority of religious employers are not covered by the Mandate's excessively narrow exemption for "religious employers."

For two years, a multitude of religious organizations have unsuccessfully sought a definition of "religious employer" that respects all faith communities' religious liberty. But for two years, the government has seemed bent on casting the narrowest net possible in order to protect the fewest religious employers possible.

The Mandate leaves any exemption for religious organizations entirely to the discretion of the Health Resources and Services Administration (HRSA) of the Department of Health and Human Services. 76 Fed. Reg. 46221, 46623 (published Aug. 3, 2011). In August 2011, HRSA issued a "religious employer" exemption that protects only a severely circumscribed subset of religious organizations. *Id.* at 46623; 45 C.F.R. § 146.130. To qualify as a "religious employer" for purposes of the exemption, a religious organization was required to: 1) inculcate values as its purpose;

2) primarily employ members of its own faith; 3) serve primarily members of its own faith; and 4) be an organization as defined in Internal Revenue Code § 6033(a)(1) or § 6033(a)(3)(A)(i) or (iii). 45 C.F.R. § 147.130(a)(1)(iv)(B).[5] The fourth criteria refers only to churches, their integrated auxiliaries, associations or conventions of churches, or exclusively religious activities of religious orders.

The exemption failed to protect most religious employers, including colleges, schools, hospitals, homeless shelters, food pantries, health clinics, and other religious organizations. This failure was intentional. HRSA itself stated that its intent was "to provide for a religious accommodation that respects the unique relationship between *a house of worship and its employees in ministerial positions*." 76 Fed. Reg. at 46623. *See also*, 77 Fed. Reg. 16501, 16502 (published Mar. 21, 2012).

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[5] HHS reached for a controversial definition of "religious employer" that it knew was highly problematic for religious charities. Used by only three states, the definition had twice been challenged in state courts. *Catholic Charities v. Superior Court*, 85 P.3d 67 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459 (N.Y. 2006). That these state mandates had been challenged by Catholic Charities as a violation of their religious liberty indicates that HHS officials necessarily knew the exemption would be unacceptable to many religious organizations. But at least religious organizations could avoid state contraceptive mandates by utilizing federal ERISA strategies, an option unavailable under the federal Mandate.

Similarly, on April 8, 2013, Secretary Sebelius said:

> Churches and church dioceses as employers are exempted from this benefit. *But Catholic hospitals, Catholic universities, other religious entities will be providing coverage to their employees starting August 1st*. . . . [A]s of August 1st, 2013, every employee who doesn't work directly for a church or a diocese will be included in the benefit package.

The Forum at Harvard School of Public Health, A Conversation with Kathleen Sebelius, U.S. Secretary of Health and Human Services, Apr. 8, 2013, *available at* http://theforum.sph.harvard.edu/events/conversation-kathleen-sebelius/ (at 48-53 min.) (last visited Oct. 21, 2013) (emphasis added).

Until the Mandate, religious educational institutions and religious charities that serve society's most vulnerable epitomized "religious employers." But the Mandate transformed the majority of religious employers into nonreligious employers.

Forty-four Protestant, Jewish, and Catholic organizations immediately sent a letter to HHS explaining why the proposed definition was unacceptably narrow. Their criticism of the exemption was two-fold. First, the definition of "religious employer" was unacceptably narrow. Even some houses of worship failed to qualify for the exemption because of its peculiar design. To qualify as a "religious employer," a house of worship would have to serve primarily persons of the same faith. But many houses of worship, as well as many religious charities, would consider it a violation of their core religious beliefs to turn away persons in need because they did not share their religious beliefs.

Second, the Mandate's definition of "religious employer" created a two-class bifurcation among religious organizations.[6] In a letter to the HHS Secretary, one hundred twenty-five religious organizations also objected to the government's attempt to divide the religious community into two classes: "churches – considered sufficiently focused inwardly to merit an exemption and thus full protection from the mandate; and faith-based service organizations – outwardly oriented and given a lesser degree of protection." The letter reasoned:

> [B]oth worship-oriented and service-oriented religious organizations are authentically and equally religious organizations. To use Christian terms, we owe God wholehearted and pure worship, to be sure, and yet we know also that "pure religion" is "to look after orphans and widows in their distress" (*James* 1:27). We deny that it is within the jurisdiction of the federal government to define,

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[6] *See* Letter to Joshua DuBois, Director of The White House Office of Faith-based and Neighborhood Partnerships, from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, August 26, 2011, *available at* http://www.clsnet.org/document.doc?id=322 (last visited Oct. 21, 2013).

> in place of religious communities, what constitutes both religion and authentic ministry.[7]

The Council for Christian Colleges & Universities, for example, also expressed its objections to a two-tier exemption in a letter to President Obama on behalf of its 138 member and affiliate schools.[8]

Nonetheless, over the sustained protest of wide swaths of the religious community, the government codified the excessively narrow definition of "religious employer" into law. 78 Fed. Reg. 8456 (published Feb. 15, 2012). In July 2013, the definition of "religious employer" for purposes of the exemption was amended by dropping three of the four criteria. 78 Fed. Reg. 39870 (published July 2, 2013). But elimination of the first three criteria failed to resolve the definition's basic defect.

The revised exemption perpetuates the second-class treatment of religious colleges and charities. The government made it clear that its elimination of the first three criteria was not intended to "expand the universe of employer plans that would qualify for the exemption." 78 Fed. Reg. at 8458-59. The exemption is still narrowly limited to churches, associations or conventions of churches, integrated auxiliaries, or the exclusively religious activities of religious orders.

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[7] Letter to Secretary Sebelius from Stanley Carlson-Thies, Institutional Religious Freedom Alliance, and 125 religious organizations, June 11, 2012, *available at* http://www.clsnet.org/document.doc?id=367 (last visited Oct. 21, 2013).

[8] Letter to President Obama from Paul Corts, President, CCCU, March 9, 2012, *available at* http://www.cccu.org/news/articles/2012/CCCU-Sends-New-Letter-to-White-House-Regarding-Contraceptive-Mandate-Accommodation (last visited Oct. 21, 2013).

Clinging to a definition of "religious employer," the government links a vital religious exemption to provisions of the tax code that have nothing to do with health care or conscience. Many religious organizations do not qualify as "preferred" § 6033 organizations because many faith-based organizations are not formally affiliated with a religious congregation or denomination.[9] Evangelical Christian institutions often are collaborative efforts across numerous denominations and intentionally independent of any specific denomination. The exemption denies religious liberty to religious organizations that have an intentional interdenominational or ecumenical affiliation. Similarly, Catholic organizations often are not formally affiliated with their diocese and also are denied the exemption.[10]

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[9] Numerous leaders of Protestant organizations expressed this concern in a letter to President Obama. Letter to President Obama from Leith Anderson, President, National Association of Evangelicals, *et al.*, December 21, 2011, *available at* http://www.nae.net/resources/news/712-letter-to-president-on-contraceptives-mandate (last visited Feb. 18, 2013).

[10] For example, the Roman Catholic Archdiocese of Washington, D.C., qualifies for the exemption, but the Catholic Charities of the Archdiocese of Washington, the Consortium of Catholic Academies of the Archdiocese of Washington, Archbishop Carroll

(Continued on following page)

The final definition of "religious employer" actually squeezed the exemption further. Under the February 2012 exemption, a church could plausibly include church-affiliated religious organizations, such as schools and other ministries that did not otherwise qualify for the exemption, in the church's insurance plan. 77 Fed. Reg. 16501, 16502. But the June 2013 regulation forecloses that option by restricting the exemption solely to the qualifying religious employer and not to any affiliated organizations that are covered by its plan. 78 Fed. Reg. 8456, 8467 ("This approach would prevent what could be viewed as a potential way for employers that are not eligible for the accommodation or the religious employer exemption to avoid the contraceptive coverage requirement by offering coverage in conjunction with an eligible organization or religious employer through a common plan.")[11]

To justify its differential treatment between churches and other religious organizations, the government asserts that employees of religious nonprofit organizations are less likely to share their

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High School, and Catholic University of America are not exempt. Despite the exemption, the Archdiocese must either sponsor a health plan that facilitates access to the objectionable drugs for the non-exempt organizations' employees or stop covering these ministries. *See* Motion for Preliminary Injunction at 2, *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-5091 (D.C. Cir. Aug. 12, 2013).

[11] *See* footnote 10.

employers' religious beliefs than are the employees of a church. Yet no evidence is given for this bald assertion. Given the pay differential between most religious non-profits and other employers, it seems highly likely that employees of religious non-profits share their employers' religious beliefs. That is, persons choose to work for religious non-profits because they agree with their religious employers' mission and, therefore, make the necessary financial sacrifices. For example, teachers at religious schools often accept a lower salary compared to their public school counterparts in order to teach in a school whose mission aligns with their religious beliefs.[12]

Thus the exemption excludes religious ministries that serve as society's safety net for the most vulnerable. Through the exemption, the government has unilaterally re-defined what it means to be a religious organization. Religious organizations that ease government's burden by providing food, shelter, education, and health care for society's most vulnerable are rewarded with a government mandate that assails their conscience rights.

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[12] According to *amicus* Association of Christian Schools International's annual survey of its members, in December 2012, an ACSI-member K-12 teacher with a Master's degree earned $32,000 (national average) while a similar public school teacher earned $51,000. *See* http://www.acsiglobal.org/acsi-2012-13-school-survey (last visited Oct. 21, 2013).

B. The so-called accommodation compels non-profit religious organizations to provide access to drugs that violate their religious beliefs.

The so-called accommodation fails to offer adequate religious liberty protection for non-profit religious organizations. Instead, the so-called accommodation coerces religious organizations to facilitate access to drugs to which they have religious objections.

Despite widespread protest from the religious community, the government codified the so-called accommodation for non-exempted, non-profit religious organizations. 78 Fed. Reg. 39870, 39874, 39877-78 (published July 2, 2013). A non-profit organization that holds itself out as a religious organization is eligible for the accommodation if it "[o]pposes providing coverage for some or all of the contraceptive services required." *Id.* at 39874. But by delivering its self-certification that it is eligible for the accommodation to its insurer or a willing third party administrator, the religious organization itself triggers the provision of abortion-inducing drugs to its employees and their beneficiaries. 78 Fed. Reg. at 39892-93.

Essentially, the so-called accommodation requires a religious organization with religious objections to covering drugs that violate its sincerely held religious convictions to identify an insurer, or a willing third-party administrator, which the government then requires to pay the costs of contraceptive coverage without any cost-sharing by the employees and (supposedly) without higher premiums charged to the religious organizations. 78 Fed. Reg. 39870 (published July 2, 2013).

The so-called accommodation fails on multiple levels. First, the religious organization's insurance plan remains the conduit for delivering drugs that violate the organization's religious beliefs. No employee or beneficiary receives the objectionable drugs unless they are enrolled in the religious organization's health insurance plan. When an employee leaves the plan, access to the objectionable drugs ceases.

Second, a religious objection to taking human life is not satisfied by hiring a third-party who is willing to do the job. At bottom, that is the essence of the so-called accommodation. Because, and only because, the religious organization provides insurance are the objectionable drugs made available to the organization's employees.[13]

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[13] For example, East Texas Baptist University and Houston Baptist University have filed suit challenging the Mandate because they have religious objections to providing coverage for abortion-causing drugs themselves or through a third-party. *East Texas Baptist University, et al. v. Sebelius, et al.*, No. 4:12-cv-03009, Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment and Preliminary Injunction at 20 (S.D. Tex. Aug. 30, 2013) (discussing why the so-called accommodation violates the religious organizations' religious beliefs that prohibit "soliciting, contracting with, or designating a third party to provide these drugs"). *See also*, *Southern Nazarene University, et al. v. Sebelius, et al.*, No. 5:13-cv-01015-F, Complaint ¶¶ 5-7 (W.D.

(Continued on following page)

Third, the government's assurances – that the so-called accommodation places real distance between religious organizations and access to the objectionable drugs – are hollow. Such assurances rest on the unconstitutional premise that the government, rather than the religious organizations, determines when the distance is adequate to satisfy the organizations' religious consciences. But the government has it backwards: the religious organizations, not the government, determine the distance necessary. *See Thomas v. Review Bd.*, 450 U.S. 707, 715 (1981) ("Thomas drew a line and it is not for us to say that the line he drew was an unreasonable one.").

Fourth, the so-called accommodation provides no credible means for covering the cost of the objectionable drugs absent the employers' premiums. Even were the coverage "cost-neutral" over a span of years, as the government claims, the up-front costs would be significant and would need to be paid now. 78 Fed. Reg. at 39877-78. The government offers insurers two modest proposals: 1) "set the premium . . . as if no payments for contraceptive services had been provided to plan participants," or 2) "treat the cost of payments for contraceptive services . . . as an administrative

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Okla. Sept. 20, 2013) (accommodation "conscripts the Universities into the government's scheme, forcing them to obtain an insurer or third-party administrator to arrange payment for the objectionable drugs, so that such coverage will apply to the Universities' own employees as a direct consequence of their employment with the Universities and of their participation in the health insurance benefits the Universities provide them").

cost that is spread across the issuer's entire risk pool, excluding plans established or maintained by eligible organizations." *Id.* Both proposals lack credibility.

Fifth, the so-called accommodation requires a *self-insured* religious employer to find a third party administrator to provide the drugs, without cost sharing, to its employees and their beneficiaries, even though the religious employer believes it is wrong to facilitate access to those drugs. *Id.* at 39880. A self-insured religious organization must provide the names of its employees to a third party administrator. The religious organization must constantly coordinate with the third party administrator to update the list of plan participants when employees leave the organization or new employees are hired. 78 Fed. Reg. 39876. The religious organization must coordinate with the third-party administrator when notices are sent. *Id.*

At bottom, the government's insistence that religious organizations are not buying objectionable insurance because the government deems contraceptive coverage to be cost-neutral does not deal with economic, legal, or moral reality. Religious organizations that offer health insurance do not pay for individual benefits and products at the time they are dispensed. Instead, the religious organizations pay a premium for a policy that provides access to covered drugs, and that access includes access to the objectionable drugs. Religious organizations are thereby paying an insurer to provide employees with access to the objectionable drugs contrary to their sincerely held religious beliefs. That is the basic reality.

In light of the bureaucratic expense and waste that implementation of the so-called accommodation will necessarily create for the government and religious organizations, as well as insurers and third party administrators, it clearly would be more economical and efficient for the government itself to provide contraceptives through direct distribution, tax credits, or other government means.

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CONCLUSION

A leading religious liberty scholar recently warned: "For the first time in nearly 300 years, important forces in American society are questioning the free exercise of religion in principle – suggesting that free exercise of religion may be a bad idea, or at least, a right to be minimized." Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. Det. Mercy L. Rev. 407, 407 (2011). Religious liberty is among America's most distinctive contributions to humankind. But it is fragile, too easily taken for granted and too often neglected. By sharply departing from our nation's historic, bipartisan tradition of respecting religious conscience, the Mandate poses a serious threat to religious liberty and pluralism.

The petitions for a writ of certiorari should be granted in order to affirm the Tenth Circuit's en banc ruling in *Hobby Lobby* and reverse the Third Circuit's ruling in *Conestoga Wood Specialties*.

Respectfully submitted,

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Supreme Court of the United States

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KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.

◆

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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BRIEF OF CALIFORNIA, CONNECTICUT, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, NEW YORK, OREGON, VERMONT, AND WASHINGTON AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

This case implicates issues of critical importance to Amici States, including (1) the integrity of the corporate form, which is a creation of state law; and (2) the health and welfare of our citizens, including their access to preventive health care services.

Although the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, applies only to the federal government, *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Tenth Circuit's decision would render broad areas of state regulation vulnerable to challenge. Courts considering religious challenges to state laws and regulations reference federal decisions under RFRA where parties invoke free exercise protections under the First Amendment, state constitutions, and state statutes analogous to RFRA. *See, e.g.*, *State v. Hardesty*, 214 P.3d 1004, 1007-09 (Ariz. 2009) (en banc); *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033-35 (Fla. 2004); *Mitchell Cnty. v. Zimmerman*, 810 N.W.2d 1, 18 (Iowa 2012); *Champion v. Sec'y of State*, 761 N.W.2d 747, 758 (Mich. Ct. App. 2008); *Barr v. City of Sinton*, 295 S.W.3d 287, 306 (Tex. 2009).

Moreover, related federal law, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq.*, which is subject to a similar analytical framework, applies directly to states. Similar to RFRA, RLUIPA bars state and local governments from enforcing certain land use regulations that impose a substantial burden on "the religious exercise of a person" absent demonstration of a compelling government interest.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief, or received notice prior to the due date and waived 10-days' advance notice.

Accordingly, the Tenth Circuit's decision will affect the States and their citizens both through its direct impact on federal regulation and through its indirect impact on state regulation.

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SUMMARY OF ARGUMENT

The federal government's regulations implementing the Patient Protection and Affordable Care Act (ACA) carefully and appropriately address an area of potential tension between the government's interests in expanding women's access to contraceptives and the rights of individuals and religious institutions to act in accordance with their religious beliefs. The pertinent regulations address this tension by exempting "religious employers" from the requirement that employer health plans include coverage for FDA-approved contraceptives without employee cost sharing, and by providing other accommodations for group health plans offered by nonprofit religious organizations that object to the coverage requirement on religious grounds. *See* 78 Fed Reg. 39,870, 39,873-82, 39,886-88 (July 2, 2013) (preamble to final regulations adopted at 45 C.F.R. § 147.131). The exemption and accommodation are designed to protect both religious freedom and public health. *Id.* The Tenth Circuit's decision upsets the delicate balance by greatly expanding the types of entities that may seek exemption from the coverage requirement to include corporations established for commercial, rather than religious, purposes.

1. The court of appeals' decision merits review because its determination that a for-profit corporation may claim exemption from religion-neutral regulation based on the religious objections of its owners would have broad consequences. The decision's reasoning could allow corporate owners to improperly disregard the corporate form and assert religious motivations to avoid regulatory obligations, leading to unfair market advantages and threatening the uniform enforcement of essential state regulation. Resolving disputes arising from such religiously motivated "opt outs" could compel courts and state governments to examine the religious beliefs of corporate owners and corporations, threatening excessive entanglement with religion.

2. The Tenth Circuit's rejection of the federal government's compelling interests in promulgating the contraceptive coverage requirement – which include safeguarding public health and ensuring gender equity in access to healthcare – merits review in its own right. Access to contraceptive services is critical to the health of women and infants; women's economic and social wellbeing; and women's opportunities to participate fully in society. In discounting the federal government's compelling interests, the

Tenth Circuit erred in a way that threatens state regulation intended to further these same compelling interests.

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ARGUMENT

I. Review Should Be Granted Because the Tenth Circuit's Expansive Interpretation of RFRA Improperly Disregards the Corporate Form and, if Not Reversed, Will Undermine Competition and Hurt the States

In holding that, under RFRA, a corporation exercises the religious beliefs of its owners, the Tenth Circuit's decision strikes at the heart of corporations law by disregarding the fundamental principle of separate corporate personality. In so doing, the decision invites abuse of the corporate form and entangling inquiries into the religion of corporations and their owners, among other negative effects.

A. The Tenth Circuit's Decision Subverts Basic Principles of Corporations Law

By attributing the religious beliefs of Hobby Lobby's and Mardel's owners to the corporate entities they own and manage, and by allowing these for-profit corporations to assert a right to exemption from a neutral law based on those beliefs, the Tenth Circuit's decision marks a "radical revision of . . . the law of corporations." Pet. App. 123a (Briscoe, C.J., concurring in part and dissenting in part). If allowed to stand, the decision would undermine the integrity of the corporate form.

Underlying the law of corporations is the principle that, with limited exceptions, owners and shareholders are "distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). This principle applies even to corporations owned by a single shareholder. *Id.* The principle of separate corporate personality is recognized under the law of Oklahoma, where respondents Hobby Lobby Stores, Inc., and Mardel, Inc., are incorporated, including as applied specifically to family businesses. *See Sautbine v. Keller*, 423 P.2d 447, 451 (Okla. 1966) ("[E]ven a family corporation is a separate and distinct legal entity from its shareholders."); *see also Carter v. Schuster*, 227 P.3d 149, 154 (Okla. 2009).

Following from the principle of separate corporate personality, the business owner makes a conscious choice when electing to incorporate: accept the advantages of the corporate form, including and in particular the limitation of personal liability, in exchange for "g[i]v[ing] up several prerogatives, including that of direct legal action to redress an injury to him as primary stockholder in the business." *Kush v. Am. States Ins. Co.*, 853 F.2d 1380, 1384 (7th Cir. 1988).

The court of appeals' decision, however, would turn the traditional protection afforded by the corporate form inside out, by allowing business *owners* to shield their *companies* from regulatory obligations based on alleged injury to their individual religious beliefs. This approach conflicts with fundamental notions of fairness and upsets the balance of benefits and burdens inherent in the decision to incorporate. "One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 437 (1946).

B. If Uncorrected, the Tenth Circuit's Decision Will Hurt Markets, Invite Religious Entanglement, and Threaten the States' Ability to Regulate in the Public Interest

The Tenth Circuit's decision, and specifically its disregard of the corporate form, will destabilize markets, lead to excessive government entanglement in religion, and undermine state regulation in the public interest, among other harms, if it is not reversed.

1. Allowing a commercial corporation to escape the costs of neutral regulation based on the religious beliefs of its owners would harm market competition by providing unfair competitive advantages to businesses asserting religious objections to a rule. The

Tenth Circuit's expansive interpretation of RFRA creates incentives for corporations and their owners to assert religious motivation as the basis for avoiding regulation. Because regulation increases the cost of doing business, a corporation that successfully exempts itself from regulation can obtain a competitive advantage over other corporations.

The Tenth Circuit's decision also would invite corporations to claim a religious basis for regulatory exemptions based on owners' opposition to a particular regulation, or to government regulation in general. For example, the CEO of one for-profit firm seeking to enjoin application of the contraceptive coverage requirement on religious grounds has been reported as stating that his objection was actually motivated by his personal opposition to government regulation. Irin Carmon, *Eden Foods Doubles Down in Birth Control Flap*, Salon, Apr. 15, 2013.[2] Whether or not pursuing competitive advantage, a business successfully claiming a religious basis for exemption would be advantaged in relation to its competitors.

2. Further, by invalidating the "uniform application" of laws as to corporations that seek a religious exemption, the Tenth Circuit's decision would thrust the courts and government into "a potentially entangling inquiry" regarding whether a practice "is the result of sincere religious belief" or some other

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[2] http://www.salon.com/2013/04/15/eden_foods_ceo_digs_himself_deeper_in_birth_control_outrage/ (last visited Oct. 18, 2013).

incentive. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1983).

Practically, the notion that a corporation may exercise religion would pose a number of challenges to federal and state governments and courts. For example, how should a court determine the religion of a corporation where a minority of owners or shareholders does not share the religious views of the majority? Or where shareholders disagree on the obligations imposed by their commonly-held religion? Should a court determine whether, or to what degree, a corporation's position on a regulation is based on sincere religious belief or some other motivation, such as political philosophy or perceived business advantage?

Inquiry into Hobby Lobby's and its owners' religious beliefs, or the extent of the coverage requirement's burden on those beliefs, might consider that Hobby Lobby provided insurance coverage of contraceptives to which its owners now object before the owners became aware of the new federal requirement. Pet. 10; *see also* Pet. App. 145a (Matheson, J., concurring in part and dissenting in part) (noting that plaintiffs had "not provided sufficient facts about specific alleged religious beliefs of the corporations with respect to the contraceptives at issue here or how those beliefs are defined and exercised by the corporations").

In short, holding that a corporation may be a "person" under RFRA ultimately could undermine, rather than advance, the religion-protective and -insulating principles at the foundation of the First Amendment.

3. Finally, the Tenth Circuit's decision is problematic for the States by rendering both state and federal regulation of business activity vulnerable to claims for religious exemption, including in the areas of public safety, civil rights, social welfare, land use, housing, employment, and public health.[3] The Tenth Circuit's determination that for-profit corporations may exercise religion could "profoundly affect the relationship between the government and potentially millions of business entities in our society in ways we can only begin to anticipate." Pet. App. 150a (Matheson, J., concurring in part and dissenting in part).

In rejecting a First Amendment right of individuals to be presumed exempt from laws on the basis of their religious beliefs, this Court has expressed concern that applying strict scrutiny to neutral laws of general applicability "open[s] the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Employ't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 888 (1990). Extension of RFRA's protections to for-profit corporations would reify the concern expressed in *Smith*, as it would open the prospect of exemptions for commercial entities from obligations imposed by almost every area of government regulation affecting business. *See* Pet. App. 128a-129a (Briscoe, C.J., concurring in part and dissenting in part).

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[3] For the reasons explained in the Statement of Interest, although RFRA does not apply to the States, RFRA precedents may impact the States where referenced as authority in actions involving analogous laws, including RLUIPA and state RFRA statutes, or the free exercise clauses of the Federal and state constitutions.

In the arena of health alone, corporations asserting recognized religious objections could refuse to provide coverage for blood transfusions, end-of-life care, psychiatric treatment, and medications and devices containing porcine or bovine products. Pet. App. 128a, n.8 (Briscoe, C.J., concurring in part and dissenting in part). Corporations could similarly claim an extraordinary "private right to ignore" laws barring discrimination on the basis of gender or religion, minimum wage and child labor laws, and countless other laws that govern modern society. *See Smith*, 494 U.S. at 886, 888-89.

Moreover, if the Tenth Circuit's broad interpretation of "person" were adopted under RLUIPA, commercial enterprises could claim religion-based exemptions from state and local land use regulations. This could allow corporations to assert rights to expand structures or conduct business operations that otherwise would be prohibited under neutral zoning regulations, as religious institutions have done, seeking to override local government interests such as limiting traffic and density of use, *see, e.g., Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 346, 353 (2d Cir. 2007) ($12 million expansion of religious school facilities), or preserving land for industrial and economic uses, *see, e.g.*, *Int'l Church of Foursquare Gospel v. City of San Leandro,* 673 F.3d 1059, 1062, 1071 (9th Cir. 2011) (purchase and use of land in industrial park by church).

The Tenth Circuit's suggestion that its holding is limited to the circumstances presented by the two corporations before it is not supportable. *See* Pet. App. 42a-43a. Even were its holding limited to closely-held or family-run companies, it would still affect large numbers of businesses and employees: family-owned or controlled businesses account for some 80-90% of all U.S. businesses, including more than one-third of the Fortune 500 companies, and account for 60% of all U.S. employment. Conway Center for Family Business, *Family Business Facts, Figures and Fun.*[4] These businesses include some of the largest companies in the United States, such as Cargill, Incorporated; Mars, Incorporated; Bechtel Corporation; PriceWaterhouseCoopers LLP; and Publix Super Markets, Inc. Andrea Murphy, *America's Largest Private Companies 2012,* Forbes, Nov. 28, 2012.[5] As noted by Chief Judge Briscoe in his dissent, "it is difficult to imagine why the majority's holding would not apply to any number of large, closely-held corporations that employ far more employees . . . than Hobby Lobby and Mardel." Pet. App. 128a.

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[4] http://www.familybusinesscenter.com/resources/family-business-facts/ (last visited Oct. 18, 2013).

[5] http://www.forbes.com/sites/andreamurphy/2012/11/28/americas-largest-private-companies-2012/.

II. Review Should Be Granted Because the Tenth Circuit's Analysis of the Compelling Interests Supporting the Contraceptive Coverage Requirement Was Flawed and Will Have Negative and Far-Reaching Consequences

Review also is warranted because the Tenth Circuit's analysis of the federal government's interests in the contraceptive coverage requirement is fundamentally flawed. If unaddressed, the decision will undermine important state and federal public health initiatives designed to protect the health and welfare of our citizens, including but not limited to those designed to ensure access to contraceptive services.

A. The Government Has Compelling Interests in the Contraceptive Coverage Requirement

The Tenth Circuit improperly discounted the significance of the government interests that undergird the contraceptive coverage requirement. Access to contraceptives is critical to women's health, autonomy, and equality, all compelling government interests.

1. Access to contraceptives is essential to promote the health of women in the most literal sense. Women who have unintended pregnancies are more likely to receive reduced prenatal care; to smoke and consume alcohol during pregnancy; and to experience

depression and other health problems during and after pregnancy. Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 103 (2011) (*Gaps*). Pregnancy may aggravate certain health conditions such as diabetes, hypertension, arthritis and coronary artery disease. *See Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 462 (N.Y. 2006) (*Serio*). Indeed, pregnancy can endanger the health of women with conditions such as hypertension and heart problems. *See Gaps*, *supra*, at 103-04.

Unintended pregnancies can jeopardize the health of women and children in other ways. Nearly 12 million women take at least one of 168 drugs that can endanger their lives or the lives of their fetuses if taken during a pregnancy; some of these drugs may only be dispensed after a negative test for pregnancy. Nat'l Health Law Program, *Health Care Refusals: Undermining Quality Care for Women* 27-29, 67-69 (2010) (*Health Care Refusals*).[6] Many of these drugs are used to treat conditions that are quite common, including cardiovascular disease, epilepsy, diabetes, and depression. Depression alone affects 25% of all women, and a third of low-income women, who often cannot afford to buy contraceptives over the counter without the help of insurance. *Id.* at 28-32; Usha Ranji & Alina Salganicoff, *Women's Health Care*

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[6] *Available at* http://www.healthlaw.org/images/stories/Health_Care_Refusals_Undermining_Quality_Care_for_Women.pdf.

Chartbook: Key Findings from the Kaiser Women's Health Survey 1 (2011).[7]

Contraceptives also provide important health benefits unrelated to contraception, as the government noted in supporting the final employer coverage regulations. 78 Fed. Reg. at 39,872. Contraceptives have been shown, among other things, to help decrease the risk of certain ovarian and uterine cancers; to help treat excessive menstrual bleeding (which can lead to anemia); to alleviate severe menstrual pain; and to prevent menstrual-related migraines. *See id.*; Rachel Jones, *Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills* 3 (2011);[8] U.S. Dep't of Health & Human Servs., Agency for Healthcare Research & Quality, Nat'l Guideline Clearinghouse, *Noncontraceptive Uses of Hormonal Contraceptives* (2010).[9]

2. Ensuring access to contraceptive services also is critical to enabling women to make personal, intimate choices that will have long-lasting impact on their lives. Whether or not to bear a child is "central to . . . personal dignity and autonomy." *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). As with other methods of reproductive control, "people

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[7] *Available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8164.pdf.

[8] *Available at* http://www.guttmacher.org/pubs/Beyond-Birth-Control.pdf.

[9] *Available at* http://www.guideline.gov/content.aspx?id=15428 (last visited Oct. 18, 2013).

have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of . . . contraception." *Id.* at 856. The government's contraceptive coverage requirement promotes the ability of citizens, both male and female, to organize their lives, fostering harmony at home and productivity in the workplace.

The need to protect women's dignity and autonomy is particularly acute with respect to survivors of rape. Nearly 15% of women have been victims of rape at least once. Alison Siskin, *Violence Against Women Act: Reauthorization, Federal Funding and Recent Developments, in Violence Against Women* 23, 25 (L.P. Gordon, ed., 2002). Without access to emergency contraception, raped women could be forced to bear children conceived during a non-consensual encounter, with life-long impacts. One report calculates that, among victims of *reported* sexual assaults, 12,677 pregnancies could have been avoided in 2005 with better access to contraceptives. *Health Care Refusals, supra,* at 41. And these numbers do not take into account incidents of unreported rape. *Id.*

3. Relatedly, access to contraceptives promotes equality between the sexes, because "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Casey*, 505 U.S. at 851. Increased access to contraceptives was responsible for the "large increases" of applications by women to professional schools of law, medicine,

dentistry, architecture, economics, and engineering in the 1970s. Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Contraceptives and Women's Career and Marriage Decisions*, 110 J. of Pol. Econ. 730, 749 (2002). Contraceptive access encourages investment in careers – for both men and women – by providing certainty in family planning. *Id.* at 731.

In addition, the contraceptive coverage requirement facilitates economic equality between the sexes in a most immediate way: by equalizing the cost of family planning. Currently, women disproportionately bear the burden of paying for contraceptive services and pregnancy, despite the obvious fact that both men and women bear responsibility for creating a pregnancy. For example, evidence presented to the California Legislature in connection with the adoption of that State's contraceptive coverage requirements demonstrated that "women during their reproductive years spent as much as 68 percent more than men in out-of-pocket health care costs, due in part to the cost of prescription contraceptives and the various costs of unintended pregnancies. . . ." *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 92 (Cal. 2004) (*Catholic Charities*). Thus, ensuring access to contraception through employer-provided insurance plans helps reduce gender inequities in out-of-pocket health care costs.

4. Improving access to contraception also serves government interests in reducing public costs. For example, a California Medicaid program that expanded access to contraceptives to otherwise ineligible

women saved the State an estimated $1.3 billion in medical, welfare, and other social service costs in 2007 alone (and more than double that amount, $2.7 billion, in cost savings to the federal government during the same year). M. Antonia Biggs, et al., U.C. San Francisco, Bixby Center for Global Reproductive Health, *Cost-Benefit Analysis of the California Family PACT Program for Calendar Year 2007* 16-20 (2010).[10] These savings resulted from decreased public costs for pregnancy and post-pregnancy medical care, income support, food stamps, parental support, child care, and early and special education. *Id.*

B. The Tenth Circuit's Compelling Interest Analysis Is Flawed

The court of appeals committed several plain errors in determining that the government's asserted interests in the contraceptive coverage requirement were too broadly formulated and diminished by exemptions.

1. In characterizing the federal government's interests in public health and gender equity as overly general, the court of appeals failed to take account of the specific interests and benefits identified by the federal government in support of the coverage requirement. These include increasing

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[10] *Available at* http://bixbycenter.ucsf.edu/publications.html (under "Publications," scroll to "Family PACT Publications," and click on link under subheading "Reports").

access to preventive health services; reducing health care costs; addressing women's unique health care needs and burdens; alleviating disadvantages for women in the workforce; improving the economic and social status of women; reducing disparities in the costs of health services; and protecting women's interests in autonomy over their procreative choices. 77 Fed. Reg. 8725, 8727-29 (Feb. 15, 2012); Br. for Appellees, *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, at 35-38 (10th Cir. March 15, 2013), *available at* 2013 WL 1192937. The court of appeals' reference to the government's interests in "public health" and "gender equity" fails to recognize that these are umbrella concepts that encompass a panoply of more specific interests that the contraceptive coverage requirement is designed to advance.

2. The court of appeals asserted that several exemptions from the coverage requirement undercut the strength of the government's stated interests. However, the government interests are in no way diminished because fewer than all women are covered. As the California Supreme Court held with respect to a similar coverage obligation under state law, simply by "eliminat[ing] a form of gender discrimination in the provision of health benefits," the provision achieves its goals, even if some women remain without access. *Catholic Charities*, 85 P.3d at 94.

Further, the exemptions provided under the regulations are both rational and limited. They are the exact opposite of the kind of exceptions that previously have concerned this Court – i.e., those that are arbitrary, or adopted for reasons that are "difficult to see" and "never explain[ed]." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433-34 (2006).

The exemption for certain nonprofit religious employers is anything but arbitrary, as it aims to accommodate religious objections. *See Catholic Charities*, 85 P.3d at 78. "[T]he government may (and sometimes must) accommodate religious practices." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987). Thus, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious mission." *Id.* at 335. Accordingly, religious exemptions do not undermine the government's interest in the regulation, but rather reflect a careful calibration of the competing interests in the regulatory requirements and in respect for religious belief. *See* 78 Fed. Reg. at 39,874 (noting that revised definition of exempt "religious employer" in contraceptive coverage regulations "continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement").

Similarly, the transitional exemption for certain existing health plans represents "a reasonable accommodation of the competing interests in administrative efficiency and fairness." *Sebelius v. Auburn*

Reg'l Med. Ctr., 133 S. Ct. 817, 830 (2013) (Sotomayor, J., concurring). And it bears emphasizing that this exemption is only temporary, with most "grandfathered" plans expected to lose their exempt status by the end of 2013. 78 Fed. Reg. at 39,887 n.49.

Finally, as the government has noted in its petition, the court of appeals' belief that employers with fewer than 50 employees are exempt from its contraceptive coverage requirement is factually inaccurate. Pet. 30-31. Employers with fewer than 50 employees are not subject to tax penalties for failing to offer health coverage to their employees, but if those smaller employers do sponsor a health plan, the plan must meet all coverage requirements. *Id.* ACA aims to expand small business employees' access to employer-provided coverage by allowing small businesses to obtain insurance through exchanges where costs are lower than on the open market because of pooled risk. *See* Small Bus. Admin., *Key Provisions Under the Affordable Care Act for Businesses with Up to 50 Employees*.[11]

ACA is estimated to guarantee some 47 million women access to women's preventive health services, including contraceptives. *See* Adelle Simmons & Laura Skopec, *47 Million Women Will Have Guaranteed Access to Women's Preventive Services with Zero Cost-Sharing Under the Affordable Care Act*, ASPE

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[11] http://www.sba.gov/content/employers-with-up-to-50-employees (last visited Oct. 18, 2013).

Issue Brief (July 31, 2012).[12] Many of these women could not afford to purchase either contraceptives or coverage on their own. *See* Kaiser Family Foundation, *Women's Health Insurance Coverage Fact Sheet* 1.[13] As prices of medical services outpace incomes, insurance becomes vital in ensuring access to these services. Ruth Robertson & Sarah R. Collins, *Realizing Health Reform's Potential* 4-5 (2011).[14]

C. The Court of Appeals' Interest Analysis Could Render State Laws Supported by Similar Government Interests Vulnerable to Future Challenge

Numerous state and federal laws are justified on the basis that they further the government's compelling interests in protecting public health and promoting gender equity. The Tenth Circuit's rejection of those goals as sufficiently compelling to sustain the contraceptive coverage requirement against a RFRA challenge could call into question other regulatory efforts that are premised on the same governmental interests.

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[12] *Available at* http://aspe.hhs.gov/health/reports/2012/womensPreventiveServicesACA/ib.pdf.

[13] *Available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/01/6000-10.pdf.

[14] *Available at* http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2011/May/1502_Robertson_women_at_risk_reform_brief_v3.pdf.

State laws in a variety of contexts have been upheld against religious objections on the ground that "public health" constitutes a compelling interest. Examples include laws increasing access to contraceptives, *Catholic Charities*, 85 P.3d 67; *Serio*, 859 N.E.2d 459; requiring individuals to obtain health insurance coverage, *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011), *aff'd sub nom. Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 133 S. Ct. 63 (2012); requiring vaccinations prior to attending school, *see Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 90 (E.D.N.Y. 1987); *Wright v. DeWitt Sch. Dist. No. 1*, 385 S.W.2d 644, 646 (Ark. 1965); preventing pharmacists from refusing to transfer patient prescriptions on conscientious objector grounds, *Noesen v. State Dep't of Regulation & Licensing, Pharmacy Examining Bd.*, 751 N.W.2d 385, 393-94 (Wis. Ct. App. 2008); prohibiting poisonous snake handling in religious services, *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 111-12 (Tenn. 1975); and prohibiting use of certain drugs for religious purposes, *State v. Hardesty*, 214 P.3d 1004, 1009 (Ariz. 2009).

The sufficiency of this government interest has been successfully invoked to uphold laws outside the religious context, as well. Examples include laws preventing livestock from intermingling with native wildlife, *Hagener v. Wallace*, 47 P.3d 847, 855 (Mont. 2002), *overruled on other grounds by Shammel v. Canyon Resources Corp.*, 82 P.3d 912 (Mont. 2003) (Commerce Clause); and giving residency preference for medical school admissions, *Buchwald v. Univ. of*

New Mexico Sch. of Medicine, 159 F.3d 487, 497-99 (10th Cir. 1998) (right to travel).

Similarly, failing to respect government's interests in gender equity and in eliminating sex discrimination could lay open to challenge a range of other statutes at the state level. States have enacted their own statutes to ensure women's access to health services, including but not limited to contraception, premised on these interests. *See, e.g., Catholic Charities*, 85 P.3d 67 (California's Women's Contraception Equity Act); *Serio*, 859 N.E.2d 459 (New York's Women's Health and Wellness Act).

But religion-based challenges to state regulation enacted for the benefit of women extend beyond public health to, for example, the provision of public accommodations. Thus, as against associational rights challenges, this Court has recognized that "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests" that justify public accommodation statutes prohibiting sex discrimination. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984). Lower courts have followed suit in other freedom of association cases challenging sex-discrimination prohibitions. *See, e.g., Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ. of N.Y.*, 502 F.3d 136, 148 (2d Cir. 2007); *State v. Burning Tree Club, Inc.*, 554 A.2d 366, 384 (Md. 1989).

In short, these interests are widely recognized to be sufficiently important to sustain a wide array of laws and regulations. The Tenth Circuit's flawed analysis should not be allowed to undermine lawmaking premised on these interests, which is of critical importance to the States.

* * *

The freedom of individuals to exercise the religion of their choosing is one of the most important values in our society, as reflected by its enshrinement in the federal Constitution. The federal government's contraceptive coverage regulations under ACA respect that freedom through inclusion of appropriate exemptions, while also advancing the similarly compelling interests in public health and gender equality in access to health care. The court of appeals' decision would upset that balance and threaten far-reaching impacts on the States beyond the issues presented by this action.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: October 21, 2013

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 13-354

In The
Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees.

CAC has published scholarship and filed *amicus* briefs demonstrating the ways in which corporations and living, breathing persons have been treated differently throughout our nation's history when it comes to constitutional rights and liberties. The Center has an interest in ensuring that these rights are protected for "We the People," while preserving the government's legitimate interest in regulating corporations.

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[1] Counsel for all parties received timely notice of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Hobby Lobby Stores, Inc., a for-profit, secular corporation that operates more than 500 arts-and-crafts stores nationwide, succeeded in persuading the court of appeals to accept a remarkable contention: that it, the corporate entity itself, is a person exercising religion. Obviously not a "person" in the usual sense of the word, Hobby Lobby is also not a religious organization; it does not hire employees on the basis of their religion, and its employees are not required to share the religious beliefs personally held by the corporation's owners. Nonetheless, a majority of the en banc court below found that Hobby Lobby was likely to succeed on its claim that the Patient Protection and Affordable Care Act's contraception coverage and screening requirement for group health plans violates the Religious Freedom Restoration Act of 1993 (RFRA), which provides that the government "shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a), (b). The en banc Tenth Circuit's unprecedented ruling allows Hobby Lobby to deny thousands of full-time employees and their families important health benefits to which they are legally entitled.

Two other federal courts of appeals have rejected similar arguments. *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013); *Autocam Corp. v. Sebelius*, No. 12-2673, 2013 WL 5182544 (6th Cir. Sept. 17, 2013). These courts observed that neither this Court nor any other court prior to the ruling below has ever recognized religious free exercise rights for secular, for-profit corporations. The First Amendment's explicit protection of "the free exercise"[2] of religion was intended to protect a basic right of human dignity and conscience, one of the "characteristic rights of freemen," as George Washington put it. WASHINGTON: WRITINGS 733 (John Rhodehamel ed., 1997) (First Inaugural Address, April 30, 1789). From the Founding until today, the Constitution's protection of religious liberty has been seen as a personal right, inextricably linked to the human capacity to express devotion to a god and act on the basis of reason and conscience. Business corporations, quite properly, have never shared in this fundamental aspect of our constitutional tradition for the obvious reason that a business corporation lacks the basic human capacities—reason, dignity, and conscience—at the core of the free exercise right.

Because Congress enacted RFRA to restore and codify the Court's free-exercise jurisprudence as it stood before *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), the question of what RFRA means when it refers to a "person's exercise of religion" must be answered by reference to the pre-*Smith* body of free-exercise law. This brief focuses on that question, and demonstrates that at no time in the more than 200-year span between the ratification of the First Amendment and the passage of RFRA were secular, for-profit corporations understood to have the fundamental right to the free exercise of religion.

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[2] U.S. CONST. amend. I.

While Hobby Lobby's owners obviously have their own personal free exercise rights, those rights are not implicated by the contraception coverage and health screening requirement because federal law does not require the individuals who own the company to *personally* provide health care coverage or to satisfy any other legal obligation of the corporation. The law places requirements only on the corporate entity, Hobby Lobby Stores, Inc. As the Court has held in the Fifth Amendment context, when individuals act in their official capacity as corporate agents, they "cannot be said to be exercising their personal rights and duties, nor to be entitled to their purely personal privileges." *Braswell v. United States*, 487 U.S. 99, 110 (1988). Instead, "they assume the rights, duties, and privileges of the artificial entity." *Id.* Hobby Lobby's owners should not be permitted to "move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Conestoga*, 724 F.3d at 389.

Finally, the fact that the Free Exercise Clause has been recognized to protect the rights of churches and other explicitly religious organizations does not help Hobby Lobby here. Since the Founding, churches and business corporations have been treated as fundamentally different. Churches, created for the purpose of ensuring the flourishing of religious exercise, have received protection under our constitutional tradition, in federal statutes, and Court precedent. These protections have never been extended to secular, for-profit corporations like Hobby Lobby.

Amicus urges the Court to grant the Petition for a Writ of Certiorari to resolve the split among the circuits on this question of exceptional importance, and reject the lower court's unprecedented extension of what it means to engage in the free exercise of religion.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT SECULAR, FOR-PROFIT CORPORATIONS DO NOT HAVE RELIGIOUS FREE EXERCISE RIGHTS.

The Religious Freedom Restoration Act, which was enacted in 1993 to restore and enforce the First Amendment's Free Exercise guarantee, provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). Under the Dictionary Act, for purposes of interpreting federal law, the word "person" "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" unless "the context indicates otherwise." 1 U.S.C. § 1. This brief supports the government's position that, because of "the context" of RFRA—that is, the history, nature, and purpose of the free exercise guarantee—secular, for-profit corporations, including Hobby Lobby, should not be allowed to invoke the statute's protections for the free exercise of religion.[3]

A. Throughout Our Nation's History, Corporations Have Been Treated Differently Than Individuals When It Comes To Fundamental, Personal Rights.

The Constitution does not give corporations the same protection of rights and liberties as it gives to individual persons.[4] As its opening words reflect, the Constitution was written for the benefit of "We the People of the United States." U.S. CONST. pmbl. Shortly after the Constitution's ratification, the Framers added the Bill of Rights to the Constitution to protect the fundamental rights of the citizens of the new nation, which reflected the promise of the Declaration of Independence that all Americans "are endowed by their Creator with certain unalienable rights, [and] that among these are life, liberty, and the pursuit of happiness." President George Washington described the amendments as exhibiting "a reverence for the characteristic rights of freemen." WASHINGTON: WRITINGS 733 (John Rhodehamel ed., 1997) (First Inaugural Address, April 30, 1789). At its core, the Bill of Rights "declare[d] the great rights of mankind." 1 ANNALS OF CONG. 449 (1789).

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[3] Respondents are two for-profit companies, Hobby Lobby Stores, Inc., and Mardel, Inc., which is a secular, for-profit bookstore that specializes in carrying Christian products (collectively referred to in this brief as "Hobby Lobby"). They are owned and operated by a management trust; five members of the Green family are the trustees of this management trust. Pet. at 9 & n.4. As the Court of Appeals explained, "the Greens believe that human life begins at conception"—"when sperm fertilizes an egg"—and they oppose certain forms of Food and Drug Administration-approved contraception that they believe prevent implantation of a fertilized egg. App. 9a, 14a; Pet. at 10. Pursuant to the Patient Protection and Affordable Care Act, all FDA-approved contraception must be provided in employer group health plans, subject to important exemptions, in order to promote women's health and gender equity. Pet. at 5-9.

[4] *See generally* David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643 (2011).

At the Founding, corporations stood on an entirely different footing than living persons. A corporation, in the words of Chief Justice John Marshall, "is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). As early as the First Congress, James Madison summed up the Founding-era vision of corporations: "[A] charter of incorporation . . . creates an artificial person not existing in law. It confers important civil rights and attributes, which could not otherwise be claimed." 2 ANNALS OF CONG. 1949 (1791). In short, corporations, unlike the individual citizens that made up the nation, did not have fundamental and inalienable rights by virtue of their inherent dignity.

To be sure, corporate entities can assert certain constitutional rights, chiefly related to their right to enter into contracts, own and possess property, and manage their affairs, but they have never been accorded all the rights that individuals possess. *Compare Dartmouth College*, 17 U.S. (4 Wheat.) at 518 (protection under Contracts Clause); *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844) (right to sue under Article III); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885) (protection under Dormant Commerce Clause); *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897) (protection under Equal Protection Clause); *Hale v. Henkel*, 201 U.S. 43 (1906) (protection under Fourth Amendment) *with Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839) (no protection under Article IV's Privileges and Immunities Clause); *Hale*, 201 U.S. 43 (no protection under Fifth Amendment's Self-Incrimination Clause); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359 (1907) (no protection under Fourteenth Amendment's Privileges or Immunities Clause). Many of the constitutional rights possessed by business corporations are grounded in matters of property and commerce, because, as this Court has explained, "[c]orporations are a necessary feature of modern business activity" and, "[i]n organizing itself as a collective body, it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the 14th Amendment, against unlawful discrimination." *Hale*, 201 U.S. at

76. Business corporations possess other constitutional rights, such as rights under the Free Speech Clause, but these rights do not vindicate a corporation's own claim to autonomy or dignity. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (applying protections of the Free Speech Clause to political advertisements financed by corporations because "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation'") (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978)).

It is well settled that "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination are unavailable to corporations . . . because the 'historic function' of the particular guarantee has been limited to the protection of individuals." *Bellotti*, 435 U.S. at 778 n.14. For example, for more than a century, this Court has affirmed that the constitutional privilege against self-incrimination "grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." *United States v. White*, 322 U.S. 694, 698 (1944). The Fifth Amendment right "is an explicit right of a natural person, protecting the realm of human thought and expression." *Braswell v. United States*, 487 U.S. 99, 119 (1988) (Kennedy, J., dissenting). Accordingly, "there is a clear distinction . . . between an individual and a corporation . . . . While an individual may lawfully refuse to answer incriminating questions . . . , it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges." *Hale*, 201 U.S. at 74, 75.

The *Braswell* case illustrates the different way fundamental rights apply to corporations as opposed to individual persons. Randy Braswell, the president and sole shareholder of a corporation, argued that he was entitled to resist a subpoena for corporate records because the act of producing those records would tend to incriminate him. In rejecting his contention, the Court found dispositive the fact that the subpoena was directed to corporate records: "[P]etitioner has operated his business through the corporate form, and we have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals." *Braswell*, 487 U.S. at 104. Proceeding from this basic principle, the Court held that "the custodian of corporate records may not interpose a Fifth Amendment objection to the compelled production of corporate records, even though the act of production may prove personally incriminating." *Id.* at 111-12.

Obviously, Mr. Braswell retained his personal right against compelled self-incrimination. However, because he was acting for the corporation, he could not "be said to be exercising

[his] personal rights and duties nor to be entitled to [his] purely personal privileges." *Braswell*, 487 U.S. at 110. Instead, he "assume[d] the rights, duties, privileges of the artificial entity." *Id.* And in that official capacity, he had no "personal privilege against self-incrimination" to assert. *Id.*[5] Importantly, the Court did not, as the lower court did here, conflate the rights of the individual corporation owner with the rights of the corporation itself. Nor was the individual owner of the company permitted to "move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 389 (3d Cir. 2013). *See* Pet. at 23-26.

B. The Free Exercise Of Religion Is A Fundamentally Personal Liberty That Does Not Apply To For-Profit, Secular Corporations.

"Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *Bellotti*, 435 U.S. at 778 n.14. The history of the free exercise guarantee demonstrates that this right is not applicable to secular, for-profit corporations. Much like the Self-Incrimination Clause, which protects a purely personal "realm of human thought and expression," *Braswell*, 487 U.S. at 119 (Kennedy, J., dissenting), and guarantees "dignity, humanity, and impartiality," *White*, 322 U.S. at 698, by preventing the government from compelling an individual's own testimony, the right to freely exercise religion simply cannot be exercised by a business corporation. A secular, for-profit business corporation cannot, in any meaningful sense, pray, express pious devotion, or act on the basis of a religious conscience. The fundamental values behind the Free Exercise Clause, like those that underlie the Fifth Amendment's constitutional privilege against self-incrimination, simply make no sense as applied to a secular, for-profit business corporation.

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[5] A similar logic underlies the Court's holding that business corporations cannot invoke the protections of citizens secured by the Privileges and Immunities Clause. "If . . . members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens . . . they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. . . . Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members." *Bank of Augusta*, 38 U.S. at 586-87.

The Founding generation well understood that the First Amendment's guarantee of free exercise was an inalienable individual right, inextricably linked to the human capacity to express devotion to a god and act on the basis of reason and conscience. Indeed, the proposed amendment that would eventually become our First Amendment started out in the Select Committee as a proposal to ensure that "the equal rights of conscience" shall not be infringed. 1 ANNALS OF CONG. 766 (1789). While debates in the First Congress over what ultimately became the

Free Exercise Clause were sparse, the protections for religious liberty contained in Founding-era state constitutions provide powerful evidence that the free exercise guarantee was understood to be a purely personal right. "These state constitutions provide the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1456 (1990); *see also City of Boerne v. Flores*, 521 U.S. 507, 553 (1997) (O'Connor, J., dissenting) ("These state provisions . . . are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty.").

New York's 1777 Constitution, for example, provided that "the free exercise of religion and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind." N.Y. CONST. of 1777, art. XXXVIII. Likewise, New Hampshire's Free Exercise Clause described religious liberty specifically as a right of individuals: "Every individual has a natural and inalienable right to worship GOD according to the dictates of his own conscience, and reason . . . ." N.H. CONST. of 1784, pt. I, art. V. The Virginia Declaration of Rights of 1776 provided that "religion . . . can be directed only by reason and conviction . . . ; therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . ." Va. Declaration of Rights of 1776, § 16. Many other state constitutions used similar language, confirming that the right to the free exercise of religion was understood to be a purely personal, inalienable human right. *See* McConnell, 103 HARV. L. REV. at 1456-58 & nn. 239-42. These provisions "defined the scope of the free exercise right in terms of the conscience of the individual believer and the actions that flow from that conscience," an affirmative understanding of free exercise "based on the scope of duties to God perceived by the believer." *Id.* at 1458-59.

Likewise, the Memorial and Remonstrance Against Religious Assessments, authored by James Madison, "'the leading architect of the religion clauses of the First Amendment,'" *Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1446 (2011) (quoting *Flast v. Cohen*, 392 U.S. 83, 103 (1968)), viewed the guarantee of the free exercise of religion in similar, wholly personal terms. Invoking the "fundamental and undeniable truth" that "'Religion . . . can be directed only by reason and conviction,'" Madison explained that "[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 184 (G. Hunt ed., 1901) (quoting Va. Declaration of Rights of 1776, § 16). Noting that "equality . . . ought to be the basis of every law," Madison argued that "[w]hilst we assert for ourselves a freedom to embrace, to profess, or to observe the Religion which we believe to be divine in origin, we cannot deny an equal freedom to those whose minds have not yielded to the evidence which has convinced us." *Id.* at 186.

For Madison, the free exercise of religion was fundamentally a personal right, closely linked to the human capacity of reason, conviction, and conscience. As with the right against self-incrimination, a business corporation simply lacks these basic human capacities. Indeed, the Founding-era protection for religious conscience overlaps with the concern for compelled testimony. The most common "free exercise controversies in the preconstitutional period" related to oaths. Michael W. McConnell, "Free Exercise As The Framers Understood It," *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 59 (Eugene Hickok, Jr., ed., 1991). Article VI ensured that conscientious objectors could "Affirm[]," rather than swear their support for the Constitution, in addition to forbidding the use of religious tests for officeholders. U.S. CONST. art. VI. The origins of the right against compelled self-incrimination and the right to religious free exercise are closely linked. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 82-83 (1998). With this backdrop, the Founding generation would never have imagined that a business corporation could claim for itself such quintessentially personal rights.

In line with this historical understanding, in the more than 225 years since the ratification of the First Amendment, this Court has never held that secular, for-profit business corporations are capable of exercising religion and has never held that the Free Exercise Clause applies to such corporations. As the Petition explains, "no pre-*Smith* case held—or even suggested—that a for-profit corporation could obtain exemptions from corporate regulation on the basis of religion." Pet. at 18.

Given the dearth of any supporting precedent and the absence of any constitutional tradition, the court of appeals was plainly wrong to hold that secular, for-profit corporations could be "person[s] exercise[ing] religion" within the meaning of RFRA, 42 U.S.C. § 2000bb-1(a).

C. While Explicitly Religious Organizations, Such As Churches, Have Been Protected Under The First Amendment, They Have Historically Been Distinguished From Secular, For-Profit Corporations Like Hobby Lobby.

The fact that "the Free Exercise Clause at least extends to associations like churches—including those that incorporate," Pet. App. 35a, does not help Hobby Lobby here. The text and history of the First Amendment show a "special solicitude to the rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694, 706 (2012), that does not extend to secular, for-profit corporations. The protections long given to churches, synagogues and other religious entities reflect the basic fact that "[r]eligion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] Clause." Douglas Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981); *see also* McConnell, 103 HARV. L. REV. at 1490 ("'Religion' . . . connotes a community of believers."). Going back to the writings of John Locke, a church was considered "a voluntary society of men, joining together of their own accord to the public worshipping of God in such manner as they judge acceptable to him and effectual to the salvation of their souls." JOHN LOCKE, A LETTER CONCERNING TOLERATION 28 (1689) (James H. Tully ed., 1983).

The legal traditions that the Founders brought from England included a sharp distinction between religious and other private corporations. Blackstone observed the "division of corporations . . . into ecclesiastical and lay. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons . . . These are erected for the furtherance of religion, and perpetuating the rights of the church." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *470 (1768). Founding-era treatises on corporate law, following Blackstone, explained that "[t]here is one *general* division of corporations into *ecclesiastical*, and *lay*. Ecclesiastical corporations are those of which not only the members are spiritual persons, but of which the object of the institution is also spiritual . . . ." STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 22 (1793).

Consistent with this history, the Court has recognized special constitutional protection for the free exercise of religion that applies to religious, but not other, corporations. For example, the Court has held that "[f]reedom to select the clergy" has "federal constitutional protection as a part of the free exercise of religion against state interference," observing that the First Amendment specifically ensures "freedom for religious organizations, and independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 154-55 (1952); *see also Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1872). Recently, in *Hosanna-Tabor*, the Court reaffirmed these principles, holding that a religious employer could not be sued under Title VII of the Civil Rights Act of 1964 for firing a minister. "Requiring a church to accept or retain an unwanted minister . . . interferes with the internal governance of the church . . . . By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor*, 132 S. Ct. at 706; *see also id.* at 712 (Alito, J., concurring) ("[T]he Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs."). Under *Hosanna-Tabor*, incorporated churches and other religious employers are free from the strictures of federal anti-discrimination law in choosing their ministers, an exemption that does not extend to business corporations. No secular, for-profit business corporation can claim a similar right to make employment decisions free from Title VII's mandate of equality of opportunity. *See also* Pet. at 22-23 (emphasizing that Title VII's religious-employer exemption has been applied only to the non-profit activities of religious employers).

Far from treating business and religious corporations as one and the same, constitutional text and history, as well as settled law, give a special status to churches and other religious institutions in recognition of the fact that individuals often exercise religion as part of a community of believers. At the Founding, churches and business corporations were seen as fundamentally different, the former created for the purpose of ensuring the flourishing of communal religious exercise, the latter to make running a business more profitable. Consistent with this history, religious institutions receive many types of legal protections for religious exercise rightly considered inapplicable to business corporations like Hobby Lobby.

* * *

Our constitutional tradition recognizes a basic, common-sense difference between living, breathing individuals—who think, possess a conscience, and hold a claim to human dignity—and artificial corporate entities, which are created by the law for a specific purpose, such as to make running a business more efficient and lucrative by limiting the liability of their individual owners. This is especially true in contexts related to matters of conscience, individual autonomy, and basic human dignity. Corporations are accountable to their shareholders for their business operations; spiritual individuals, in Washington's words, are "accountable to God alone for his religious opinions." WASHINGTON 739 (Letter to the United Baptist Churches of Virginia, May 1789). The ruling below is both unprecedented and wrong.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

No. 13-354

IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH
AND HUMAN SERVICES, *ET AL.*,
Petitioners,
v.

HOBBY LOBBY STORES, INC., *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICUS CURIAE THE OVARIAN CANCER NATIONAL ALLIANCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000BB *et seq.*, provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. § 2000BB-1(a) and (b). The question presented is whether RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners.

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IN THE

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for the Tenth Circuit**

BRIEF OF AMICUS CURIAE THE OVARIAN CANCER NATIONAL ALLIANCE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

The Ovarian Cancer National Alliance (the Alliance) is the nation's leading organization fighting to save the lives of women with ovarian cancer. Toward that end, the Alliance advocates nationwide for increased research funding for the development of an early detection test, improved health care practices, and life-saving treatment protocols. In further support of its mission, the Alliance also promotes increased access to medicines and treatments—including preventive treatments—that can help lower the risk of ovarian and other gynecologic cancers. The Alliance has filed amicus briefs in other cases involving the contraceptive-coverage mandate. *See* Br. of the Ovarian Cancer Nat'l Alliance, *et al.*, as *Amici Curiae* in Support of Appellees, *Eden Foods, Inc.* v. *Sebelius*, No. 13-1677 (6th Cir. July 30, 2013); Br. of the Ovarian Cancer Nat'l Alliance, *et al.*, as *Amici Curiae* in Support of Appellees, *Gilardi* v. *HHS*, No. 13-5069 (D.C. Cir. June 14, 2013).

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[1] *Amicus curiae* provided all parties with timely notice of its intent to file this brief. All parties have consented to the filing of this brief. No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than *amicus curiae* or its counsel made a monetary contribution to the brief.

The contraceptive-coverage mandate takes an important step toward increasing access to treatments that reduce the risk of ovarian and other gynecologic cancers. Research shows that for many women at higher risk of developing ovarian cancer, oral contraceptives can be the difference between developing ovarian cancer and not developing it. The Tenth Circuit's divided *en banc* opinion permits for-profit corporations across Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming to deny women enrolled in employer-sponsored health insurance the contraceptive coverage to which they are otherwise entitled under federal law. There is no question that this holding undermines women's access to a critical preventive therapy in the fight against ovarian cancer.

That erroneous holding warrants review and reversal. Left undisturbed, the decision could have wide-reaching medical consequences: ovarian cancer kills over half the women diagnosed with the disease within five years, amounting to thousands of

American women each year. And because there is currently no way to reliably detect ovarian cancer at an early stage, prevention remains the primary weapon against this devastating disease. Women living in the states of the Tenth Circuit, unlike those living elsewhere in the country, will be forced to pay out of pocket for that protection or forego it entirely. Such important consequences—resulting from an interpretation of federal law in direct conflict with decisions of other circuits—presents precisely the sort of situation in which this Court's review is warranted. The Alliance respectfully requests that this Court grant certiorari.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision to invalidate application of the contraceptive-coverage mandate to for-profit corporations like Hobby Lobby, Inc. and Mardel, Inc. jeopardizes access to critical preventive care. Oral contraceptives and intrauterine devices (IUDs) are widely recognized preventive therapies for reducing the risk of ovarian, endometrial, and other gynecologic cancers. The Tenth Circuit's decision therefore undermines women's ability to afford potentially life-saving treatments, based solely on a for-profit corporation's religious objection.[2]

That outcome is particularly troubling given the deadly nature of these gynecologic cancers. Ovarian cancer kills thousands of American women each year. More than half of the women diagnosed with the disease will die within five years, and with no effective way to detect ovarian cancer at an early stage, prevention remains the most effective tool to combat the disease. Endometrial cancer—which forms in the tissue lining of the uterus—likewise kills thousands of American women every year, most of whom are post-menopausal women over the age of sixty. For these women too, contraceptives are a potentially life-saving cancer-preventive treatment.

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[2] Hobby Lobby covered many of these preventive services *before* the contraceptive-coverage mandate took effect; it was only *after* learning about the mandate that the company "re-examined its insurance policies" and at that point determined that certain previously covered contraceptives should be removed from the Hobby Lobby plan based on a religious objection. Pet. 10.

The cancer-preventive potential of oral contraceptives and IUDs has been corroborated by a plethora of scientific research. That research—and the medical practice of prescribing contraceptives to reduce a woman's risk of developing gynecologic cancer—played a key role in the government's decision-making when it implemented the women's preventive-services provision of the Affordable Care Act. Access to the full benefits contemplated by that provision should not turn on the religious convictions of the owners or controlling shareholders of a for-profit corporation.

The Tenth Circuit's decision affects more than just the mothers, wives, sisters, and daughters insured through the Hobby Lobby and Mardel plans. Other for-profit employers have already successfully invoked the decision to enjoin the contraceptive-coverage mandate's application to them. *See Newland* v. *Sebelius*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013) (manufacturer and distributor of heating and air conditioning units); *Armstrong* v. *Sebelius*, No. 13-cv-00563-RBJ, 2013 WL 5213640 (D. Colo. Sept. 17, 2013) (mortgage company). This Court should grant review now to confirm that the contraceptive-coverage mandate applies to corporations that run craft stores, manufacture heating and air conditioning units, and offer mortgages, just as it does to all other for-profit corporations.

Certiorari is also warranted because of the circuit split on this issue. *See Conestoga Wood Specialties Corp.* v. *HHS*, 724 F.3d 377, 388 (3d Cir. 2013); *Autocam Corp.* v. *Sebelius*, No. 12-2673, 2013 WL 5182544, at *7 (6th Cir. Sept. 17, 2013). When the negative health consequences of having a contraceptive-coverage mandate that applies differently depending on geography are added to the mix, the case for certiorari becomes even stronger. Congress contemplated, and the Department of Health and Human Services implemented, a statutory and regulatory scheme designed to be uniform throughout the country. Only then could the full benefits of preventive coverage without cost sharing be realized. But so long as the decision below stands, women living within the Tenth Circuit, in contrast to women living elsewhere, will be deprived of the full prophylactic benefits to which they are otherwise entitled under federal law.

For all these reasons, the Court should grant certiorari and reverse the decision below.

ARGUMENT

ACCESS TO CANCER-PREVENTIVE TREATMENTS FOR WOMEN INSURED THROUGH FOR-PROFIT CORPORATIONS SHOULD NOT TURN ON WHERE THE CORPORATION IS LOCATED.

The requirement that health plans provide members with access to contraception is based on the scientific reality that contraceptives provide significant medical benefits for many women, including benefits that are wholly unrelated to preventing pregnancy. The Health Resources and Services Administration (HRSA) took into account the non-contraceptive benefits that contraceptives have, including reducing the risk of cancer and other serious medical conditions. The Institute of Medicine (IOM) report relied upon by HRSA specifically explained that "[l]ong-term use of oral contraceptives has been shown to reduce a woman's risk of endometrial cancer."[3] As the IOM report makes clear, the contraceptive-coverage mandate is based, in part, on the government's compelling interest in ensuring that women have cost-free access to this important preventive treatment.

Myriad studies confirm that the use of oral contraceptives and intrauterine devices (IUDs) corresponds to a lower risk of certain deadly cancers in women, including ovarian, endometrial, and other gynecologic cancers. Requiring most health plans to provide coverage for contraceptives thus promotes women's health by ensuring that all women, regardless of their employer, have access to medical treatments that effectively reduce the risk of some of the most lethal cancers.

1. Oral contraceptives offer life-saving preventive health benefits by reducing the risk of ovarian cancer—a disease that kills more American women each year than any other gynecologic malignancy and kills more than half of the women it afflicts within

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[3] *See* Inst. of Med., *Clinical Preventive Servs. for Women: Closing the Gaps* 3 (2011), *available at* http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx.

five years of diagnosis. In 2013 alone, the National Cancer Institute estimates that 22,240 women will be diagnosed with the disease and 14,030 more will die from it.[4]

Because this form of cancer is so lethal and evades early detection, prevention is the best weapon to combat the disease. Oral contraceptives are one of the few effective non-invasive prevention options.[5] Indeed, study after study has confirmed the significant protective association between oral contraceptive use and the risk of ovarian cancer.[6] The results are profound for families in the Tenth Circuit and throughout the country: Contraceptive use has saved thousands of lives. A 2008 study, for example, concluded that oral contraceptives have prevented some 200,000 cases of ovarian cancer worldwide since the drugs were first approved, saving 100,000 women who otherwise would have died from the disease.[7]

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[4] Nat'l Cancer Inst., *Ovarian Cancer*, http://www.cancer.gov/cancertopics/types/ovarian (last visited Oct. 21, 2013).

[5] Francesmary Modugno *et al.*, *Oral Contraceptive Use, Reproductive History, and Risk of Epithelial Ovarian Cancer in Women With and Without Endometriosis*, 191 Am. J. Obstet. Gynecol. 733, 738 (2004); *see also* Roberta B. Ness *et al.*, *Risk of Ovarian Cancer in Relation to Estrogen and Progestin Dose and Use Characteristics of Oral Contraceptives*, 152 Am. J. Epidemiol. 233, 233 (2000).

[6] *See, e.g.*, Laura J. Havrilesky *et al.*, *Oral Contraceptive Pills as Primary Prevention for Ovarian Cancer*, 0 Obstet. & Gynecol. 1 (2013); Valerie Beral *et al.*, *Ovarian Cancer and Oral Contraceptives: Collaborative Reanalysis of Data from 45 Epidemiological Studies Including 23,257 Women with Ovarian Cancer and 87,303 Controls*, 371 Lancet 303, 307–12 (2008); Julia B. Greer *et al.*, *Androgenic Progestins in Oral Contraceptives and the Risk of Epithelial Ovarian Cancer*, 105 Obstet. & Gynecol. 731, 735 (2005); Ness *et al.*, *supra*, at 239; Harvey A. Risch *et al.*, *Parity, Contraception, Infertility, and the Risk of Epithelial Ovarian Cancer*, 140 Am. J. Epidemiol. 585, 589 (1994).

2. Oral contraceptives also play a critical role for women at risk of endometrial cancer. A deadly cancer that forms in the tissue lining the uterus, endometrial cancer is the most common invasive gynecologic cancer among U.S. women. Approximately 49,560 new cases are expected in 2013, and more than 8,000 women are expected to die of endometrial cancer this year.[8] Endometrial cancer typically occurs in post-menopausal women, with an average age of 60 at diagnosis. There are currently no effective screening or detection methods for endometrial cancer.[9] The use of combination oral contraceptives (containing estrogen and progestin) is an important part of the fight to prevent endometrial cancer.[10]

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[7] Beral, *Ovarian Cancer and Oral Contraceptives: Collaborative Reanalysis of Data from 45 Epidemiological Studies Including 23,257 Women with Ovarian Cancer and 87,303 Controls*, 371 Lancet at 307, 312.

[8] Nat'l Cancer Inst., *Endometrial Cancer Screening: Significance*, http://www.cancer.gov/cancertopics/pdq/screening/endometrial/HealthProfessional/page2 (last visited Oct. 21, 2013).

[9] Nat'l Cancer Inst., *Endometrial Cancer Screening: Evidence of Benefit*, http://www.cancer.gov/cancertopics/pdq/screening/endometrial/HealthProfessional/page3 (last visited Oct. 21, 2013).

[10] The Cancer and Steroid Hormone Study of the Centers for Disease Control and the National Institute of Child Health and Human Development, *Combination Oral Contraceptive Use and the Risk of Endometrial Cancer*, 257 J. Am. Med. Ass'n 796, 796-797 (1987); M.P. Vessey & R. Painter, *Endometrial and*

3. Intrauterine devices are also used to help reduce the risk of gynecologic cancers. In particular, studies have linked IUD use with a reduced risk of endometrial cancer.[11] IUDs also may help prevent cervical cancer.[12]

4. As the foregoing research demonstrates, contraceptives provide significant medical benefits that help save women's lives. These medical benefits have nothing to do with the prevention of pregnancy. This preventive-health effect is—beyond dispute—a compelling governmental interest. The contraceptive-coverage mandate furthers that interest by ensuring women covered by most health plans have access to these life-saving treatments without cost sharing.

A woman's decision about whether to use contraceptives to reduce her risk of developing gynecologic cancers should be made in consultation with her physician based on her health profile and

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Ovarian Cancer and Oral Contraceptives—Findings in a Large Cohort Study, 71 Br. J. Cancer 1340, 1340 (1995).

[11] *See, e.g.*, Abraham Benshushan *et al.*, *IUD Use and the Risk of Endometrial Cancer*, 105 Euro. J. Obstet. & Gynecol. & Reprod. Biology 166, 167 (2002); Deirdre A. Hill *et al.*, *Endometrial Cancer in Relation to Intra-Uterine Device Use*, 70 Int'l J. Cancer 278, 279 (1997); Susan Sturgeon *et al.*, *Intrauterine Device Use and Endometrial Cancer Risk*, 26 Int'l J. Epid. 496, 498 (1997); F. Parazzini *et al.*, *Intrauterine Device Use and Risk of Endometrial Cancer*, 70 Br. J. Cancer 672, 673 (1994); Xavier Castellsague *et al.*, *Intra-uterine Contraception and the Risk of Endometrial Cancer*, 54 Int'l J. Cancer 911, 915 (1993).

[12] Xavier Castellsague *et al.*, *Intrauterine Device Use, Cervical Infection with Human Papillomavirus, and Risk of Cervical Cancer: A Pooled Analysis of 26 Epidemiological Studies*, 12 Lancet Oncol. 1023, 1028 (2011).

risk factors. Under the current rule in the Tenth Circuit, however, that decision can be skewed by the religious views of the for-profit employer providing the woman's health coverage, which may deny coverage for these potentially life-saving treatments. This case presents an ideal vehicle for the Court to reject that conclusion and ensure that the contraceptive-coverage mandate's prophylactic benefits remain uniform nationwide.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are physicians and other health care professionals with expertise in women's health, including reproductive health and contraception, with the common goals of disseminating current medical and scientific data concerning the method of action of various contraceptives that are frequently mischaracterized as abortificients and ensuring that the scientific distinction between contraceptives and abortifacients be recognized and preserved in judicial decisions on the issue.

Amici are cognizant that the public discourse on contraception generally, and emergency contraception in particular, is infused with misleading or charged rhetoric stemming from political or religious views. *Amici* seek to inform this Court of the objective scientific facts relevant to the method of action of the contraceptives at issue to aid this Court's determination as to whether to grant certiorari.

Physicians for Reproductive Health ("PRH") is a doctor-led national not-for-profit organization that relies upon evidence-based medicine to promote sound reproductive health care policies. Comprised of physicians, PRH brings medical expertise to discussions of public policy on issues affecting reproductive health care and advocates for the provision of comprehensive reproductive health services as part of mainstream medical care. Ensuring the reasonable availability of contraceptives is one such aspect of comprehensive reproductive health care within PRH's objectives. As an organization of medical professionals, PRH is particularly sensitive to the need to ensure that public discourse concerning issues affecting reproductive health, as well as legislative and judicial decision-making, is based on medical and scientific facts and to prevent misinformation from forming the basis of reproductive health care policies. Based on its medical expertise, PRH seeks to highlight for the Court how certain FDA-approved contraceptives function and to dispel, based on scientific data, the notion that these contraceptives cause abortion and therefore are "abortifacients."

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and no person other than *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Pursuant to Supreme Court Rule 37.2(a), *amici* also state that all parties were provided with ten-day written notice of their intent to file this brief and all parties have consented in writing to its filing.

The American College of Obstetricians and Gynecologists (ACOG) is a non-profit educational and professional organization founded in 1951. With more than 57,000 members, ACOG is the leading professional association of physicians who specialize in the health care of women. ACOG's members represent approximately 90% of all board-certified obstetricians and gynecologists practicing in the United States. By virtue of the years of collective expertise of its physician members, ACOG recognizes that increased access to prescription contraceptives is an essential component of effective health care for women and their children.

The American Society for Emergency Contraception (ASEC) is a national organization which holds as its primary mission the promotion of access to and education about emergency contraception. ASEC supports collaboration among and represents a diverse group of stakeholders in the reproductive health community whose work includes a focus on emergency contraception. ASEC provides technical expertise to reproductive health organizations, including interpreting and explaining the scientific research about how emergency contraceptives work. ASEC's work is guided by a Steering Committee comprised of experts from leading reproductive health organizations.

The Association of Reproductive Health Professionals (ARHP) is a non-profit membership organization that was founded by Alan Guttmacher in 1963 as the education arm of Planned Parenthood. ARHP translates good science into practice by producing accredited, evidence-based programs for health care professionals across a broad range of sexual and reproductive health topics. ARHP is the only association offering continuing medical education designed for an inter-professional audience. ARHP is committed to increasing access to emergency contraception and co-manages the Not-2-Late website and hotline with James Trussell and Princeton's Office of Population Research.

The American Society for Reproductive Medicine (ASRM) is a non-profit, multidisciplinary organization with members in all 50 states and more than 100 countries worldwide. Founded in 1944, ASRM is dedicated to the advancement of the art, science, and practice of reproductive medicine. ASRM pursues its mission by supporting research, providing professional and patient education, developing practice and ethical standards in the field, and engaging in advocacy. As an organization of physicians, scientists, and other healthcare providers, ASRM seeks to clarify how certain contraceptive methods operate to ensure that patients are able to receive the most appropriate, individualized contraceptive care.

The Society for Adolescent Health and Medicine (SAHM) was founded in 1968 and is a multidisciplinary organization committed to improving the physical and psychosocial health and well-being of all adolescents through advocacy, clinical care, health promotion, health service delivery, professional development and research. In its pursuit of optimal adolescent health and developmentally-appropriate health care, SAHM believes that scientific research provides the evidence base for effective health promotion as well as prevention and treatment of illness and injury. SAHM believes prevention of unintended adolescent pregnancy requires a multifaceted approach that includes primary and secondary prevention methods. Because access to emergency contraceptive methods are essential components of secondary prevention efforts, SAHM seeks to ensure the accuracy of information regarding these safe and effective medications.

The American Medical Women's Association (AMWA) is a multispecialty organization comprised of physicians, residents, medical students, and health care professionals. AMWA functions at the local, national, and international level by providing and developing leadership, advocacy, education, expertise, mentoring, and strategic alliances to advance women in medicine and improve women's health.

The National Association of Nurse Practitioners in Women's Health (NPWH) is a non-profit educational and professional organization that was established over 30 years ago and is the leading professional association of nurse practitioners who specialize in the health care of women. The mission of NPWH is to ensure the provision of quality health care to women of all ages by nurse practitioners and to protect and promote women's rights to make their own health care choices. NPWH continues to advocate for access to contraceptives and education about emergency contraception.

The Society of Family Planning (SFP) is an academic society of researchers, clinicians and educators dedicated to improving sexual and reproductive health. Among its other activities, SFP promotes scientifically sound research by funding studies on family planning and fosters the advancement of clinical care through the development of evidence-based clinical guidelines. SFP also advances the creation of family planning knowledge to inform public policy. SFP maintains that promoting the most current research findings and medically accurate information about contraception, including emergency contraception, is a critical part of improving sexual and reproductive health.

The International Association of Forensic Nurses (IAFN) is an international non-profit membership organization comprised of forensic nurses working around the world and other professionals who support and complement the work of forensic nursing. Forensic nursing is the practice of nursing at the intersection of the health and legal systems, including the care of victims of violence and sexual assault. IAFN is dedicated to the use of evidence-based forensic nursing practices and advocates for the availability of emergency contraception to victims of sexual assault who choose to use it as a means of preventing pregnancy.

The American College of Nurse-Midwives, (ACNM) is the professional organization for certified nurse-midwives and certified midwives. ACNM leads the profession through education, clinical practice, research and advocacy. ACNM advocates on behalf of women and families, its members, and the midwifery profession to eliminate health disparities and increase access to evidence-based, quality cares.

James Trussell, Ph.D, is Professor of Economics and Public Affairs and Faculty Associate of the Office of Population Research at Princeton University. He is the author or co-author of more than 300 scientific publications, primarily in the area of reproductive health. His recent research has been focused in four areas: emergency contraception, contraceptive failure, the safety of contraception and abortion, and the cost-effectiveness of contraception. He has actively promoted making emergency contraception more widely available as an important step in helping women reduce their risk of unintended pregnancy; in addition to his research on this topic, he maintains an emergency contraception website (http://not-2-late.com) and designed and launched a toll-free emergency contraception hotline (1-888-NOT-2-LATE). Dr. Trussell received his B.S. degree in mathematics from Davidson College in 1971, a B.Phil. in economics from Oxford University in 1973, and a Ph.D. in economics from Princeton University in 1975. He is a senior fellow at the Guttmacher Institute, a member of the National Medical Committee of Planned Parenthood

Federation of America, and a member of the board of directors of the NARAL Pro-Choice America Foundation and the Society of Family Planning. He serves on the editorial advisory committees of Contraception and Contraceptive Technology Update.

Susan F. Wood, Ph.D., is associate professor of health policy at the George Washington University School of Public Health and Health Services where she directs the Jacobs Institute of Women's Health. Formerly, she was Assistant Commissioner of Women's Health at the FDA (2000-2005). She is both an expert in women's health, family planning and preventive services policy, and in FDA regulation. She has worked to support the scientific evidence and public health interest in women's health, family planning, and access to emergency contraception.

Don Downing, RPh, is a Clinical Professor at the University of Washington School of Pharmacy in Seattle. His major practice and training interests have included the development of the nation's first pharmacist-provided emergency contraception program and the first pharmacist-initiated on-going hormonal contraception services. In 2002 he was awarded the Washington State Pharmacists Association's Pharmacist of the Year Award and also the University of Washington School of Pharmacy's Alumni of the Year. In 2005 he was awarded the American Pharmacists Association's Academy of Pharmacy Practice and Management Distinguished Achievement Award for his efforts in contraception and other public health endeavors. In 2008 the Pharmacy Access Partnership named him Pharmacist Leader of the Year for his national work in improving contraceptive access.

Kathleen Besinque, Pharm.D., M.S.Ed., FASHP, FCSHP is an Associate Professor of Clinical Pharmacy and the Assistant Dean for Curriculum and Assessment at USC School of Pharmacy. She teaches in both the Doctor of Pharmacy program and the Academic Medicine program at USC. She received both a Doctor of Pharmacy degree and a Masters degree in Education from the University of Southern California and completed a residency in Ambulatory Care at the Veterans Affairs Outpatient Clinic in Los Angeles. Her clinical practice area is primary care women's health including emergency contraception and menopause therapies.

SUMMARY OF ARGUMENT

This Petition implicates several issues of national importance and the outcome of this case will affect countless Americans who obtain health insurance through their employers' group plan. This case arises at the intersection of several significant issues of widespread interest: health care, contraceptive coverage and the free exercise of religious belief. This case concerns the enforceability of an important provision of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat 119, which mandates that non-exempt employer group health plans provide preventive health services, including coverage of FDA-approved contraceptives (the "Mandate"). Respondents' challenge the Mandate and this Petition specifically addresses whether the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000BB *et seq.*, allows a for-profit corporation to decline to provide its employees with the mandated contraceptive coverage based on the belief of the owner of the corporation that certain contraceptives prevent implantation of a fertilized egg and that coverage of these contraceptives in the corporation's group health plan contravenes the owner's religious belief. The sincerity of the owner's belief that the use of such contraceptives would be wrong is not challenged.

However, as pointed out by the dissenting opinion of Chief Judge Briscoe, below, Respondents' *religious* objection to providing coverage for emergency contraceptives Plan B and ella, and for two intrauterine devices, ultimately is premised on Respondents' belief regarding a *scientific* matter; namely, their belief regarding how such contraceptives work. Petition App. at 131a-132a (noting that the connection between Respondents' religious beliefs and their objection to coverage of these contraceptives is "not one of religious belief, but rather of purported scientific fact, *i.e.*, how the challenged contraceptives operate to prevent pregnancy). Although Respondents' supposition as to the method of action of the challenged contraceptives form the basis of their challenge to the Mandate, the majority below declined to "wade into scientific waters here[.]"

In fact, Respondents' claim that Plan B and ella prevent implantation is not supported by current scientific data or by evidence in the record below. To the contrary, scientific research shows that Plan B and ella both function by inhibiting or postponing ovulation; they do not prevent fertilization or implantation. *See, e.g.*, K. Gemzell-Danielsson, *et al.*, *Emergency Contraception—Mechanisms of Action*, 87 CONTRACEPTION 300, 305 (2013) ("Gemzell-Danielsson").

Equally unsupported is Respondents' characterization of any of the FDA-approved contraceptives or emergency contraceptives as "abortifacients." Petition App. at 5a (summarizing Respondents' objection to providing coverage for certain contraceptive services, including "drugs and devices that the plaintiffs believe to be abortifacients . . ."). Similarly, decisions in other lower courts addressing this same issue have also failed to preserve the scientific distinction between a contraceptive and an abortifacient, and have erroneously suggested that certain of the FDA-approved contraceptives that are covered by the Mandate are abortifacients. *See, e.g.*, *Conestoga Wood Specialties Corp. v. HHS*, 724 F.3d 377, 416 (3d Cir. 2013) ("the Hahns and Conestoga are being forced to pay for the offending contraceptives, including abortifacients . . ."); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *3 (7th Cir. Dec. 28, 2012) ("[t]he religious-liberty violation at issue here inheres in the coerced coverage of contraception, abortifacients, . . ."). Abortificient has a precise meaning in the medical and scientific community and it refers to the termination of a pregnancy. Contraceptives that prevent fertilization from occurring, or even prevent implantation, are simply not abortifacients regardless of an individual's personal or religious beliefs or mores.

As demonstrated herein, the weight of the scientific evidence establishes that the FDA-approved contraceptives and emergency contraceptive are not abortifacients. It is respectfully urged that the Court grant a writ of certiorari in this significant case and that any formulation of the issues for review accurately reflect the scientific record and maintain the proper distinction between a contraceptive and an abortifacient.

ARGUMENT

THE SCIENTIFIC EVIDENCE CONFIRMS THAT THE FDA-APPROVED FORMS OF EMERGENCY CONTRACEPTION ARE NOT ABORTIFACIENTS

As highlighted by Chief Judge Briscoe's opinion below, "there is no evidentiary support in the record for plaintiffs' allegations that the objected-to contraceptive drugs and devices actually have the potential to prevent implantation of fertilized eggs." Petition App. at 106a. And, as to this issue of science, not religious belief, "plaintiffs' allegations regarding the abortion-causing potential of the challenged drugs are subject not only to examination but evidentiary proof." *Id.* at 132a. First Amendment jurisprudence maintains a distinction between scientific facts which are verifiable, and matters of protected religious belief which are more personal. *See Founding Church of Scientology v. United States,* 409 F.2d 1146, 1164 (D.C. Cir. 1969) ("... in order to raise a religious defense to a charge of false statement ..., the person charged with the alleged misrepresentation must have explicitly held himself out as making religious, as opposed to medical, scientific or otherwise secular, claims"), *on remand sub nom. United States v. Article or Device "Hubbard Electrometer,"* 333 F. Supp. 357, 362 (D.D.C. 1971) ("... the proof showed that many scientific claims permeate the writings and that these are not even inferentially held out as religious, either in their sponsorship or context."). As demonstrated below, there is a scientific distinction between a contraceptive and an abortifacient and the scientific record demonstrates that none of the FDA-approved contraceptives covered by the Mandate are abortifacients.

A. Contraceptives v. Abortifacients: the Difference Between Pregnancy Prevention and Pregnancy Termination

Understanding the difference between a contraceptive and abortifacient requires some familiarity with how various forms of contraception work to prevent pregnancy, which, in turn, requires a general understanding of certain biological processes leading to pregnancy. Fertilization occurs upon the fusion of a viable egg with viable sperm. Because sperm can remain viable in the female reproductive tract for approximately five days and an egg for up to one day, sexual intercourse can result in fertilization from five days before ovulation up to one day after. Following fertilization, the blastocyst (the fertilized egg) may implant into the lining of the uterus (the endometrium), which typically occurs, if at all, over the course of several days between 5-9 days following fertilization. A.J. Wilcox, *et al.*, *Timing of Sexual Intercourse in Relation to Ovulation. Effects on Probability of Conception*, 333 NEW ENG. J. MED. 1517 (1995); D.B. Dunson, *et al*, *Day-Specific Probabilities of Clinical Pregnancy Based on Two Studies With Imperfect Measures of Ovulation*, 14 HUM. REPROD. 1835 (1999).[2] Pregnancy is established only upon the conclusion of such implantation. OBSTETRIC-GYNECOLOGIC TERMINOLOGY: WITH SECTION ON NEONATOLOGY AND GLOSSARY OF CONGENITAL ABNORMALITIES 299, 327 (E.G. Hughes, ed., F.A. Davis Co. 1972); *Statement on Contraceptive Methods* (Am. Coll. of

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[2] Not all blastocysts implant. The limited data available suggests that even under optimal conditions and timing, no more than 40% of blastocysts eventually implant in the endometrium. See K. Diedrich,*et al.*, *The Role of the Endometrium and Embryo in Human Implantation*, 13 Hum. REPROD. UPDATE 365 (2007).

Obstetricians & Gynecologists, Wash., D.C., Jul. 1998). The scientific definition of pregnancy is also the legal definition of pregnancy, accepted by governmental agencies and all major U.S. medical organizations. *See, e.g.*, 45 C.F.R § 46.202 (recognizing pregnancy as "the period of time from implantation to delivery").

In the medical literature, a "contraceptive" refers to that which prevents fertilization of an egg or prevents implantation of a fertilized egg – in other words, it prevents a pregnancy from taking place. "Emergency contraception" (EC) refers to a drug or device that is used after intercourse, but before pregnancy, to prevent pregnancy from occurring. *See generally* Gemzell-Danielsson at 300 ("emergency contraception (EC) is defined as the use of any drug or device after an unprotected intercourse to prevent an unintended pregnancy"); *see also* H.B. Croxatto *et al.*, *Mechanism of Action of Hormonal Preparations Used for Emergency Contraception: A Review of the Literature*, 63 CONTRACEPTION 111, 112 (2001) ("emergency contraception is used after coitus but before pregnancy has become established."). An "abortifacient," by contrast, works to terminate a pregnancy, which necessarily occurs after an embryo has implanted in the uterine lining. *See* COCHRANE LIBRARY, http://onlinelibrary.wiley.com/cochranelibrary/search/mesh/quick (search "Abortifacient Agents").[3]

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[3] Although Respondents and others may have differing personal views as to when life begins, the medical and scientific communities define pregnancy as beginning upon implantation. While personal beliefs may dictate individual choices and values, they cannot alter established scientific standards and terminology: abortion refers to the termination of a pregnancy. Thus, the term "abortifacient" refers to – and should only be used in connection with – drugs or devices that end a pregnancy, not those that prevent it.

EC is contraception that is effective within a specified window *after* intercourse to prevent pregnancy. EC works much the same way as traditional contraceptives, but provides protection after-the-fact in the event of contraception failure (such as a broken condom) or unprotected sex, including in the case of sexual assault. Plan B and ella are among the emergency contraceptives approved by the FDA.

B. FDA-Approved Emergency Contraceptives are not Abortifacients

Given the established scientific demarcation between contraceptives and abortifacients at the point of pregnancy – with contraceptives preventing pregnancy and abortifacients ending a pregnancy that has occurred - we turn to the specific mechanism of action of each of the approved emergency contraceptives as established by the medical and scientific literature. At the outset, we note that, as discussed below, there is no scientific evidence that emergency contraceptives available in the United States and approved by the FDA affect an existing pregnancy. Gemzell-Danielsson at 305. None, therefore, is properly classified as an abortifacient.

By way of explanation, there are two types of emergency contraceptive pills (ECPs) available in the United States: those containing levonorgestrel (LNG) and those containing ulipristal acetate (UPA). Plan B, Plan B One-Step, Next Choice One Dose and others are hormonal pills containing 1.5 mg LNG, a synthetic version of the naturally-occurring hormone progesterone. FDA, LABELING FOR PLAN B ONE STEP, *available at* http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf ("PLAN B LABEL"). LNG, which has long been approved at lower dosage levels for use in ordinary contraceptives, has also been approved as emergency contraception since 1999 and is presently the most commonly used form of emergency contraception. Gemzell-Danielsson at 301. Ella, which came on the market more recently in 2010, is an oral pill containing 30 mg UPA, which acts on human progesterone receptors. As established by the weight of the scientific evidence, LNG and UPA function primarily, if not exclusively, by inhibiting ovulation, thereby preventing fertilization from occurring. *See id.* at 305.[4]

LNG EC has been widely studied, and current evidence shows that it works by preventing or disrupting ovulation, but is not effective after ovulation has already occurred. Indeed, if LNG EC were effective in preventing the implantation of a fertilized egg, pregnancy rates among women who took it after ovulation had occurred would most certainly be lower than the research indicates. *See* Noe at 491; N. Novikova *et al.*, *Effectiveness of Levonorgestrel Emergency Contraception Given Before or After Ovulation – A Pilot Study,* 75 CONTRACEPTION 112 (2007).[5]

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[4] Some studies have suggested that Plan B and/or ella increase cervical mucosal viscosity, which could impede the migration of sperm in the reproductive tract, or increase alkanization of the reproductive tract, which immobilizes sperm. These incidental effects of ECPs create an environment inhospitable to fertilization; they still do not have a post-fertilization effect. See, e.g., G. Noe *et al.*, *Contraceptive Efficacy of Emergency Contraception With Levonorgestrel Given Before or After Ovulation*, 84 CONTRACEPTION 486 (2011) ("Noe").

[5] Progesterone inhibits ovulation, but once fertilization has occurred, it actually supports pregnancy. A.S. Penzias, *Luteal Phase Support*, 77 FERTILITY AND STERILITY 318 (2002).

UPA EC (ella) is highly effective in preventing ovulation because UPA EC works later in the pre-ovulatory cycle, when LNG EC is no longer effective. The fact that UPA EC works when taken later than LNG EC does not mean that UPA EC prevents implantation. Indeed, there is no evidence that UPA EC affects implantation: "EC with a single dose of 1.5 mg LNG or 30 mg UPA acts through inhibition of or postponing ovulation but does not prevent fertilization or implantation and has no adverse effect on a pregnancy." Gemzell-Danielsson at 305.

Opponents of emergency contraception frequently cite the FDA-approved product label for LNG EC products, which states that "it *may* inhibit implantation (by altering the endometrium)." PLAN B LABEL at 4 (emphasis added). The product label has not been updated since the product was originally approved in 1999 and it does not reflect the most current research. In fact, later studies have led to the conclusion that LNG does not cause changes to the endometrium (uterine lining) that would hamper implantation. M. Durand *et al.*, *On the Mechanisms of Action of Short-Term Levonorgestrel Administration in Emergency Contraception*, 64 CONTRACEPTION 227, 233 (2001) (study of LNG-exposed tissue "strongly suggest[s] the apparent preservation of endometrial structures thought to be associated with implantation capabilities."); Noe at 486-492 (concluding that LNG-EC, when used after ovulation "is completely unable to prevent pregnancy *because it has no effect on subsequent reproductive processes, including implantation of the embryo*") (emphasis added). *See also* U.S. Gov't Accountability Office, GAO-06-109, *Food and Drug Administration: Decision Process to Deny Initial Application for Over-the-Counter Marketing of the Emergency Contraceptive*

Drug Plan B Was Unusual, at 12-13 (November 2005) ("Research has shown that levonorgestrel-only hormonal emergency contraception, such as Plan B, interferes with prefertilization events. . . . ECPs, including Plan B, do not interfere with an established pregnancy.").

There is no scientific evidence showing that either LNG or UPA ECPs are able to prevent implantation of a fertilized egg. While the chemical compound found in ella has been shown to have some effect on the endometrium when higher or repeated doses are taken,[6] whether, in fact, ella has an effect sufficient to prevent implantation of a fertilized egg is unknown and assertions that ella works in this way are speculative at best. As stated by *amicus* James Trussell, Ph.D., "the best evidence is that the ability of levonorgestrel and ulipristal acetate ECPs to prevent pregnancy can be fully accounted for by mechanisms that do not involve interference with post-fertilization events," such as implantation. J Trussell & E.G. Raymond, A LAST CHANCE TO PREVENT UNINTENDED PREGNANCY, at 7 (2013), *available at http://ec.princeton.edu/questions/ec-review.pdf.*; *see also* Gemzell-Danielsson at 305 ("EC with [...] LNG or [...] UPA [...] does not prevent fertilization or implantation" of a fertilized egg).

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[6] P. Stratton *et al.*, *A Single Mid-Follicular Dose of CDB-2914, a New Antiprogestin, Inhibits Folliculogenesis and Endometrial Differentiation in Normally Cycling Women*, 15 HUM. REPROD. 1092 (2000); P. Stratton *et al.*, *Endometrial Effects of a Single Early Luteal Dose of the Selective Progesterone Receptor Modulator CDB-2914*, 93 FERTILITY AND STERILITY 2035 (2010).

In any event, even if LNG or UPA did, in fact, inhibit implantation (which the evidence does not support), such effects would necessarily be pre-pregnancy; they would not transform LNG or UPA EC into abortifacients. Critically, LNG and UPA, when given for EC, have "no adverse effect on pregnancy." Gemzell-Danielsson at 305; *Access to Emergency Contraception*, ACOG Comm. Op. 542, 120 OBSTET GYNECOL 1250 (2012). Neither, therefore, is an abortifacient.

In addition to objecting to the two ECPs based on the erroneous claim that they prevent implantation, Respondents also object to coverage of two intrauterine devices (IUDs) approved as contraceptives by the FDA. Here, again, Respondents' scientific assumptions are faulty.

The first type of IUD is a levonorgestrel-releasing intrauterine system (LNG-IUS). LNG-IUS works primarily by thickening the cervical mucus, thereby preventing sperm from reaching the egg. M.F. Natavio, *et al.*, *Temporal Changes in Cervical Mucus After Insertion of the Levonorgestrel-Releasing Intrauterine System*, 87 CONTRACEPTION 430-31 (2013). *See also* Radha A. Lewis, *et al. Effects of the Levonorogestrel-Releasing Intrauterine System on Cervical Mucus Quality and Sperm Penetrability*, 82 CONTRACEPTION 491,495 (2010) (cervical mucus shown impenetrable by sperm in all LNG-IUS users in study, corroborating the primary contraceptive role of cervical mucus of the LNG-IUS). In addition, an LNG-IUS may also prevent ovulation, as the levonorgestrel released by the device has been shown to impair ovulation. I. Barbosa *et al.*, *Ovarian function after seven years' use of a levonorgestrel IUD*, Adv Contracept. 1995;11:85-95.

The second form of contraception approved by the FDA is the copper Intrauterine Device (Cu-IUD). Copper ions released from the IUD create an environment that is toxic to sperm. Gemzell-Daniellson at 305. The Cu-IUD affects the motility and viability of sperm and impairs their fertilizing capability. *Id.* In addition to its use as ordinary contraception, the Cu-IUD has also proven effective as emergency contraception when inserted up to five days following intercourse. When used as emergency contraception, the Cu-IUD could also act to prevent implantation, due to copper's effect of altering molecules present in the endometrial lining. *Id.* However, studies show that the alteration of the endometrial lining prevents rather than disrupts implantation. *Id.* at 304.). The Cu-IUD, just like any IUD, can produce an inflammatory response in the reproductive tract and uterus that is toxic for sperm and oocytes (eggs). M.E. Ortiz *et al*, H. *Copper-T Intrauterine Device and Levonorgestrel Intrauterine System: Biological Bases of their Mechanism of Action.* 75 Contraception 528 (2007). Critically, because neither IUD has been shown to disrupt pregnancy, they too are properly classified as contraceptives, not abortifacients. *See* FDA, BIRTH CONTROL GUIDE, *available at* http://www.fda.gov/downloads/ForConsumers/ByAudience/ForWomen/FreePublications/UCM282014.pdf ("BIRTH CONTROL GUIDE").

Emergency contraceptive drugs LNG and UPA should not be confused with the drug mifepristone, sold as Mifeprex in the United States and formerly known as RU-486. Opponents of contraception, including certain *amici curiae* appearing in the circuit court on behalf of Respondents, often cite to the fact that UPA and mifepristone are in the same class of drugs (anti-progestins) to suggest that ella is an abortifacient in the same manner as mifepristone. This claim is not supported by the scientific record. Both the chemical composition and the mechanisms of action of mifepristone and UPA differ. Moreover, mifepristone as contained in Mifeprex is taken at a materially greater dose and in combination with another drug, misoprostol. At the dosage used to induce abortion (200-600 mg), mifepristone acts to change the lining of the uterus, causing any implanted embryo to dislodge. M.D. Creinin *et al.*, *Medical Abortion in Early Pregnancy*, MANAGEMENT OF UNINTENDED AND ABNORMAL PREGNANCY 111, 111-135 (Maureen Paul et al., eds., Wiley-Blackwell 2009). Mifeprex, when combined with misoprostol, is effective at inducing abortion through the ninth week of gestation. *Medical Management of Abortion*, ACOG PRACTICE BULLETIN 67, 160 OBSTET GYNECOL 871, 872 (2005). Given its effect on a pregnancy, Mifeprex is clearly an abortifacient. Notably, Mifeprex is not on the list of FDA-approved contraceptives. *See* BIRTH CONTROL GUIDE.

C. Reduced Efficacy of ECPs Upon Delayed Use Demonstrates that ECPS are not Abortifacients

Further evidence that emergency contraceptives are not abortifacients is their lack of effect on pregnancies and their reduced efficacy to prevent pregnancy when taken post-ovulation. Some studies demonstrate a marked decline in the efficacy rate of emergency contraceptive pills the longer the interval between intercourse and treatment. *See* G. Piaggio *et al.*, *Timing of Emergency Contraception With Levonorgestrel or the Yuzpe Regimen*, 353 THE LANCET 721, 721 (1999). Moreover, when taken post-ovulation, LNG has been shown to have no effect on preventing pregnancy at all, "indicating that no reproductive process subsequent to ovulation is interfered with by LNG-EC." Noe at 491.

LNG works by blocking or delaying the luteinizing hormone (LH) surge, which triggers the ovulatory process; however, once that process has already been triggered by the LH surge, LNG cannot prevent follicular rupture and release of the egg. V. Brache *et al.*, *Immediate Preovulatory Administration of 30 mg Ulipristal Acetate Significantly Delays Follicular Rupture.* 25 HUM REPROD. 2256 (2010) ("Brache "). If LNG prevented implantation (or caused abortion), it would remain effective when taken post-ovulation. Noe at 491.

Ella's UPA has been shown to still be effective at delaying ovulation when taken later in the pre-ovulation period. This is because while LNG is effective at preventing ovulation only when taken *before* the LH surge, UPA EC is still effective at preventing pregnancy even when taken after the LH surge has begun, but before the LH peak. Brache; *see also* A.L. Glasier *et al.*, *Ulipristal Acetate Versus Levonorgestrel for Emergency Contraception: A Randomised Non-Inferiority Trial and Meta-Analysis.* 375 THE LANCET 555 (2010) (in a meta-analysis, the pregnancy rate for users of UPA was 65% lower than for users of LNG within the first 24 hours after intercourse and 42% lower within the first 72 hours). Although UPA has a wider window of effectiveness than LNG, it still does not prevent release of the egg, and, therefore, is not effective, if taken after the peak of the LH surge. *See* Brache. Once again, this diminished efficacy of UPA when taken at a point too late to stop ovulation is incompatible with the assertion that ella prevents implantation or causes abortion.

CONCLUSION

The medical and scientific record establishes that the emergency contraceptives approved by the FDA, as well as the approved intrauterine devices, do not interfere with pregnancy and are not abortifacients, because they are not effective after a fertilized egg has successfully implanted in the uterus. The Court should grant the petition for writ of certiorari and, in formulating any questions for review, should maintain the medical and scientific distinction between contraceptives and abortifacients.

Dated: New York, New York
October 21, 2013

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JOINT
APPENDIX

Supreme Court, U.S.
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In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

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for Respondents

PETITION FOR A WRIT OF CERTIORARI FILED: SEPT. 19, 2013
CERTIORARI GRANTED: NOV. 26, 2013

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Docket No. 12-6294

HOBBY LOBBY STORES, INC., DAVID GREEN, BARBARA GREEN, MART GREEN, STEVE GREEN, DARSEE LETT, PLAINTIFFS

v.

KATHLEEN SEBELIUS, SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, HILDA SOLIS, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF DEPARTMENT OF THE TREASURY, AND UNITED STATES DEPARTMENT OF THE TREASURY, DEFENDANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
11/20/12	[10020725] Civil case docketed. Preliminary record filed. DATE RECEIVED: 11/20/2012 * * * .

* * * * *

DATE	PROCEEDINGS
11/20/12	[10021229] Motion filed by Appellants Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc. for injunction pending appeal. * * *

DATE	PROCEEDINGS
	* * * * *
11/28/12	[10023101] Supplemental authority filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc. * * *
11/30/12	[10023484] Response filed by Timothy Geithner, Kathleen Sebelius, Hilda Solis, United States Department of Health and Human Services, United States Department of Labor and United States Department of the Treasury to Appellants' Motion For Injunction Pending Appeal. * * *
	* * * * *
12/3/12	[10024305] Reply filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
	* * * * *
12/19/12	[10029616] Supplemental authority filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
12/20/12	[10029966] Order filed by Judges Lucero and Ebel denying motion for injunction pending appeal filed by Appellants Mr. Steve Green,

DATE	PROCEEDINGS
	Barbara Green, Mr. David Green, Hobby Lobby Stores, Inc., Mardel, Inc., Mart Green and Darsee Lett. * * *
	* * * * *
1/10/13	[10034786] Motion filed by Appellants Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc. for initial en banc hearing. * * *
	* * * * *
1/24/13	[10038471] Opposition filed by Timothy Geithner, Kathleen Sebelius, Hilda Solis, United States Department of Health and Human Services, United States Department of Labor and United States Department of the Treasury to Petition for Initial Hearing En Banc. * * *
	* * * * *
2/11/13	[10043982] Appellant/Petitioner's brief filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
	* * * * *
2/12/13	[10044486] Appendix filed by Appellants Barbara Green, Mr. David Green, Mart

DATE	PROCEEDINGS
	Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc..
	* * * * *
3/15/13	[10053599] Appellee/Respondent's brief filed by Timothy Geithner, Kathleen Sebelius, Hilda Solis, United States Department of Health and Human Services, United States Department of Labor and United States Department of the Treasury. * * *
	* * * * *
3/29/13	[10057912] Order filed by Judges Briscoe, Kelly, Lucero, Hartz, O'Brien, Tymkovich, Gorsuch, Matheson and Bacharach granting appellants' petition for initial hearing en banc, granting the request to expedite oral argument and denying request to set this appeal and the Newland matter before the same panel. The parties will be advised promptly of the hearing date. Please see attached order for details. * * *
3/29/13	[10058025] Appellant/Petitioner's reply brief filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
4/1/13	[10058387] Order filed by Judges Briscoe, Kelly, Lucero, Hartz, O'Brien, Tymkovich, Gorsuch, Matheson and Bacharach directing

DATE	PROCEEDINGS
	appellants and appellees to file simultaneous supplemental briefing addressing the issues set forth in the attached order. (Supplemental briefs due 04/15/2013 for Timothy Geithner, Barbara Green, David Green, Mart Green, Steve Green, Hobby Lobby Stores, Inc., Darsee Lett, Mardel, Inc., Kathleen Sebelius, Hilda Solis, United States Department of Health and Human Services, United States Department of Labor and United States Department of the Treasury.) * * *
4/3/13	[10059018] Order filed by Judges Briscoe, Kelly, Lucero, Hartz, O'Brien, Tymkovich, Gorsuch, Matheson and Bacharach setting case for oral argument for May 23, 2013 at 2:00 p.m. * * * .
	* * * * *
4/22/13	[10064177] Appellee/Respondent's supplemental brief filed by Timothy Geithner, Kathleen Sebelius, Hilda Solis, United States Department of Health and Human Services, United States Department of Labor and United States Department of the Treasury. * * *
	* * * * *
4/22/13	[10064469] Appellant's supplemental brief filed by Barbara Green, Mr. David Green,

DATE	PROCEEDINGS
	Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. 12 paper copies to be provided to the court. Served on 04/22/2013. * * *
5/1/13	[10067611] Supplemental authority filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
5/7/13	[10069628] Supplemental authority filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
	* * * * *
5/23/13	[10075445] Case argued by Stuart Duncan for Appellant and by Alisa Klein for the Appellee; Submitted to Judges Briscoe, Kelly, Lucero, Hartz, Tymkovich, Gorsuch, Matheson and Bacharach. * * *
	* * * * *
6/26/13	[10085533] Supplemental authority filed by Barbara Green, Mr. David Green, Mart Green, Mr. Steve Green, Hobby Lobby Stores, Inc., Darsee Lett and Mardel, Inc.. * * *
6/27/13	[10085720] Response filed by Timothy Geithner, Kathleen Sebelius, Hilda Solis, HHS,

DATE	PROCEEDINGS
	United States Department of Labor and United States Department of the Treasury to appellants' 28j letter of June 26, 2013. * * *
6/27/13	[10085854] Reversed and Remanded with instructions. Terminated on the merits after oral hearing. Written, signed, published. Judges Briscoe (concurring in part and dissenting in part), Kelly (concurring), Lucero (concurring in part and dissenting in part), Hartz (concurring), Tymkovich (authoring), Gorsuch (concurring), Matheson (concurring in part and dissenting in part) and Bacharach (concurring). * * * .
6/27/13	[10085872] The order of the district court is reversed and remanded with instructions. [12-6294]
6/27/13	[10085874] Mandate issued. * * *
9/20/13	[10110122] Petition for writ of certiorari filed by Kathleen Sebelius on 09/19/2013 and placed on the docket 09/19/2013 as Supreme Court Number 13-354. * * *
11/26/13	[10128482] Supreme court order dated 11/26/2013 granting certiorari filed. The petition for a writ of certiorari in 13-356 (3rd Circuit) is granted. The cases are consolidated. * * *

* * * * *

UNITED STATES COURT DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Docket No. 5:12-cv-01000-HE

HOBBY LOBBY STORES, INC., DAVID GREEN, BARBARA GREEN, MART GREEN, STEVE GREEN, DARSEE LETT, PLAINTIFFS

v.

KATHLEEN SEBELIUS, SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, HILDA SOLIS, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF DEPARTMENT OF THE TREASURY, AND UNITED STATES DEPARTMENT OF THE TREASURY, DEFENDANTS

DOCKET ENTRIES

DATE	DOCKET ENTRY NO.	PROCEEDINGS
9/12/12	1	COMPLAINT against All Defendants filed by Steve Green, David Green, Darsee Lett, Mardel Inc, Barbara Green, Hobby Lobby Stores Inc, Mart Green. (Attachments: # 1 Civil Cover

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		Sheet) (pw) (Entered: 09/12/2012)

* * * * *

DATE	DOCKET ENTRY NO.	PROCEEDINGS
9/12/12	6	MOTION for Preliminary Injunction *and Opening Brief in Support* by All Plaintiffs. (Attachments: # 1 Exhibit 1—Order [Dkt#30] USDC Colorado) (Geister, Charles) (Entered: 09/12/2012)

* * * * *

DATE	DOCKET ENTRY NO.	PROCEEDINGS
9/28/12	18	MOTION to Expedite by All Plaintiffs. (Baxter, Eric) (Entered: 09/28/2012)

* * * * *

DATE	DOCKET ENTRY NO.	PROCEEDINGS
10/4/12	27	RESPONSE to Motion re 18 MOTION to Expedite filed by All Defendants. (Bennett, Michelle) (Entered: 10/04/2012)

* * * * *

DATE	DOCKET ENTRY NO.	PROCEEDINGS
10/4/12	29	ENTER ORDER . . . setting plaintiffs' motion 6 for preliminary injunction for hearing on 10/24/2012 @ 10:00 a.m., in Courtroom No. 304

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		before Honorable Joe Heaton; Defendants' response to plaintiffs' motion 6 is due for filing on 10/22/2012. Signed by Honorable Joe Heaton on 10/04/2012. (lam) (Entered: 10/04/2012)
10/9/12	30	UNOPPOSED MOTION to Continue *hearing on motion for preliminary injunction* by All Defendants. (Bennett, Michelle) (Entered: 10/09/2012)
10/10/12	31	ORDER granting 30 the government's unopposed motion for continuance . . . the hearing on plaintiffs' motion for preliminary injunction 6 is CONTINUED to 10/30/2012 @ 9:00 a.m., in Courtroom No. 304. Signed by Honorable Joe Heaton on 10/10/2012. (lam) (Entered: 10/10/2012)
10/10/12	32	CORRECTED ORDER continuing hearing on plaintiffs' motion 6 for preliminary injunction to: 11/1/2012 @ 09:00 AM in Courtroom 304

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		before Honorable Joe Heaton. Signed by Honorable Joe Heaton on 10/10/2012. (lam) (Entered: 10/10/2012)

* * * * *

DATE	DOCKET ENTRY NO.	PROCEEDINGS
10/22/12	41	RESPONSE in Opposition re 6 MOTION for Preliminary Injunction *and Opening Brief in Support* filed by All Defendants. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2) (Bennett, Michelle) (Entered: 10/22/2012)
10/29/12	42	REPLY by Plaintiffs Barbara Green, David Green, Mart Green, Steve Green, Hobby Lobby Stores Inc., Darsee Lett, Mardel Inc re 41 Response in Opposition to Motion filed by All Plaintiffs. (Duncan, Stuart) (Entered: 10/29/2012)
11/1/12	43	Minute Entry for proceedings held before Honorable Joe Heaton . . . hearing held on plaintiffs' motion for preliminary injunction 6; arguments from counsel heard;

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		court to enter written order. (Court Reporter Jeanne Ring) (lam) (Entered: 11/01/2012)

* * * * *

DATE	DOCKET ENTRY NO.	PROCEEDINGS
11/19/12	45	ORDER denying 6 plaintiffs' motion for preliminary injunction . . . see order for specifics. Signed by Honorable Joe Heaton on 11/19/2012. (lam) (Entered: 11/19/2012)
11/19/12	46	NOTICE OF APPEAL as to 45 Order on Motion for Preliminary Injunction by All Plaintiffs. Filing fee $ 455. (Duncan, Stuart) (Entered: 11/19/2012)

* * * * *

DATE	DOCKET ENTRY NO.	PROCEEDINGS
11/30/12	51	UNOPPOSED MOTION for Extension of Time *to Respond to Complaint by* All Defendants. (Bennett, Michelle) (Entered: 11/30/2012)

* * * * *

DATE	DOCKET ENTRY NO.	PROCEEDINGS
12/03/12	53	ORDER granting 51 defendants' unopposed motion for extension of time . . .

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		defendants shall file their answer or other responsive pleading to plaintiffs complaint not later than 12/13/2012. Signed by Honorable Joe Heaton on 12/03/2012. (lam) (Entered: 12/03/2012)
12/10/12	54	JOINT MOTION to Stay Case *Pending Appeal* by All Defendants. (Bennett, Michelle) (Entered: 12/10/2012)
12/12/12	55	ORDER granting 54 the parties' motion to stay . . . further proceedings in this case are stayed pending resolution of plaintiff's appeal to the Tenth Circuit Court of Appeals or further order of the court. Signed by Honorable Joe Heaton on 12/12/2012. (lam) (Entered: 12/12/2012)
12/20/12	56	ORDER of USCA—The motion for an injunction pending appeal is denied as to 46 Notice of Appeal filed by Mart Green, Hobby Lobby Stores Inc., Steve Green, Barbara

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		Green, Mardel Inc., David Green, Darsee Lett (pw) (Entered: 12/20/2012)

* * * * *

DATE	DOCKET ENTRY NO.	PROCEEDINGS
6/27/13	65	USCA OPINION Reversed and Remanded to District Court of Western District of Oklahoma as to 46 Notice of Appeal filed by Mart Green, Hobby Lobby Stores Inc., Steve Green, Barbara Green, Mardel Inc., David Green, Darsee Lett (Attachments: # 1 Attachment Letter from Tenth Circuit Court of Appeals) (pw) (Entered: 06/27/2013)
6/27/13	66	USCA JUDGMENT Reserved and Remanded to US District Court of Western District of Oklahoma as to 46 Notice of Appeal filed by Mart Green, Hobby Lobby Stores Inc., Steve Green, Barbara Green, Mardel Inc., David Green, Darsee Lett (pw) (Entered: 06/27/2013)

DATE	DOCKET ENTRY NO.	PROCEEDINGS
6/27/13	67	MANDATE ISSUED From USCA 46 Notice of Appeal filed by Mart Green, Hobby Lobby Stores Inc, Steve Green, Barbara Green, Mardel Inc, David Green, Darsee Lett (pw) (Entered: 06/27/2013)
6/27/13	68	EMERGENCY MOTION for Preliminary Injunction by All Plaintiffs. (Duncan, Stuart) (Entered: 06/27/2013)
6/28/13	69	ORDER granting 68 plaintiffs' emergency motion for temporary restraining order pending hearing on plaintiffs' motion for preliminary injunction; party seeking leave to offer additional evidence shall do so by motion and brief by 07/03/2013 . . . any response to such motion shall be filed by 07/10/2013; hearing on plaintiffs' for preliminary injunction is set 07/19/2013 at 9:00 a.m., in Courtroom No. 304 before the Honorable Joe Heaton. Signed by Honora-

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		ble Joe Heaton on 06/28/2013. (lam) (Entered: 06/28/2013)

* * * * *

DATE	DOCKET ENTRY NO.	PROCEEDINGS
7/19/13	75	Minute Entry for proceedings held before the Honorable Joe Heaton . . . hearing held on plaintiffs' emergency motion 68 for preliminary injunction; counsel for the parties present; court hears oral argument; plaintiffs' motion 68 is granted and this proceeding is STAYED until 10/01/2013; written order to follow. (Court Reporter Jeanne Ring) (lam) (Entered: 07/19/2013)
7/19/13	76	ORDER granting 68 plaintiffs' motion for issuance of a preliminary injunction . . . defendants, their agents, officers and employees are enjoined and restrained from any effort to apply or enforce as to plaintiffs, the substantive requirements imposed in 42:300gg-12(a)(4) and at issue in this case, or the penalties

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		related thereto until further order of the court; as agreed by the parties further proceedings in this case are stayed until 10/01/2013 . . . see order for further specifics. Signed by Honorable Joe Heaton on 07/19/2013. (lam) (Entered: 07/19/2013)
		* * * * *
9/17/13	79	NOTICE OF APPEAL as to 76 Order on Motion for Order, by All Defendants. (Bennett, Michelle) (Entered: 09/17/2013)
		* * * * *
9/20/13	82	PETITION FOR WRIT OF CERTIORARI re Supreme Court Number: 13-354 (pw) (Entered: 09/20/2013)
9/23/13	83	JOINT MOTION to Stay Case by All Defendants. (Bennett, Michelle) (Entered: 09/23/2013)
9/24/13	84	ORDER granting 83 the parties' joint motion to extend the stay previously entered based

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		on the government's filing of a petition for writ of certiorari that seeks Supreme Court review of the 10th Circuit's 06/27/2013 en bac decision . . . this case is STAYED pending the Supreme Court's disposition of the government's petition. Signed by Honorable Joe Heaton on 09/24/2013. (lam) (Entered: 09/24/2013)
9/26/13	85	ORDER of USCA granting Unopposed Motion to Hold Appeal in Abeyance. See order for specifics. (pw) (Entered: 09/26/2013)
11/26/13	86	ORDER of USCA as to 79 Notice of Appeal—Order filed by Clerk of the Court (DEC) continuing abatement. Status report(s) due 05/12/2014 by Hobby Lobby Stores, Inc., et al. and Kathleen Sebelius, et al. However, if there are any developments in the Supreme Court that would affect the need for continued abatement of this case, the parties are

DATE	DOCKET ENTRY NO.	PROCEEDINGS
		under an obligation to advise the court as soon as reasonably possible. (kw,) (Entered: 11/27/2013)

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case Number: CIV-12-1000-HE

HOBBY LOBBY STORES, INC., MARDEL, INC., DAVID GREEN, BARBARA GREEN, STEVE GREEN, MART GREEN, AND DARSEE LETT, PLAINTIFFS

v.

KATHLEEN SEBELIUS, SECRETARY OF UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, HILDA SOLIS, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF DEPARTMENT OF THE TREASURY, AND UNITED STATES DEPARTMENT OF THE TREASURY, DEFENDANTS

Nov. 1, 2012

TRANSCRIPT OF HEARING ON MOTION FOR PRELIMINARY INJUNCTION

APPEARANCES:

FOR THE PLAINTIFFS:

Stuart Kyle Duncan
Eric S. Baxter
The Becket Fund for Religious Liberty
3000 K. Street NW
Suite 220

Washington, DC 20007

Derek B. Ensminger
Hartzog Conger Cason & Neville
201 Robert S. Kerr
Suite 1600
Oklahoma City, OK 73102

FOR THE DEFENDANTS:

Michelle R. Bennett
U.S. Department of Justice
Civil Div-20-DC
Federal Programs Branch
20 Massachusetts Avenue NW
Washington, DC 20001

[3]

(The following was had in open court on November 2, 2012:)

THE COURT: Well, good morning. We're here on Hobby Lobby stores versus Sebelius and others, Civil Case 12-1000. If counsel would make your appearances for the record.

MR. DUNCAN: Yes, Your Honor. Stuart Kyle Duncan for the plaintiffs.

THE COURT: All right.

MR. BAXTER: Good morning, Your Honor. Eric Baxter also here for Hobby Lobby.

MR. ENSMINGER: Derek Ensminger, also on behalf of the plaintiff, Your Honor.

THE COURT: All right.

MS. BENNETT: Good morning, Your Honor. Michelle Bennett from the Department of Justice on behalf of the defendants.

THE COURT: All right.

Well, let's see. Some of you who are here as counsel, I understand, had kind of a breathless experience earlier this week on figuring out whether you were going to get here or not, so I'm glad to see that you were able to dodge the hurricane and make it in for this.

Let me ask just by way of background here, the briefs that you've submitted make reference to two other cases that are addressing similar issues in a similar factual context, the Colorado decision and the Missouri decision that are attached [4] to the briefs. Are those the only cases that counsel are aware of that really address this particular factual circumstance?

MR. DUNCAN: If I may, Your Honor. Last night at about 11 o'clock we received an order in a case from the Eastern District of Michigan involving a Catholic-owned business called Weingartz Supply Company. This is a case—we don't—Becket Fund does not represent the plaintiffs in that case, but we were aware of that case, and last night we received an order from counsel in that case that the judge issued a preliminary injunction with the mandate on behalf of the company. And so we looked at the order, we have copies of the order for the court. We have copies for the government as well. The government was already aware of the case. And so we're aware of a third case now.

THE COURT: All right. If you would submit that. Ms. Bennett, do you know of any others beyond that one?

MS. BENNETT: Your Honor, there are no other cases where there have been decisions issued, but there are several other—probably four or five additional cases where there are motions for preliminary injunction pending, they've either been fully briefed or not, argued or not.

THE COURT: And they are private company cases as—

MS. BENNETT: Yes.

THE COURT: —opposed to churches or religious schools or something of that sort?

[5]

MS. BENNETT: That's right, Your Honor. Obviously, we have many nonprofits as well, but there are about, I think, a total of seven or eight for-profit companies.

THE COURT: All right.

MR. DUNCAN: That sounds right.

THE COURT: All right.

Let's first talk about the standard that I'm to apply here. Before we get to that, let me just ask, what are the parties' expectations in terms of the hearing today? Do you anticipate offering evidence on disputed fact questions or not?

MR. DUNCAN: No, Your Honor, we don't.

THE COURT: You do not?

MS. BENNETT: We don't either, Your Honor. Just argument.

THE COURT: I take it, Ms. Bennett, from your brief that there is no dispute here as to the sincerity of the religious beliefs—

MS. BENNETT: No.

THE COURT: —asserted on the part of the Greens?

MS. BENNETT: That's right, Your Honor. We don't dispute that.

THE COURT: All right. Well, let me ask then, in light of that, let's first address the question of what the legal standard is in connection with the preliminary injunction that's sought here.

Mr. Duncan, why don't we start with you. The briefs make reference to—I guess maybe the first question is whether or not this is a disfavored sort of injunction based on whether it does or doesn't disturb the status quo. And I gather that is related principally to this issue of the coverage at some point of this Plan B and Ella drug that at some later point was removed.

MR. DUNCAN: That's correct, Your Honor.

THE COURT: Why don't you tell me what you understand the facts to be as it relates to that, and your views on the favored or disfavored status aspect of this.

MR. DUNCAN: Yes, Your Honor. So this injunction, the plaintiffs are seeking to maintain the status quo. What the status quo means is the freedom of the plaintiffs to continue to exclude the mandated drugs from their policies. That's the status quo. The mandate does not go into effect against the plaintiffs until January 1st. So the injunction seeks to maintain the status quo.

As for the prior coverage, the plaintiffs' insurance policies have always explicitly excluded pregnancy-terminating drugs. When they discovered in a chemical formulary in their plan, two of the chemical names corresponded to abortion-inducing drugs, they realized that recently, they immediately excluded the drugs because those drugs are inconsistent with the explicit terms of their policy, [7] pregnancy-terminating drugs. And more importantly, inconsistent with their religious faith, which forbids them from participating in the provision of abortion, abortion-inducing drugs.

So as to the standard, this injunction is not disfavored because it seeks to preserve the status quo. Status quo means plaintiffs can exclude them from the policy without incurring fines, and the mandate has not yet applied. So the injunction is not disfavored.

Now, we would point out as well, that's the standard that the *Newland* court used in the Colorado case; however, plaintiffs believe that they would meet either standard. So this would be similar to the *Awad versus Ziriax* case that went to the Tenth Circuit in which there was an argument about the standard, and the Tenth Circuit said, well, look, the plaintiffs meet either standard. So in other words, the normal standard, which is likelihood of success on the merits or the lower standard.

So we believe we meet either standard here as a strict question of the technical standard, the injunction is not disfavored because it seems—

THE COURT: I think you've kind of moved to a second question there.

MR. DUNCAN: Sorry.

THE COURT: But in terms of the status quo aspect of [8] this, what was the point at which the existence of these two drugs on the formulary list was discovered?

MR. DUNCAN: It was discovered very recently, Your Honor. Very recently.

THE COURT: All right.

MR. DUNCAN: And so it's important to note that looking at the insurance policy, the insurance policy doesn't say it covers abortion-inducing drugs, it doesn't say it covers Plan B. It simply says we cover these drugs, we don't cover a pregnancy termination. And so the plaintiffs have been very candid with the court and with the government, this controversy over the mandate has caused plaintiffs, along with presumably millions of other Americans, to say, well, what is this going to make me do in my insurance policies. So this is a very complicated matter and it requires going back and looking through very detailed chemical formularies and long chemical names and—

THE COURT: Do these two drugs that you focused on, do they have any purpose other than pregnancy termination?

MR. DUNCAN: No. As far as we know, as far as the government's own FDA-approved birth control guide says, the purpose of these drugs is emergency contraception. In other words, a back-up contraception. And of course, the government's own guide says they may work by preventing implantation in the womb. So that's the only purpose we're [9] aware of. In other words, there's no purpose for these drugs that we're aware of that would be to treat some other medical condition. Certainly we're not aware of it.

THE COURT: All right.

Ms. Bennett, why don't we hear from you on this status quo issue here. We'll kind of chop these issues up to keep both of you off your stride here for the first hour or so.

MS. BENNETT: Sure, Your Honor. Thank you.

Although counsel for the plaintiff didn't indicate exactly when plaintiffs discovered this coverage, it appears as being very recently that it was after the government promulgated its regulation requiring coverage of contraception, which was August 1st of 2011. After that, plaintiff then changed their insurance coverage.

So our position is that effectively the status quo that plaintiffs were providing this coverage to their over 13,000 employees, we don't know for how long, but they were providing it. And now they are attempting to change the coverage, or attempting to get this court to enjoin them from going back to that. So, Your Honor, I think—

THE COURT: Well, is there any dispute that, as Mr. Duncan suggests, that the restriction itself has not yet gone into effect?

MS. BENNETT: It's true that it does not affect these plaintiffs until January 1st, because that's when their plan [10] year starts. But the regulations were promulgated and became effective generally on August 1st of 2011.

I would also just note, Your Honor, and I think you are going to ask more questions about the preliminary injunction standards later, so I'll save that other information. But plaintiffs indicated that—or Your Honor asked the question do these drugs serve another purpose or it's just to terminate pregnancy. It's the government's position that they do not terminate pregnancy, which again, is not an issue here. But I'm unaware of any other purpose that they serve. And we argue again the fact that plaintiffs didn't monitor their health plan—

THE COURT: The government's position is that the drugs prevent a pregnancy from occurring?

MS. BENNETT: From occurring. Yes, Your Honor.

THE COURT: All right.

MS. BENNETT: As I said, I don't think that's an issue this court needs to get into.

But the government also thinks that setting aside the issue of the status quo, that the fact that plaintiffs covered these services before, basically the finding of irreparable harm from the fact that they might have to cover them in the future.

THE COURT: Well, do you have any reason to disbelieve the explanation that they just discovered it?

[11]

MS. BENNETT: I don't, Your Honor. But I think that based on the allegation in their complaint, they go out of their way to, for example, make sure that their store doesn't sell greeting cards that are inconsistent with their religious faith, there are many ways in which they monitor their activities to make sure they are consistent with their faith. Our position is just that to the extent that they haven't—weren't monitoring their health insurance policy closely weighs against the finding of irreparable harm.

THE COURT: Of course, I'm guessing that most of us don't spend a lot of time poring over our homeowners policies or our fire policies or our car policies looking for all the exceptions either.

MS. BENNETT: That's probably true, Your Honor. But I just think in this case, as I said, where they made allegations that they want to make their business consistent with their faith in all aspects of their life, the fact that they didn't do it here, also note that they didn't begin looking until, as they allege in their complaint, this controversy arose. So we think that weighs against a finding of irreparable harm.

THE COURT: While you're up there, let's move to kind of the second question as it relates to the standard, and that is, assuming that this is not a disfavored motion, what standard then applies in terms of the requirements for finding of preliminary injunction. And in particular I'm interested in [12] what the standard is on likelihood of success and whether this relaxed standard does or doesn't apply here.

MS. BENNETT: Yes, Your Honor. It's the government's position that the plaintiffs do have to show a likelihood of success on the merits of their claims for several reasons. First of all, that's the most recent—that's the standard articulated by the Supreme Court most recently in *Winter*. In that case, the court didn't suggest that there was any sort of weighing or modifying of standards. In fact, it explicitly rejected that idea and said that a plaintiff must satisfy all four factors.

As we indicated in our brief, the Tenth Circuit hasn't really addressed the effect of *Winter*. Some other circuits have, but we think that the Tenth Circuit also hasn't applied the relaxed standard since *Winter*, which suggests that perhaps *Winter*, the Supreme Court's most recent guidance, is the standard.

In addition, Your Honor, there's case law in the Tenth Circuit saying that the modified test does not apply when plaintiffs—when a PI seeks to stay government action in the public interest. An action taken pursuant to a statutory scheme is presumed to be in the public interest.

So we think here, as we've indicated in our brief, that the goal of these regulations is to improve the health of women and newborn children and to promote general equality, that [13] these are regulations promulgated pursuant to a statute of congress and they are in the public interest; and, therefore, the modified standard should not apply.

An additional reason, Your Honor, is that plaintiffs' irreparable harm argument is based on the idea, the allegation of violation of their First Amendment rights. In that context, the Tenth Circuit, and specifically this district in *Isbell v. City of Oklahoma*, said that the merits of the claim and the likelihood of irreparable harm sort of merged. In other words, a plaintiff can't show irreparable harm just based on the possibility of a violation of his First Amendment rights. He has to actually show that he's likely to succeed on that claim, because if there's no violation of First Amendment rights, there's no irreparable harm.

That's one of the ways in which, Your Honor, we think that the *Newland* court erred by finding irreparable harm based on the possibility of a violation of First Amendment rights, and never actually deciding whether plaintiffs were likely to succeed on the merits of their claims.

Your Honor, so for those reasons we think that plaintiffs do—must show a likelihood of success on the merits.

THE COURT: All right.

Mr. Duncan.

MS. BENNETT: Thank you.

MR. DUNCAN: Thank you, Your Honor.

[14]

So as to the precise standard. The *Heideman* case, which is what the government is referring to, says these things about public interest and statutory scheme. The *Heideman* case involves a different kind of First Amendment challenge, however. That case involves a facial challenge to a public ordinance. In other words, knock it out altogether. This case involves a plaintiff-specific challenge under RFRA to—in other words, asking for an exemption with respect to a single plaintiff, not to knock out an entire scheme. And that's a means of distinguishing that case.

Also that case, the *Heideman* case, which involved nude dancing, the court in that case said this involves a minimal, marginal First Amendment interest. Without getting into the details too much, it involved whether dancers had to wear minimal clothing or not. And Judge McConnell in that case said, well, this is a minimal First Amendment interest, and so it applied this sort of more restrictive standard.

Here, what we have are core First Amendment and RFRA claims about not being coerced to violate your faith. And we have a targeted action seeking an exemption. And I might add, in contrast to the *Newland* case, and in contrast to this Michigan case that just came out, plaintiffs here are seeking an exemption with respect to only a small subset of the drugs. They are not—they already cover almost all FDA contraceptives. They already cover all the other preventive [15] services, or they will cover them on January 1st. They are seeking an exemption for a small subset of drugs.

The government has already exempted millions of people and plans from covering a whole range of FDA-approved contraceptives. So it's difficult to understand how the public interest means plaintiffs here can't get an exemption for a small subset of the drugs.

Having said all that, the Tenth Circuit still talks about disfavored versus favored, right? So the disfavored injunctions don't apply to this case because they are not seeking to change the status quo, we're not seeking government—to force the government to do anything, so it's a favored injunction. So, you know, by government law and the Tenth Circuit, the lower standard applies. We think they meet either one.

THE COURT: Well, but that's really combining two different things, isn't it? You've got one set of—I think they now recognize, at least in an explicit sense, three kinds of injunctions that they say are disfavored.

MR. DUNCAN: Right.

THE COURT: And then you've got the further question if it's not a disfavored injunction, then you've got the further issue of how it is you go about proving likelihood of success on the merits. That's not the same thing, is it?

MR. DUNCAN: Well, you're likely right, Your Honor. [16] It is a confusing set of standards in the Tenth Circuit, unfortunately. That's why our ultimate position is that the plaintiffs meet likelihood of success on the merits, or substantial likelihood of success on the merits, for the reasons that we'll go through.

THE COURT: Well, with respect to—and I'm not so concerned at the moment about counsel's reference to this merging of issues, or whatever it is. But the circuit has said on three or four occasions that if the injunction that is sought challenges a statutory scheme of some sort, that the relaxed standard does not apply. Now, I'm assuming for sake of this discussion that this later Supreme Court case still leaves that as potentially an applicable distinction.

But I guess as I read those cases, I'm having difficulty seeing where the circuit has ever recognized the kind of distinction you're talking about, about whether the exception that's sought is narrow or broad, or what.

MR. DUNCAN: Well, what those cases are looking at is the public interest. They are saying if you have a legal scheme that proceeds from a regulatory framework that's in the public interest, then we, you know, have to be especially cautious, I guess, about substantial likelihood on the merits. All we're saying is that—

THE COURT: But, I mean, isn't that present here?

MR. DUNCAN: Well, we do have a challenge to a [17] regulation, but by the federal government. All we're saying is we're seeking an exemption from a specific part of the regulation, we're not seeking to overturn the regulation altogether. We're seeking a plaintiff-specific injunction under the Religious Freedom Restoration Act.

The cases don't make those kinds of distinctions, but we think it's a legitimate one to make, because those cases involve facial challenges. Having said all that, we meet the *Winter* test, which is the Supreme Court decision from 2008, substantial likelihood of success on the merits here. The plaintiffs meet that and we believe in a compelling way if you go through the RFRA—

THE COURT: Well, that may well be, but for purposes of the standard, though, I guess the thing I'm particularly interested in is the—I think Judge Kane essentially said in applying the relaxed standard that he thought that it applied, and that this challenge to a statute standard didn't because the exceptions or the extent of the exceptions that were present here.

MR. DUNCAN: That's correct.

THE COURT: And I'm having trouble seeing how that follows.

MR. DUNCAN: I think it works this way, Your Honor, that the government is saying, look, the public interest requires that we apply this. The public interest requires [18] this, but through grandfathering provisions, through the various religious employer exemptions, through the small employer exemptions, through the various delays that the government has given to nonexempt religious organizations, the government has essentially told over 100 million people you don't have to comply with this thing either permanently or for a while, for a year. And so the idea that the public interest means that we have this paramount public interest in applying this law right now to these plaintiffs, I think that doesn't work.

THE COURT: Well, but isn't it true for purposes of the injunction standard that it doesn't matter whether it's a compelling interest or any of the things that we might apply when we're looking at the substantive issue, it's just a question of whether there's a public interest advanced by the scheme, isn't it?

MR. DUNCAN: Well, Your Honor, if the standard is unclear, but look, if that's the standard, then we have—then we have to meet the regular. If that is in fact the prevailing standard in the Tenth Circuit, that simply if you're challenging something that comes out of a regulation you have to meet the regular injunction standard, then, yes, it's true, that's—that's—we have to meet it. We don't think it's that clear in light of the court's—the Tenth Circuit's distinction between favored and disfavored injunctions.

[19]

It's a slightly different issue, but they are really connected. Let me give an example. In the *Gonzalez* case that—the *Gonzalez versus O Centro* case, which is sort of the premier RFRA case that the Supreme Court decided. That case came up through the Tenth Circuit, right? So in that case that was a disfavored injunction. Why was it a disfavored injunction? Because the law was already in effect as to that church. And so the church was saying, hey, government, we need you to stop enforcing the narcotics laws against us. And so it's difficult to tell, but the en banc decision in the Tenth Circuit in that case said, okay, it's a disfavored injunction.

Here—and this goes back to the status quo issue. Here, the law hasn't even gone into effect as to the plaintiffs. It's very, very clear when the mandate became effective—when mandate was promulgated in August 2011, the law required them to build in at least a year before it affected anyone, right? And so what the law says is it's not going to affect you until the insurance year that starts after August 1st, 2012. So there's no question that the law is not in effect as to the plaintiffs. There is simply no question about that. So again, compared to *Gonzalez*, which is a RFRA case, this is a—not a disfavored injunction, it's a favored injunction.

So we do think that the lower standard is available. Again, we are happy to meet the regular standard as well.

THE COURT: Let me ask, it's actually a separate [20] question, but I think it kind of has some common factual questions here as to a couple of things we've already touched on. That has to do with this exemption for—the grandfathering exemption.

MR. DUNCAN: Correct.

THE COURT: Your complaint says that Hobby Lobby didn't seek it or didn't elect it or something. Is that because it wasn't potentially available to them because of this change in drug coverage, or they simply elected not to try?

MR. DUNCAN: They elected not to go with grandfathering. Grandfathering involves kind of an economic calculus about do we keep the status, do we do things to our plan that changes that makes us lose the status. So it's an economic decision, and Hobby Lobby, a significant time ago, made the decision not to do—not to do grandfathering, which is a perfectly legitimate thing to do. And the government has, in numerous cases, including this case, as I understand their position, the government said, look, if you voluntarily elect not to be grandfathered, you're not grandfathered.

But that decision was quite separate and apart from any question about the mandate. That's an economic decision about, well, you know, does our plan work under the grandfathering rules or do we need to go forward into the world of the Affordable Care Act. So—

THE COURT: I'm not sure I understand that. You're [21] saying that Hobby Lobby had the option to simply keep its existing plan in place, but elected not to?

MR. DUNCAN: I think what Hobby Lobby did is they made an economic decision that we're not going —understand, Your Honor, grandfathering means that you're in a sort of a—it's sort of a straight-jacket. You can—you can only change your plan so much. And companies, you know, often have to make changes to their plans and they may lose grandfathering status. And the government recognizes that, that it just may be because of just basic financial considerations in your—in your coverage you have to change—

THE COURT: Well, I guess that's what I'm not understanding. If the finances of it worked for the plan last year, or the year before that, and we're talking about continuing the same plan on a grandfathered basis into the future, what's different about the financial circumstances?

MR. DUNCAN: Because the grandfathering requirements mean that you can't make a whole menu of changes to your plan that involve things like the amount of co-pays, the amount of co-insurance, deductibles, that sort of thing. And so if you look at the menu of changes you say, wow, just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shifts over time.

So they are looking at that and they are saying, well, you know, we can't freeze our plan in place this way, so we can't [22] really—we can't claim grandfather status just as a practical financial means. So they have to make the changes—

THE COURT: And that's because the finances were driving you to change something in terms of copayments or some other aspect—

MR. DUNCAN: That's correct, Your Honor.

THE COURT: —of the finances of the plan?

MR. DUNCAN: That's correct. And, look, we don't plead the details of that because the—because the government has been very clear that if you don't claim the grandfather status in your notice, it's just not an issue, you're just not grandfathered, which means you're subject to all the provisions of the Affordable Care Act.

THE COURT: Is grandfathering yet an option today?

MR. DUNCAN: Not in our understanding. No, it's not something you can go back and get, again, nor is it something that, you know, Hobby Lobby would consider because quite apart from the mandate, I mean, it made the financial decision a long time ago we're not going to be grandfathered.

I have to say the government's—

THE COURT: Well, I guess the reason I ask is that, you know, against the context of these—this suggestion of irreparable harm and, you know, the extent of the problem that's caused if there is no injunction granted, I guess my question essentially is, do you have an alternate way to fix [23] that?

MR. DUNCAN: No, not in our understanding, Your Honor. The grandfathering provisions are very clear. Hobby Lobby is not grandfathered, it wasn't grandfathered, you know, long before this lawsuit was brought. Hobby Lobby is subject to the law and there's really no way we know, no way the law says you can just go back. But consider it this way: Suppose the issue were—

THE COURT: Well, I mean, is there some regulation that says if you're going to seek grandfathered status you have to do it by a certain date or do it in a certain way?

MR. DUNCAN: That's correct. You have to do it in a certain way. You have to include certain notices with your plan materials, and those notices have never been included, again, because Hobby Lobby made this decision to do it. I mean, that—so it's not available to them, they are not grandfathered. But I would say this. Suppose it were conceivable, although it's not, suppose it were conceivable that at this late date Hobby Lobby could say, okay, we'll go back and get grandfather status just so we can avoid the mandate. I mean, Hobby Lobby is still burdened. They are still having to make decisions with this mandate hanging over its head. In other words, the financial decisions that the company is making are being driven by this idea of the mandate hanging over their head.

[24]

THE COURT: Well, I don't think there would be much question about that.

MR. DUNCAN: Right.

THE COURT: I mean, there's still potentially some burden. But as I say, in weighing these temporary injunction factors of how big an emergency is this—

MR. DUNCAN: Yeah.

THE COURT: —whether it's a, you know, a $26 million emergency or whatever the number is that you've suggested would be the penalty—

MR. DUNCAN: Right.

THE COURT: —in certain circumstances versus something less maybe makes a difference.

MR. DUNCAN: Well, consider it this way, Your Honor. So on January 1st—I mean, Hobby Lobby is having to make these decisions right now. I mean, that's why we're in court, to have this decision, this burden taken off us. But Hobby Lobby is staring at

January 1st and saying, okay, on January 1st our current policies are out of compliance with federal law. They are clearly not complying with the mandate. They don't include any of the mandated emergency contraceptives, right? They include the FDA-approved contraceptives other than that, they will include all the women's preventive services, right? But they are looking at we're not going to be in compliance with federal law.

[25]

And so there's really no other option at this point. You know, I might—I might mention, as far as irreparable harm, the idea that the government says that we waited too long to sue. Look, first of all, it's no small matter to go and sue the federal government. It's not something that Hobby Lobby or any other company really wants to do. Secondly, for the last year or so we have heard the government talk about potential compromises, potential accommodations. You know, you don't know what's going to come out next as far as a delay or some kind of promised accommodation. It turns out those accommodations don't include for-profit businesses.

And the other practical aspect of that is that the Affordable Care Act was within one vote of being struck down altogether, which would have removed the problem of mandate. You know, it didn't happen. But Hobby Lobby sued four months before the mandate takes effect against us as a last resort. And so the idea that it's waited too long, I don't think that's fair to the company.

THE COURT: Well, I'm not so concerned with the timeliness of it either. I don't think that makes a whole lot of difference here.

Anything else you want to add on the standard before we move to a new area?

MR. DUNCAN: No, Your Honor.

THE COURT: Ms. Bennett, anything you want to add on [26] the injunction standard?

MS. BENNETT: No, Your Honor.

THE COURT: All right. Mr. Duncan, while you're up there let's just move forward with you.

MR. DUNCAN: Very good.

THE COURT: As I understand it, in the plaintiffs' complaint you've alleged seven or eight different claims, but as I understand it, you're relying on only two—

MR. DUNCAN: That's correct.

THE COURT: —as the basis for the preliminary injunction that you're seeking. Let's talk first about the constitutional claim.

MR. DUNCAN: Very good.

THE COURT: I take it there is no disagreement that the constitutional standard that's applicable here is the *Smith* case.

MR. DUNCAN: That's correct.

THE COURT: And—

MR. DUNCAN: And the *Lukumi* case.

THE COURT: I'm sorry?

MR. DUNCAN: And the sort of companion to the *Smith* case, which is the *Lukumi* case.

THE COURT: Right. Right. So essentially, so long as the law involved here is neutral and of general applicability, it's constitutional?

[27]

MR. DUNCAN: That's correct, Your Honor.

THE COURT: Let me ask, in terms of application of that constitutional standard, have you—are you aware of any authority where a court has concluded that a general corporation or a for-profit corporation like Hobby Lobby, and for present purposes I want to concentrate on the corporation as plaintiffs.

MR. DUNCAN: Corporation only.

THE COURT: Are you aware of any situation where a court has said that a for-profit corporation has free exercise constitutional rights?

MR. DUNCAN: Only—you know, the answer is, yes, there are many cases that say corporations generally have First Amendment rights. Those cases are typically in the free speech arena, though. So there's—

THE COURT: Well, that's the reason for my question. I have looked in the same spots under the same key notes and I haven't found any—

MR. DUNCAN: Right.

THE COURT: —that suggest that you get outside the First Amendment, or the free speech context, and I'm not finding any.

MR. DUNCAN: Well—

THE COURT: There are situations potentially where a corporation or an association may be in a position to assert [28] some individual's rights, but as far as having a corporate right to the free exercise of religion, I'm not finding it.

MR. DUNCAN: There are some—there are—it's true that most of the cases are in the free speech context, but there are—there are cases clearly recognizing that you've got equal protection rights, you've got due process rights, right, obviously, a corporation has a takings, right against takings. So there's a menu of rights that have long been recognized.

I mean, the *Citizens United* case is really the most dramatic recent example, but look at *New York Times v. Sullivan*, for example. There, you've got a corporation, New York Times, that is asserting a free speech right in connection with a paid advertisement. In other words, somebody paid them to run the advertisement. So you've got corporate, you've got First Amendment, free speech, and you've got a commercial transaction. And you know, that case is celebrated for recognizing the rights of the New York Times corporation to bring a free speech claim.

THE COURT: Well, but you've also got a pretty good string of cases that say things like compulsory self-incrimination and various privacy-related rights and so on don't apply to corporations.

MR. DUNCAN: Sure. Not all of them apply, right? Compulsory self-incrimination does not apply.

[29]

THE COURT: And as I read those, they seem to say, well, that's because some of these rights are particularly personal with the individual. I mean, isn't—isn't a religious exercise or a religious faith issue almost uniquely personal to the individual?

MR. DUNCAN: Well, we think no more than a free speech right. So what we think you need to look at is the facts of this particular case. Obviously, not every corporation is going to have any kind of religious exercise right. That's clear. But what about the ones before this court, right? Hobby Lobby and Mardel exercise religion in very open and obvious and deliberate ways through the way the companies are run. I mean, the most obvious example is closing on Sundays at a loss of millions of dollars in profits. But you've also got the chaplains provided, you've got the Christian conciliation provided, you've got giving millions in profits to fund ministries, you've got—

THE COURT: I was particularly worried about that part that I can't buy a shot glass there.

MR. DUNCAN: Well, so that goes to show you that's a very specific kind of religious exercise. That's avoiding participating in activities that their religion says we don't want to participate in. The more dramatic example is we won't backhaul beer for a beer company and lose—and let our facilities be associated with—

[30]

THE COURT: Well, you know, I appreciate that it does those things, but I guess my question is, in terms of the legal analysis, are we really evaluating an exercise of a constitutional right by the corporation as opposed to exercise of a constitutional right that the individuals unquestionably have, and the question of how and whether that can be exercised through a corporation?

MR. DUNCAN: I think the answer is both. Admittedly, though, the easier way to get there is individuals exercising their rights through a closely-held family corporation. You have cases directly on point saying, yes, you can do that. The *Stormans* case, the *Townley* case from the Ninth Circuit. And not only that—I mean, those are for-profit cases.

So you've got scores of cases from the Supreme Court and lower courts in which the courts have said a corporation can exercise its own rights. I mean, *Lukumi*, the case I just mentioned, a case like that is *Lukumi*, the Lukumi Church—it's got a long complicated name, but the Lukumi Church, Inc. Take the *Gonzalez* case. So the *Gonzalez* case—

THE COURT: Well, I appreciate that. And that's why I asked, you know, if you knew of any where we were talking about essentially a general business corporation. I mean, certainly there is with churches or I guess maybe unincorporated associations of various types, but—

MR. DUNCAN: But the reason those cases are important [31] is the government is saying the corporate forum sort of insulates the conscience of the owners from it, and those cases never say anything like that. They have a corporation and its president or its principals suing, right? So there's no—this idea of a corporate forum somehow divorcing these rights from these rights over here, there's no case that says that. The only cases that address it say, look, you've got a closely-held family business. These people are operating their religion in the—they're exercising their religion in the operation of their business. And, you know, that's what—that's what the cases say.

There's no case that says a nonprofit or a for-profit corporation is somehow so separate and distinct from the owners or the proprietors of a corporation that it cuts off their right to give—to exercise religion.

I might add one thing. I know we're talking about free exercise, but look at RFRA. Look at the Religious Freedom Restoration Act. All it says is a person exercises religion—

THE COURT: Well, let's stick with the constitutional standards at this point.

MR. DUNCAN: Okay. Sure.

THE COURT: We'll get to that.

MR. DUNCAN: Okay.

THE COURT: But most of the cases out there generally—I say most of them, at least a good many of them apply in [32] circumstances just like we've got here where you've got a corporation among the plaintiffs and you've got individuals who unquestionably have free exercise rights.

MR. DUNCAN: We do have that here.

THE COURT: And most of the cases end up not—just like the Ninth Circuit case you were saying, we'll assume it and go on down the road because it doesn't matter here. But it occurs to me that when you get into evaluating and applying some of these other standards, the neutrality and all the other aspects of the test, and particularly when you do get over into the balancing under RFRA—

MR. DUNCAN: Right.

THE COURT: —that whether you're talking about the individuals' rights exercised in a certain way versus some independent right of the corporation, maybe makes a difference. That's why I ask.

MR. DUNCAN: We don't think it does in this case, but we're happy to address that when we talk about the balancing under RFRA. Yes.

THE COURT: All right.

MR. DUNCAN: Can I add one other thing, Your Honor?

THE COURT: Sure.

MR. DUNCAN: You do have cases—this idea that commercial activity sort of divorces you from religion, look at the *Lee* case, that's the Amish carpenter. Look at the [33] *Braunfeld* case, that's the Orthodox—

THE COURT: But the Lee case itself says precisely that, doesn't it?

MR. DUNCAN: No. The—

THE COURT: When you go out and engage in commercial activity, you potentially trigger a different set of considerations than if it was purely a personal exercise.

MR. DUNCAN: The *Lee*—the *Lee* case says that in terms of the strict scrutiny analysis. There's another section in the *Lee* case at the beginning, Section A of the opinion, that says this employer clearly has religious liberty rights in refusing to pay the tax. The court is crystal clear about that.

THE COURT: But the employer was an individual.

MR. DUNCAN: The employer was—the employer—all the—it's difficult to tell from the case. All the lower court—

THE COURT: It describes him as an Amish carpenter, slash, farmer.

MR. DUNCAN: Okay. But he had employees and he was having to pay the Social Security tax for them.

But look at *Braunfeld*, for example. So *Braunfeld* is the Orthodox Jewish business owners who were complaining about the Sunday closing law. You look in the lower cases there and it is retail business owners who are selling clothing and [34] furniture, right? And the Supreme Court clearly said, you've got a religious liberty right.

All we're saying here—

THE COURT: Well, but I did look at that case with that question in mind, and I don't find anything there that suggests they were incorporated.

MR. DUNCAN: It doesn't say so. In the lower court cases—in the lower court opinions there it says they're operating a retail clothing and furniture business. I think the point is, it doesn't matter if they are incorporated or not, they are in commercial business, right? They are exercising their rights through a commercial business, which is exactly what you have in *Stormans* and exactly what you have in *Townley*.

In other words, the distinctions the government is making, well, they are interesting abstract theoretical distinctions, but I don't see them anywhere in any case. They are just nowhere in the cases.

Anything else, Your Honor?

THE COURT: I sense that Ms. Bennett doesn't agree with you on some of that. Let's give her a chance to talk here.

MS. BENNETT: Thank you, Your Honor.

First of all, plaintiffs' counsel indicated that there are cases recognizing that corporations can exercise First [35] Amendment rights, due process rights, other rights. But as Your Honor noted, there is—we have not found, and plaintiffs have not cited, any case recognizing that a for-profit secular, or as Your Honor said, a general commercial corporation can exercise religion within the meaning of the First Amendment or RFRA. We think in *First National Bank v. Belotti* the Supreme Court indicated that the analysis of whether a corporation can exercise various rights is sort of an individual analysis. You have to take it right by right. It's just not the case that corporations broadly can exercise all rights that individuals can.

I would also note, Your Honor, that the cases that plaintiffs cite that involve corporations that have been —that are exercising religion, *O Centro*, *Lukumi*, those deal with religious organizations, actually churches. But even if not, religious organizations, not general commercial or secular corporations like we have here. And we think that that distinction makes a difference.

Plaintiffs' counsel indicated that those religious organizations, because they are incorporated, may have owners behind them, and they are really exercising their rights through a religious organization. We think that's not the case. We think actually religious organization, the church, is exercising the religion, it's the church's rights that you look at. Where you're talking about a for-profit secular company, [36] it can't exercise religion and, therefore, it doesn't have First Amendment or RFRA rights.

And we think the Supreme Court's most recent juris prudence in *Hosanna-Tabor*, which didn't address this exact question, is relevant. There, the court says that although First Amendment protections like the freedom of association and freedom of speech apply to religious and secular groups alike, the free exercise clause gives special solicitude to the rights of religious organizations.

And in *Hosanna-Tabor* the court cites numerous cases going back decades for this proposition, and we also cite them in our brief. So we think that this distinction between secular and religious is not a new idea.

The cases that plaintiffs cite, *Stormans* and *Townley*, as Your Honor recognized, they explicitly declined to decide whether a for-profit corporation can exercise religion.

And in the context of—we've offered an analysis, Your Honor, in the context of Title VII where the congress gave an exemption for religious organizations as opposed to secular organizations. And we think the idea that a secular organization could exercise religion would basically wipe this Title VII exemption off the map.

If you imagine, for example, plaintiffs—I know the Greens allege that they don't discriminate based on religion in their hiring. But assume that they or someone else decided to [37] do so, they wanted to hire a personal assistant, for example, that shared their religious views. Title VII would prohibit them from doing so because they are not a religious organization.

And, in fact, plaintiffs don't claim that they would satisfy the Title VII exemption. Yet, under plaintiffs' analysis, they could come in under RFRA or the First Amendment and obtain such an exemption and hire someone that satisfies or that agrees with their religious views. We think that that, like I said, would wipe Title VII off the map. And congress clearly didn't intend to do that through RFRA.

Moving on a little bit, and I understand, Your Honor—

THE COURT: Well, let's move here to the question of whether there's a substantive—I guess a likelihood of success of establishing a substantive constitutional violation.

Mr. Duncan, I think it probably makes sense for you to lay it out first why you think that's present. However this issue gets resolved, it's at least clear that the Greens have free exercise rights that are potentially violated here. So why don't you address that, if you would, please.

And as I say, at this point, I'm interested in the constitutional standard—

MR. DUNCAN: Constitutional—

THE COURT: —as opposed to RFRA.

MR. DUNCAN: Free exercise as versus RFRA.

[38]

THE COURT: Yes.

MR. DUNCAN: I do—I do sort of reserve time later to respond to the Title VII argument, but I won't do that right now.

So—

THE COURT: Nobody is keeping a time record here.

MR. DUNCAN: Right.

So the specific question is substantial burden; is that right, Your Honor?

THE COURT: Yes. My question is, or my suggestion is that you address essentially the *Smith* standard—

MR. DUNCAN: Oh. I understand.

THE COURT: —as to whether the mandate involved here violates the constitutional standard in terms of neutrality and those things.

MR. DUNCAN: Right. So the question is, is the mandate neutral and generally applicable?

THE COURT: Yes.

MR. DUNCAN: Right. So what neutrality means is, do you treat religions evenly. Do you—or do you notice religious characteristics of certain groups and say we'll privilege you, and other groups that have different religious characteristics, we won't privilege you.

So what do you have here? We have a mandate that makes a religious employer exemption based on the internal religious [39] characteristics of the organization. So it's not—it's not an exemption like Title VII where it just says, well, if you're a religious corporation you get an exemption. It looks at the internal characteristics of the organization and says, who do you serve, what's the purpose of your organization, do you inculcate religious values or not, who do you primarily hire, and what's your treatment under the tax code.

Our position is, is that when the law takes that kind of intrusive look at religions, what it's doing is acting in a nonneutral way with respect to religion. In other words, what *Smith* is about, you've read *Smith*—

THE COURT: Well, but isn't that almost inherent, though, in any effort to draw a line at all? I mean, if the government in any statutory scheme carves out an exception for a conscience exception or religious exception, it's got to define the parameters of it some way.

MR. DUNCAN: It does, but it can't—

THE COURT: So there's necessarily going to be some in it and some out of it.

MR. DUNCAN: That's true. But look at the way this one has been defined. Who do you serve? So do you serve people who agree with your religious tenets or do you serve people who don't agree with your religious tenets? That's an unusual kind of exemption in the law. It's intruding into the internal characteristics of religious organizations. And what [40] that means for *Smith* purposes is it's not neutral.

So take the *Lukumi* case, which is the animal sacrifice case that came after *Smith*. In that case you had a law saying, well, we're going to prohibit animal sacrifices, but then there were all these weird distinctions in the law that said, well, animal sacrifice is prohibited, but maybe not hunting and maybe not kosher butchers, maybe not this, maybe not that. And so you have this sort of patchwork. And the court said, well, that's not really neutral with respect to religion, that looks like it's sort of playing favorites. And our argument is that the mandate is playing favorites with respect to exempted religious organizations.

I might also add, the Affordable Care Act as a whole makes exemptions for religious organizations who have specific objections to insurance coverage per se, right? The so-called Amish exemption from the ACA, and also the Health Care Sharing Ministries. That shows you that government knows how to sort of identify groups that have problems with insurance coverage. Those groups have problems with insurance coverage wholesale.

Over here you have plaintiffs who have problems with a specific kind of insurance coverage, and the law leaves those people out. So that's not neutral.

As far as general applicability, that looks at—the government has an interest. Is it pursuing that interest across the board, or does it leave large swaths of the [41] population unregulated? And here we say that that's what the government is doing. They are exempting out people from having to comply with the mandate, the grandfathered.

By 2014, the government has estimated that there will still be over 50 million people, that's the mid-range estimate, that will not have to comply with the mandate. By 2014, over 50 million people, 50 million plans that covered those individuals won't have to comply.

So the government is leaving huge swaths of the population unregulated. And all we're saying is, that doesn't look like a generally applicable law.

Now, we're not saying that the law is as bad as it was in *Lukumi*, right? In *Lukumi*, literally the law had targeted a specific religious group and said, you're out. You know, we're going to drive you out of town, the Santeria folks.

Here, that's not what's happening. We're not saying the government has just gone and targeted a specific religious group, but the government hasn't come up with a scheme of regulation that is generally applicable. And so all that does, for free exercise purposes, Your Honor, is it triggers strict scrutiny. That's all it does. And so if the law is not an across-the-board requirement, it triggers strict scrutiny.

You know, admittedly, we already get to strict scrutiny with RFRA, right? So we get there on RFRA, regardless. But we wanted to include the free exercise claim now because it shows [42] that the law is not—it's not treating all religions and all religious people equally, which is a really big problem when it comes to religious exercise.

THE COURT: Ms. Bennett.

MS. BENNETT: Thank you, Your Honor.

First, I would just note that there are already three courts that have rejected these exact First Amendment arguments. The Supreme Courts of New York and California in the context of state laws that were very similar, almost identical to this one, and that had religious employer exceptions that are identical to this one, and then the *O'Brien* court, which, if Your Honor looks at *O'Brien*, basically addresses the same arguments that plaintiffs make here.

With respect to neutrality, a law is neutral if it doesn't target religiously motivated conduct and if it has as its purpose something other than the disapproval of a particular religion or of religion in general.

We've presented lots of evidence, Your Honor, through the IOM Report that the purpose of these regulations is to promote the health of women and newborn children, and to further gender equality by increasing access to and utilization of contraception.

The recommendations in the regulations are based on a study by the Institutes of Medicine, which is an independent organization that conducted a science-based study. The [43] regulations have absolutely nothing to do with religion.

The regulations are also generally applicable.

THE COURT: Well, let me ask you about that. In terms of the factual, I guess, the reach of these exemptions and so on. I think in the Colorado decision, Judge Kane's decision, he reached some conclusion that at least in the short-term there were—I think the number was 150 million or 190 million or something like that, that were exempted from this scheme because of the cumulative effect of the various exemptions. Do you factually dispute that?

MS. BENNETT: Your Honor, we dispute the number; I don't actually know where that number came from, the 190 million. We don't dispute that there are entities that do not have to provide this coverage for periods of time after the rules go into effect.

THE COURT: Do you have a sense on a percentage basis or other basis what the impact, for example, of the grandfathering provision is for next year?

MS. BENNETT: Your Honor, I mean, obviously, it's hard to predict, but the agencies did an analysis on various assumptions, and they determined by 2013 that the majority of plans, I believe it was 51 percent was the mid-range value, would lose their grandfather status by 2013. And, of course, going forward, more and more plans would do so.

THE COURT: And the reason for that is that —what? [44] The economics of the marketplace are going to force them to change the coverage in such a way that they would no longer qualify?

MS. BENNETT: That's right, Your Honor. And also, I guess, different choices. Your Honor, the regulations on grandfathering set forth a list of the happenings that would cause someone to lose grandfather status. For example, if they eliminate all or substantially all of coverage to treat or diagnose a particular condition, if they increase a percentage cost-sharing requirement, if they increase a fixed amount co-payment by a certain amount, or if they decrease a contribution rate by employees or employer organization.

So the idea is that based on just the changes in the market that over time more and more companies will be required to make changes in their health plans, and so they'll lose grandfather status.

THE COURT: Do you disagree with what Mr. Duncan said in terms of the availability of the grandfathering exception to Hobby Lobby?

MS. BENNETT: Yes, Your Honor. Because they—I think—I don't know if I agree specifically with the reasons. I don't know that we know enough facts based on the complaint to—

THE COURT: Well, for one thing he says it's no longer available. Do you agree with that?

[45]

MS. BENNETT: That's right, Your Honor. In other cases we have argued where a plaintiff makes a decision and doesn't give an injury-based reason for it to just lose grandfather status, to establish jurisdiction or whatever, that that's an injury that they create themselves and so it doesn't satisfy the standing requirements. That doesn't appear to be the case here.

I would say in addition, plaintiffs, as you know, dropped coverage for certain contraceptive services. So we think that would also cause them to lose grandfather status. So we don't dispute that they—

THE COURT: You think simply taking two of the drugs off of a formulary, if the policy otherwise excluded contraception, would be a significant enough change to deny grandfather status?

MS. BENNETT: Your Honor, I guess I don't know that for sure, I don't think the agencies have spelled that out specifically. But I do think that combined with their counsel's representations here, as I said, it wasn't necessarily in the complaint, but that because of various market forces, their financial condition, they were required to do that or it made good business sense for them to do so. We don't dispute that they have lost grandfather status, and there is no mechanism to sort of revive that status.

THE COURT: All right.

[46]

MS. BENNETT: Moving on, Your Honor, with respect to general applicability. A law is not—or a law is generally applicable if it does not selectively impose burdens only on conduct motivated by religion. And that is the case here. These regulations apply to all health plans that don't meet the exceptions that Your Honor referred to, not just those that are affiliated with a particular religion.

The Tenth Circuit has made clear in numerous cases—and I would note, Your Honor, Judge Kane did not actually address the First Amendment question, so all of his concerns about grandfathering, the small employer exemption, were in the context of compelling interest.

So the Tenth Circuit has made clear that objectively defined categories of exemptions do not destroy general applicability. And we think *Lukumi*, for the reasons plaintiff said, is not at all relevant here. I mean, there the legislature made a specific—had a specific intent to target a specific church, and made sacrifice of animals illegal for that church, but for no other purpose. And that's clearly not what these regulations do. They don't target religion, they apply to everyone that doesn't qualify for an exemption.

With respect to the idea that the religious employer exemption somehow interferes with internal governance. First of all, Your Honor, I would note that that's not a claim that plaintiffs have pressed in this PI, that's more of an [47] establishment clause claim which they left out. They do state it in their reply, but we think that it's a different claim.

But in any event, for the reasons Your Honor noted, that doesn't violate the First Amendment either. Any time the government accommodates religion, it has to draw a line. So the religious employer exemption is an attempt to accommodate religion.

The Supreme Court in *Walz* upheld a similar exemption that applied to organizations that were organized solely for religious purposes, and that carried out—and carried out only religious purposes. I think that's similar to the sort of exemption that the government has created here. And to the extent that Your Honor is thinking of the establishment clause, we just refer you to *O'Brien* where Judge Jackson addressed that claim and rejected the same argument that plaintiffs are making here.

And so, Your Honor, for those reasons, we think this is a neutral and generally applicable law and doesn't violate the First Amendment.

THE COURT: Anything you want to add on that, Mr. Duncan? That's always a dangerous thing to ask a lawyer; you've always got something you want to add.

MR. DUNCAN: Only sort of on the issue of grandfathering that we've addressed now again. Hobby Lobby can't get grandfather status back. They made a grandfathering [48] decision based on an economic decision, doesn't have anything to do with the mandate. But all that means is right now they are subject to the ACA, to the Affordable Care Act, and there's no going back on that. So that's just—it's just a fact and the government, I hear them admitting again, as they've admitted in other cases, if you make that decision, you don't include the notices, grandfathering is no longer an issue.

THE COURT: All right.

Why don't we take about a ten-minute break and reconvene at 10:15, and we'll take up the issues under the Religious Restoration Act. We'll be in recess.

(A recess was had, after which the following was had in open court:)

THE COURT: Let's shift the focus to the Religious Freedom Act. Mr. Duncan, why don't you address that, if you would.

MR. DUNCAN: Thank you, Your Honor.

You know, the Religious Freedom Act, or RFRA, is an exceedingly important law to protect.

The key case here, and frankly, the case that shows a clear path to preliminary injunction for my clients, is the *Gonzalez* case, the *Gonzalez versus O Centro* case, and so I'll refer to that case repeatedly.

So RFRA requires the *movants here, the plaintiffs, to show that they have a sincere exercise of religion, which the [49] government has certainly conceded the sincerity of their religion, and the plaintiffs have to show that the law burdens, substantially burdens that exercise of religion.

Then the burden shifts to the government at the preliminary injunction phase, as well as the ultimate trial on the merits, to demonstrate a compelling interest in not exempting these plaintiffs from the scheme, and also that they've chosen the least restrictive means of furthering their interests.

So as to our burden, the exercise of religion and substantial burden. First, let me deal with exercise of religion. It's very straightforward. Many cases have held that plaintiffs, religious plaintiffs have a religious exercise right in not participating in objectionable acts. For example, the *Thomas* case. This is the Jehovah's Witness who said I cannot participate in the manufacture of tanks; the *Sherbert* case, I cannot work on a Sabbath; the *Yoder* case, Amish cannot send our children of a certain age to high school. So this decision not to participate is a common religious objection, it's religious exercise within the broad definition of religious exercise that RFRA lays down, which includes any exercise of religion.

Here, the specific action—the plaintiffs have many different ways of exercising religion through their businesses, which I can list and we've already talked about some of them. [50] The specific one here is not participating, not allowing their property, their insurance policies to be used for something that they find objectionable. And here that is, as we talked about, their insurance policy explicitly excludes abortion—pregnancy-terminating drugs and abortion-causing drugs like the ones mandated.

So before I go to substantial burden, I want to say the government has offered essentially two arguments that I will address on why this is not an exercise of religion. And as we've discussed at length, and I hope we discuss more, the government says through operating a secular business a person cannot, an individual even, cannot exercise religion, and the government has also offered the *O'Brien* case, which in our view clearly goes against *Thomas* by rewriting the plaintiffs' religious beliefs. So that's exercise of religion.

Substantial burden is also very straightforward. The standard in this circuit, and it's similar to other circuits, is the ***Abdulhaseeb*** case, which is a RLUIPA case, but it's equally applicable to RFRA. Sorry about all the acronyms.

So what that says is, the law here substantially burdens in two distinct ways. One, if the law tells you you must participate in an activity that's forbidden by your faith, then that by definition is a substantial burden, right? You saw that, for example, in the *Yoder* case as well. That's the Amish case where the law said you're going to send your children over [51] a certain age to high school, right? So that's an affirmative compulsion by the law. It's a substantial burden.

The second way is by saying, if you don't do that, we're going to fine you. We're going to make certain financial consequences occur that impact you and your business if you don't comply.

So again, let's take a look at the *Sherbert* case. The *Sherbert* case is the unemployment compensation case where the Supreme Court said if you put someone in the position of having to choose between following their faith and getting unemployment benefits, that pressures them to choose one or the other, and it's the mere pressure that causes the burden.

Take the *Yoder* case. The *Yoder* case is both an affirmative compulsion, you have to send your kids to school, and if you don't we'll fine you. In that case, the fine was five dollars. The court said this is an affirmative compulsion to violate your religion. So we have a clear-cut case of substantial burden.

What the government offers against that is the *O'Brien* case. The *O'Brien* case from Missouri says this isn't a burden because there's no difference in your belief between offering the drugs in an insurance policy and paying the salary of an employee who might turn around and buy the drugs. The Supreme Court has already said that courts and the government may not engage in this kind of rewriting of the beliefs.

[52]

It's very, very clear from the complaint here that the belief here of the plaintiffs is not only that they themselves don't use the drugs, but also that they don't want to be involved in handing them out and providing them through insurance and subsidizing the drugs. They don't want them in the policy. Just like the plaintiff in *Thomas* said, look, I can work on—

THE COURT: Well, I suppose the government would say all the plaintiff—all Hobby Lobby is doing here is writing the check anyway, right?

MR. DUNCAN: Well, they may say that, but what Hobby Lobby is being forced to do is to include specific drugs in the policy and subsidize them. In other words, Hobby Lobby is being asked to participate in a real way that their faith says we can't do it. Just like they can't cover abortions, just like they can't cover pregnancy-terminating drugs. You know, if—I have to say, this isn't a case about surgical abortions, but imagine if the law said you have to cover surgical abortions. Well, you know, that would clearly be a burden, a violation of the plaintiffs' religious beliefs.

Here you have drugs, you know, that cause early abortions. It's really just a difference in degree, not a difference in kind. But the important point here is, the government can't say we're going to sort of reorganize your belief so that you don't really have a burden. We believe that's what the *O'Brien* [53] court did. The *Thomas* case, *Thomas versus Review Board*, clearly says the government can't do that.

The *Lee* case also says that. The government made the same argument in *Lee* and said, well, it really doesn't violate religious Amish beliefs to pay the Social Security tax. And the court said, no, they say that it does. We accept them. We're not going to redraw their religious beliefs.

So those are the two steps here for our burden, for the plaintiffs' burden. Religious exercise, substantial burden.

As we've discussed, what the government seems to be saying is, is because the individuals are participating in a, quote unquote, secular business, which I take it to mean a business that makes a profit, then for some reason that excludes the ability of the plaintiffs to exercise religion in operating their business. There is no case that says that, with respect to individuals, the proprietors of a closely-held family business, which you have here. There's no case that says that.

As we've discussed, the *Stormans* and the *Townley* case hold, in order to avoid the question of does the corporation itself have the rights, the *Stormans* and *Townley* case says we recognize that these individuals are exercising religion through their business. Keep in mind, what was the business in *Stormans*? It's pharmacy. It wasn't anything religious about it. What was the business in *Townley*? Mining equipment. Nothing religious about it.

[54]

We would say, we do say that the religious exercise here is far clearer than the religious exercise in any case that we've seen, including *Stormans* and *Townley*, because what you have here are plaintiffs who, yes, they engage in the arts and crafts business, but that doesn't exhaust their business, right?

This business is a closely-held family business managed by a trust document. In other words, the documents give the family, or the family gives themselves this ability to manage everything that happens in the company according to their faith. They have to take a statement of faith and a trust commitment based on faith to even be officers of the business that they founded. And so you see—

THE COURT: Well, let me ask you, and I guess it goes to the broader question of the consequence, if any, of the corporate entity being involved here. But it appears to be clear factually in this case that all of the individual plaintiffs who are owners are of one mind—

MR. DUNCAN: Correct.

THE COURT: —in terms of their religious beliefs as applied to what's challenged here.

MR. DUNCAN: That's correct.

THE COURT: But in your view of the law, and the legal standard that you're relying on, how would it be different if we were talking about a wholly-owned general business [55] corporation where, let's say Cousin Bob, who had five percent of the company, didn't agree with the 95 percent? Where does that lead you?

MR. DUNCAN: Into far more difficult questions than we have here. Because—well, first thing I would say is it leads us to a factual question. It leads us to a factual question about the actual exercise of religion by a business. If there is a very difficult factual record about whether the business is exercising religion at all, then as a factual matter, the result might be, well, look, they don't exercise religion, it's just not clear that they do, so they haven't met the first prong of RFRA, right?

You have no cases on that. The only cases you have are closely-held family businesses like the one here. All I'm saying is, is that RFRA—this is an important point about RFRA. RFRA says let's look at the claimant before us. Let's not worry about all the other claimants who might come, a slippery slope, right, or the bureaucrat argument that the court knocks down in *Gonzalez*.

It says you can't make the argument, the government can't make the argument, look, we can't give you an exemption because look at all these other people who are lined up for exemptions. The government can't make that argument. We have to focus—RFRA requires courts to focus on the people before it. The people before it. And the people before this court are of one [56] mind, as you point out, they have carefully structured their business so that it is a reflection of the religion that they practice in numerous ways.

You know, Your Honor, this is not a case where you've got a business that's set up and the owner just says, I'm a religious person. I really care about my religion. There may be a lot of businesses like that. This is a case where a family has said, we have a faith commitment to doing business, and in doing business in a certain way, and we've worked that out very carefully. So that's the facts in this case.

As far as the idea that it's going to—

THE COURT: Well, but it does seem to me, though, that at some point you have to take into account how a particular accommodation of religious beliefs plays out against the overall regulatory framework. I mean, you've referred to the *Lee* case, which essentially applied the compelling standard that's the RFRA standard.

MR. DUNCAN: That's correct.

THE COURT: Part of what they talk about there is, you know, I guess the practicalities of how you run a tax system and the practicalities of how you run a Social Security system or whatever. And so you can't totally—it would seem to me you can't totally exclude the practical consequences of saying if we grant relief here, then assuming we apply the same standard to other people, you know, it's going to have a [57] broader impact.

MR. DUNCAN: That's correct, Your Honor. But it goes to the government's burden of compelling interest in the least restrictive means. So let me explain why. *Gonzalez* makes this very clear with respect to *Lee* and with respect to *Braunfeld*. So moving away from that—

THE COURT: Well, I appreciate it may be their burden—

MR. DUNCAN: Okay.

THE COURT: —I'm just responding to your suggestion that because of the language in *Gonzalez* they just can't make that argument. That's the bureaucrat argument.

MR. DUNCAN: That's what *Gonzalez* says. But may I respond directly to the practicalities argument?

So what *Gonzalez* says is, here's what *Lee* and *Braunfeld* mean. You ask yourself, is the scheme that the government set up, if you grant an exemption to it, does it make the scheme impossible to work? Does it completely undermine the regulatory scheme? In *Lee*, the government said, yes, because it was the Social Security tax system, and mandatory participation the court said was indispensable to that system.

Apply that question to this case. Ask yourself, is mandatory participation with no religious exemptions indispensable to the way the mandate works? We say the answer is obviously no because the government has already created a [58] number of different exemptions structured in different ways.

It's clear that this is a regulatory scheme that can accommodate exemptions. And that's all that *Gonzalez* was asking. It was asking—consider this. *Gonzalez* was saying, and this—again, this goes to the government's burden. But *Gonzalez* said, look, the government is saying they have a compelling interest in uniform application of the narcotics laws, Schedule I narcotics.

I remember as a law student when I was reading—no, I wasn't a law student. I remember reading *Gonzalez* the first time it came out. And I said to myself, wow, Schedule I narcotics, the government has got to have an important interest in that. I mean, that's the narcotics trade.

THE COURT: Why were you so interested in drugs in those days?

MR. DUNCAN: Yes. It was the law, Your Honor.

And so what did the court say? It unanimously said that this so-called overriding interest in the narcotics trade doesn't win out. Why? Because the government didn't demonstrate that the scheme that they had set up would not admit of an exemption. They gave an exemption to the Native American tribes.

So the question is, do we have a scheme like that here? And we submit the answer is clearly no, the government has not set up a closed system here. The government has set up a [59] system that can give targeted exemptions, general exemptions, that can delay. The government mentioned all the nonprofit cases. There are a lot of nonprofit cases. We represent a few plaintiffs in those as well. The government has delayed and been somewhat flexible about when the thing applies.

This is a scheme that can admit of exemptions, and all the plaintiffs are saying here is that RFRA compels that the plaintiffs here get an exemption too, for a small subset of contraceptives.

May I address very quickly the Title VII argument, because that goes to substantial burden?

THE COURT: Sure. Go ahead.

MR. DUNCAN: The government is saying, and I'm paraphrasing, that allowing a RFRA claim here will blow up Title VII, the exemption. In other words, you'll have a flood of claims in here by religious employers to say I have a religious right to fire people.

Several things about that. First of all, this isn't an employment discrimination case. Hobby Lobby doesn't discriminate on the basis of religion. If it brought a claim like that, which it's not doing, we would have the *Townley* case. The *Townley* case, the Ninth Circuit, there was such a claim. The mining corporation said we have a religious right to, you know, essentially discriminate on the basis of religion in hiring.

[60]

And what did the Ninth Circuit say? It said Title VII meets strict scrutiny. The government has a compelling interest in combatting that. So Title VII survived that challenge, and there's reason to think it wouldn't survive otherwise.

The other thing is, is that the carefully worked out exemption in Title VII is done with congressional language. Religious corporation, religious association. That's been on the books for a long time.

When congress passed RFRA, they deliberately defined religion, they just said a person, right, didn't qualify it. A person, and under federal law that means people or corporations, a person, but it certainly means people.

THE COURT: Unless the context otherwise—

MR. DUNCAN: Unless the context otherwise —and there's nothing in the context that says it. It just—

So, but another thing that RFRA said is RFRA said if there's any conflict with federal law, RFRA applies. In other words, you know, RFRA applies to some hypothetical conflict between Title VII and RFRA, but that—we don't have that case here. That's a case for some other day and we've seen how the Ninth Circuit dealt with it. The Ninth Circuit said there's—that Title VII won out in that case.

So there is no Title VII issue. It is another example of this kind of slippery slope argument, where the government says [61] allow this one and look what's going to happen. *Gonzalez* says that's not the analysis under RFRA.

Anything else, Your Honor?

THE COURT: Thank you.

MS. BENNETT: Thank you, Your Honor.

In the context of the First Amendment, we previously addressed the corporation Hobby Lobby and whether it can exercise religion in the context of the

First Amendment. Respectfully, Your Honor, we think the analysis is the same under RFRA, so unless Your Honor has specific questions about the corporation, I won't repeat that.

With respect to the Greens. First of all, the government—it's not the government's position that the Greens as individuals can't exercise religion, nor do we say—the Greens are free to manifest their religion through their business in a number ways. Our argument here boils down to the fact that the regulations don't impose any obligations on the Greens, the regulations apply to a legally separate entity. In fact, a legally separate entity that's twice removed, the corporation's group health plan, which under ERISA law is a legally separate entity. Under corporate law, corporations are separate from the individuals.

In the cases that plaintiff—

THE COURT: Well, but here is there any dispute that this is a self-funded plan? I mean, as I understand it, it's [62] self-administered or self—it's not like there's a third-party entity administering the plan here.

MS. BENNETT: Your Honor, they don't have a third-party insurer, it's self-insured, but I'm not clear whether they have a—many self-insured plans used a third-party administrator to actually administer the claims. I don't know, with respect to plaintiffs, whether they do that. Many self-insured entities also have a stop loss plan where they go through an insurance—if their claims reach a certain amount, then they have insurance for those. And I don't know—in the facts of this case, I don't believe it's set forth in the complaint.

THE COURT: All right.

MS. BENNETT: In the context of distinguishing plaintiffs' reference to *Sherbert* and *Thomas* and *Yoder*, those all involved cases where the law that was challenged applied directly to the individual. Here, as I said, that's not the case. The law applies to the corporation's group health plan. The Greens chose to organize Hobby Lobby as a corporation, in a sense separating the owners from the entity. And that's the very purpose of incorporation, so that the owners don't become liable for the corporation's debts so that they are separate.

And even—under Oklahoma law, even a family corporation like this one, the corporation is a separate and distinct legal entity from the shareholders. The Greens cannot ignore—

THE COURT: Would RFRA be violated here if the Greens had chosen to operate their business as a family partnership or if one of them could operate a sole proprietorship?

MS. BENNETT: Your Honor, I think a sole proprietorship would raise a very difficult—a very different question. There, Your Honor, you're right, there is no legal separation between the owner and the corporation, so a duty on the corporation is in a sense a duty on the owner. We still—the argument I'll get to, I think we would still have the argument that the court adopted in *O'Brien*, that the burden is too attenuated. But I do think with respect in this argument about the legal separation, it would be a much more difficult argument to make.

Here, however, there is a corporation, it is separate, and the burden applies to the corporation, not to the individuals. And having established this corporation and intentionally separating themselves from the corporation, the Greens can't ignore that separation to avoid a general commercial law designed to improve the health and well being of Hobby Lobby's employees, and to impose their religious beliefs on their employees. If it were otherwise, any secular organization has precisely the same rights as a religious organization.

And as Your Honor indicated, it would be difficult to administer. What would we do with public corporations? If a majority of the shareholders of a public corporation voted that [64] they wanted their corporation to run in a manner consistent with a specific faith, would that be sufficient? Even for a closely-held corporation, what if there was disagreement? You mentioned Cousin Bob, how would that play out?

And the reason that the corporate entity was set up was to separate the owners from the corporation, and the Greens can't eliminate that separation in this context to deny their employees the protections of federal law.

And, Your Honor, this is nothing—nothing new. I think we cite this in our brief, but I think the language from *McClure*, which is a Minnesota Supreme Court case, is very instructive. It says:

> "By engaging in this secular endeavor, appellants have passed over the line that affords them absolute freedom to exercise religious beliefs. When appellants entered into the economic arena and began trafficking in the marketplace, they have subjected themselves to standards the legislature has prescribed, not only for the benefit of prospective and existing employees, but also for the benefit of the citizens of the state as a whole in an effort to eliminate pernicious discrimination."

So, Your Honor, you can't collapse this separation that [65] the law creates in this context. And I think plaintiffs mentioned a few cases where they argue that individuals that set up businesses were allowed to exercise their religion or were allowed to make a claim of religion with respect to a burden that was imposed on their company. But none of those cases conclude that the legal requirement on a corporation imposes a substantial burden on the religious exercise of its owners.

Plaintiffs mentioned *Lee*. As Your Honor pointed out, that case didn't involve a corporation, it involved an individual who had a farm and a carpentry shop and hired a couple of people to help him in those. He was not a corporation. *Braunfeld*, the Sunday closing law at issue there, aside from Your Honor mentioned it's not clear from the case that it was incorporated, the law that was at issue there imposed criminal liability on the owners of a business that stayed open on Sundays, it didn't impose it on the company. Therefore, that's very different from the case we have here where the legal obligation and any fines that follow from that are imposed on the corporation's group health plan, not on the individual owners of the corporation.

Stormans and *Townley* are also not on point, Your Honor. Those cases, when they talk about the corporation and the individual being one and the same, were doing it in the context of standing. They were addressing the question of whether a [66] corporation can assert the rights of its owners. It's a very different question than what we're asking about here. If it were true that standing merged with substantial burden, then courts would never need to address substantial burden. Once they addressed Article III standing, they would say, okay, we assume a burden.

So we don't think that the analysis about how the individual and the corporation sort of merge in *Stormans* and *Townley* is relevant here. And indeed, neither of those cases address the question we have here, which is whether there is a substantial burden. In *Stormans*, the court was looking at the First Amendment, so it looked at neutrality and general applicability analysis. In *Townley*, the court sort of skipped over the substantial burden analysis and went on to compelling interest.

Your Honor, also—I'm sure Your Honor has not had a chance to read it, but when you do, *Legatus*, the case the plaintiffs mentioned this morning where the decision came out last night, in that case as well the court does not address the argument of illegal separation between a corporation and its individuals and how that impacts the substantial burden analysis, nor does the court find that the for-profit company in that case could exercise religion.

And, Your Honor, as plaintiffs indicated, as we indicated in the brief, we make an alternative argument which is [67] essentially the argument that the *O'Brien* court adopted, which is that any burden imposed by these regulations is too attenuated to constitute a substantial burden. In there—*O'Brien* explained that the word "substantial" in RFRA has to mean something, otherwise, congress wouldn't have put it there.

And the court held that:

> "RFRA does not protect, in other words, there is no substantial burden, against the slight burden on religious exercise that arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own."

THE COURT: Of course, RFRA says that if you have—essentially says, I guess, that so long as there are no questions of the sincerity of the religious beliefs, that whether or not a particular aspect of that is central to a religion or peripheral to it doesn't matter.

MS. BENNETT: Right, Your Honor. That's correct. It doesn't have to be a central tenet. And, Your Honor, we do not challenge the sincerity. But plaintiffs' argument basically boils down to that plaintiffs, the way they define their beliefs, is sort of dispositive for purposes of the substantial burden analysis. But that can't be the case. And in fact, Your Honor, to—once you read *Legatus*, the court actually [68] said that. There's language in there where the court says:

> "Courts often simply assume that a law substantially burdens a person's exercise of religion when that person so claims."

That's not a test. That takes meaning out of the word "substantial," which the *O'Brien* court said you can't do.

> "It can't be that the manner in which a plaintiff defines their religious beliefs is determinative of whether there's a substantial burden."

And so although, as we said, it doesn't have to be the central—the centrality, the court does have some role to come in and say is it a substantial burden. And as we say, and as the *O'Brien* court said, it's not here.

> "If the financial support of which plaintiffs complain was in fact substantially burdensome, secular companies owned by individuals objecting on religious grounds to all modern medical care could no longer be required to provide health care to their employees."

And, Your Honor, in addition to *O'Brien*, the DC Circuit has also had a similar holding in a case challenging the minimum coverage provision of the Affordable Care Act. As Your Honor is probably aware, that provision requires most individuals starting in 2014 to obtain health insurance or pay [69] a penalty. In *Seven-Sky v. Mead* the plaintiff brought a claim saying that her religion prohibited her from purchasing insurance because she believed that God would provide for her medical care. The district court, and the DC Circuit affirmed, held that there was no substantial burden in that case.

And that case is a stronger case than this one because there the obligation was imposed directly on the individual, individuals had to purchase coverage.

THE COURT: Let me ask in connection with that, you're talking about the requirement on individual policies, and this is, I think, frankly, a different question than what we're talking about here, but I'm just curious about it. The plaintiffs' complaint asserts one claim suggesting that this mandate requirement is contrary to the Act itself because it refers to some provision of the Act that I think says—maybe the difference is it's not a group policy, but it says policies will not be required to cover abortion or contraception for purposes of whatever that requirement is. What is that? I'm unclear on—does that have any application here and what is it?

MS. BENNETT: Sure, Your Honor. That's a provision of the—if you'll hold on a second, let me grab my other binder, I can read that specific language for you.

Just to be clear, Your Honor, plaintiffs don't raise that claim here. But it—

THE COURT: Well, I agree they don't, that's why I'm a little hesitant to bring it up. I'm not trying to get off the track here.

MS. BENNETT: That's right, Your Honor. I believe I have the language right here, in very small font, unfortunately.

Basically, the provision says that certain types—group health insurance issuers and another entity, which I can't remember the name of at the moment, cannot be required to provide coverage for abortions.

Plaintiff is neither a group health insurance issuer nor this other entity, which I'm sorry, Your Honor, but I can't remember what it is. And, therefore, we would argue initially that they lack prudential standing.

THE COURT: Well, it seemed to me like, maybe it was *O'Brien* or one of the opinions tied it to the insurance exchanges or something, but I'm fuzzy on how all that fits together.

MS. BENNETT: In *O'Brien*, the court addressed—basically, the *O'Brien* court found what I'm saying now, is that the plaintiff in that case was not a group health insurance issuer, and therefore, the court lacked prudential standing. It basically applies to—it does apply to policies offered on the exchange, so it would apply to any insurance company. It would apply to—it could potentially apply to plaintiffs [71] depending on how they organize their plan, I think beginning after 2017. But as of now, it doesn't.

And I think more importantly, Your Honor, it's the government's position that the contraceptive coverage requirement, which requires plans to cover all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling, does not constitute an abortion as that term is defined in federal law; therefore, that provision does not apply. That's a legal question.

THE COURT: Okay. Assuming, then, that we get past the question of whether or not there's a substantial burden on exercise here, that then puts the burden on the government to show a compelling interest and least restrictive means. Why don't you address that.

MS. BENNETT: Sure, Your Honor.

I don't think plaintiffs dispute that the interests that we've offered are compelling interests. In fact, the case law clearly establishes that improving public health, in this case women and children, and promoting gender equality are compelling government interests.

Plaintiffs mostly take note with the idea that the government has shown a compelling interest with respect to all contraception, but hasn't shown it with respect to the three types of contraceptives that they object to. And they argue that the government must make a compelling interest showing [72] just with respect to those. And, Your Honor, we disagree.

First of all—

THE COURT: Let me ask one question in that regard. I recall in your discussion of compelling interest that at some point in the brief that you had made the suggestion that the lack of contraceptive use has proven in many cases to have negative health consequences for both the woman and the developing fetus.

MS. BENNETT: Uh-huh.

THE COURT: With respect to the developing fetus, that seems a little counterintuitive to me. What are you talking about there?

MS. BENNETT: Well, Your Honor, the studies show that when the—lack of access to contraception results in unplanned pregnancies, and when pregnancies aren't planned or when they are not appropriately spaced, women are less likely to get the prenatal care they need, they're more likely to engage in risky behaviors, which then affects a developing fetus. So the idea is that if access to contraceptives is eliminated, there will be fewer unplanned pregnancies which improves the health of the pregnancies that do come to term.

THE COURT: That's a little problematic for some of the others.

MS. BENNETT: I'm sorry, Your Honor?

THE COURT: I say, it's a little problematic, I [73] suppose, for some of the others that don't come to term.

MS. BENNETT: What's problematic, Your Honor? I'm sorry.

THE COURT: Well, let's not get off into that. I mean, I'm not trying to reopen the whole abortion discussion here today in terms of policy issues. But it does seem to me that, at least to the extent you're suggesting that the availability of contraception somehow is in the interest of a fetus which is aborted, that's a hard—that's a hard case to make.

MS. BENNETT: Your Honor, let me be clear. The regulations cover all forms of FDA-approved contraception; the regulations do not require abortion. And the government's position is that when women have access to contraception, when barriers to contraception are eliminated, women have access to contraception, they can plan their pregnancies, and that has been shown to have positive effects for children.

THE COURT: But I think you're right, there's no need for this case to resolve whatever factual dispute may exist as to whether a particular contraceptive at issue here is or is not an abortion.

MS. BENNETT: I think that's right, Your Honor.

THE COURT: You don't disagree with that, do you, Mr. Duncan?

MR. DUNCAN: Your Honor, this case does not need to [74] resolve that question.

THE COURT: All right. Go ahead.

MS. BENNETT: So, Your Honor, as I indicated, the compelling government interest that, to the extent that plaintiffs object to it, they object on the basis that they only—they only are opposed to several types of contraception and not all types of contraception. But the government's—

THE COURT: How do you respond to, I guess essentially Judge Kane's conclusion that—maybe I'm misstating it, but I think the essence of what he said was, how can it be compelling if 150 million Americans are exempted from it. I mean, if it was truly that compelling wouldn't the exemptions be more limited?

MS. BENNETT: Well, your Honor, first of all, I take issue with 150 million.

THE COURT: Well, 190 or whatever it was. I don't recall.

MS. BENNETT: Your Honor, his—that decision was based on the exceptions, which I would like to talk a little bit about, but first with respect to grandfathering. Grandfathering is not—plaintiffs here are asking for a permanent exemption. Grandfathering is not a permanent exemption, it's a temporary exception to the rule for certain plans. And it was an effort by the government to balance competing interests, which the government is—

[75]

THE COURT: Well, but Judge Kane says, and I think it's right, in terms of the temporariness of the grandfathering exemption, there's no time limit on it, is there?

MS. BENNETT: There no explicit time limit on the statute, Your Honor, but the—

THE COURT: So that conceivably a company, if it was otherwise able to do it based on the financial considerations, could maintain a common policy indefinitely into the future under the grandfathering provision.

MS. BENNETT: Your Honor, I think it's conceivable as a nonpractical matter, but I think as plaintiffs indicated earlier when they were talking about their decision to forego grandfather status, that it's very likely that as time goes on more and more plans will lose grandfather status. I can't give Your Honor a number because we're predicting into the future, but I don't expect that it's possible that a company in perpetuity would be able to maintain grandfather status.

So it is a phase-in, and that's what congress intended it as. As I said, congress was attempting to balance competing interests, the one providing for preventative services without cost sharing and, two, to develop or to implement all of the provisions of the Affordable Care Act in a manner that would allow it to exist within the existing employer-based scheme.

Most people in this country currently obtain their insurance through their employer and congress didn't want to [76] upend that whole system, congress wanted to work within that system, and determined that the best way to do that was to allow employers to ease into the system.

THE COURT: Well, let me—and I asked this a second ago, and maybe the answer is we just don't know. But in terms of percentages, does anybody know what the—if you give effect to all the exemptions here, exemptions and safe harbors and so on, what percentage of employees in this country, or employers, I don't know which would be exactly the pertinent focus, what's the percentage of those that are covered by the requirement or subject to it versus those that aren't? I mean, it would seem clear if the 150 or 190 million is even ball park close that it must be something in excess of 50 percent that are not covered by it.

MS. BENNETT: Your Honor, I think with respect to—I don't think we have the numbers with respect to all of them, or at least I don't at this moment, with respect to grandfathering. As I said, the government expects that 51 percent of plans will lose grandfather status by 2013. I think the government did a study and said that by 2012 it's expected that about 67 million employees will be on a grandfathered plan. And as I said, that number will decrease as time goes on.

And, Your Honor there's nothing about—and plaintiffs cite no cases that say to—for interests to be compelling [77] that the government must pursue it immediately and all at once, that the government can't transition into it. And in fact, in *Legatus*, which was decided, although the court did enter a preliminary injunction, the court said that:

> "Grandfathering seems to be a reasonable plan for instituting an incredibly complex health care law while balancing competing interests."

Which is the argument that the government is making here.

Your Honor, with respect to the small employer exception. First of all, and I don't have the specific numbers on that, Your Honor, but it's not an exemption from the preventative services coverage requirement.

THE COURT: It's an exception from the law generally?

MS. BENNETT: It's an exception from the requirement—well, it's not an exception at all. Small employers, just like large employers, get to choose whether to provide their employees with health insurance. The only difference is in the government mechanism that the government uses.

With respect to large employers, the government imposes assessable payments if large employers don't provide health insurance. With respect to small employers, the government gives them tax incentives to encourage them to purchase it.

In either case, if a small employer or large employer chooses to purchase health insurance, that policy, if it's not [78] grandfathered, must cover preventative services, including contraceptive services. So it's a difference in the way the government has chosen to enforce the requirement to cover health insurance generally.

And I note, Your Honor, that for small employers that don't provide health insurance coverage, their employees are still required to obtain health insurance, and they can do that through the exchanges, and all the policies on the exchanges will provide contraceptive coverage.

So, Your Honor, basically, the argument that we're making is that these aren't really exemptions from this requirement. They don't undermine congress's compelling interest, they just show that congress was implementing an incredibly complex statute, it—attempting to balance competing interests, which the Tenth Circuit in *United States v. Wilgus* has said is entirely appropriate, and using various enforcement mechanisms to do so.

So we don't think that these undermine the government's compelling interest. And I think, although it's not entirely clear, and I will admit I was reading it late last night, the court in *Legatus* seemed to agree with that, that the government—it can't be that there are, you know, any exceptions or any phase-in exception undermines—always undermines the government's compelling interest.

Your Honor, with respect to the least restrictive means [79] analysis. The plaintiffs offer a number of sort of ideas about a least restrictive means for the government to pursue its interest. As we indicated in our brief, these don't satisfy the standard for a least restrictive means.

First of all, all of them are based on establishing entirely new programs. For example, one idea is for the government to create, I assume, a sort of Medicaid-like program for contraceptive coverage. The agencies—plaintiffs don't challenge the Affordable Care Act. The agencies are required to work within that system, which relied on congress's—on the employer-based system that congress created. So agencies just don't have the authority to do that.

Even if they did, the least restrictive means analysis doesn't require the government to sort of refute every conceivable idea. It doesn't require the government, most importantly here, to upend the system that congress decided to rely on. And, Your Honor, we think *United States v. Wilgus* again, which was decided by the Tenth Circuit in 2011, illustrates this point. The court talked about the government not having to, you know, imagine all types of scenarios that are least restrictive. And the alternatives the *Wilgus* court considered were within the existing scheme.

In that case it involved—the law imposed criminal liability on individuals that possessed eagle feathers without a permit. And the permitting system that the court had set up [80] only applied to members of Native—of federally-recognized Native American tribes. And so the plaintiff was a practicer of Native American religion but he was not a member of a tribe. So he brought suit saying, you know, this violates RFRA.

The least restrictive means that the court considered were all within that permitting system. In other words, they could expand it and give a permit to anyone who practices the Native American religion, or they could expand the system where tribe members could give away feathers to other tribe members and allow them to give them away to others.

THE COURT: And so your suggestion is that this is different because this would require a delivery system completely outside the realm of employer provided health care?

MS. BENNETT: Right, Your Honor. And in that case—so, for example, in that *Wilgus* case, I mean, the government could probably set up eagle sanctuaries across the country and start raising, you know, eagles, and they would have more feathers to give to more people and wouldn't need the system. But the court didn't consider that—

THE COURT: That could be a shovel-ready project.

MS. BENNETT: Yes, Your Honor. That's right. Perhaps we should propose that.

But the court didn't consider that. The court considered alternatives within the existing scheme, and we think that that's what the least restrictive means analysis requires.

[81]

In addition, the proposals that the plaintiffs offer would require enormous administrative and financial cost to the government. And as we cite numerous cases in our brief that talk about that the least restrictive means, there's a practicality component to that. It can't—it has to be practical. It can't—costs are a concern. And we think that the proposals that they offer are simply too costly and too difficult to administer.

We also think, Your Honor, that they wouldn't effectively advance the government's interests. A least restrictive means has to be equally able to advance the government's interests as the scheme that's created. But all of the proposals that plaintiffs offer impose barriers to women's access. In other words, a woman not only has to buy insurance through her employer, but also has to sign up for this government mandated insurance, or she has to go to another provider, she has to file a special tax form to get a subsidy.

Those are additional barriers to obtaining coverage, and what the IOM Report says is that when you impose barriers to coverage, barriers to access, like cost sharing, et cetera, it limits the access. Women are less likely to obtain it, less likely to utilize preventative services when there are barriers to access. So we think that these systems, which impose additional barriers, are not equally effective as the one the government has created here.

[82]

So if Your Honor has no additional questions—

THE COURT: So if you're at a point where you're ready to pause—

MS. BENNETT: Yes.

THE COURT: —let's turn it over to Mr. Duncan and let him respond to the compelling interest and least restrictive option aspects of this.

MR. DUNCAN: Thank you, Your Honor.

We have a deep disagreement with the government on compelling interest and least restrictive means. We do not concede that the government has articulated any compelling interest in this case. Let me be clear and explain why that is. Articulating a compelling interest in the abstract in improving women's health or improving equality simply doesn't cut it under RFRA. RFRA demands a different burden altogether from the government, and they have not even attempted to meet it here. So let me explain that in terms of the *Gonzalez* case.

The compelling interest test that RFRA requires is—this is the question. Why does the government have a compelling interest in not granting an exemption to this plaintiff? Broadly stated interests don't cover it, don't cut it.

So let's take the government at its face value, what it says. It says, okay, our interest here is improve women's health and equality through greater access to preventive services. Preventive services generally, that's not just [83] contraceptives, that's gestational diabetes screening, HPV, HIV, STD screening, all sorts of things that include FDA-approved contraceptives.

Does a broad statement like that cut it under RFRA? Let's look at the cases. Here's what the government said in *Gonzalez*, the drug case. The government said, look, we have a compelling interest in safeguarding the public health through banning Schedule I narcotics. Banning Schedule I narcotics. The court said, that's not even articulating a compelling interest because what we're interested in is do you have a compelling interest in not exempting the plaintiffs from that scheme. That's what the court said. The court found no.

What about *Yoder*, the Amish case? The court said, or the government said, look, we have a compelling interest in educating children by compulsory school laws. It sounds very important in the abstract, but the court said that's not compelling in the circumstances of this case, because you haven't explained why you need to apply that interest and you can't exempt the plaintiffs from it, the Amish who were already educating their children.

What about *Sherbert* and *Thomas*? The government said, compelling interest in preserving the unemployment compensation system and preventing fraud in the employment compensation system. Again, in the abstract who can say that's not really an important interest? Compelling? Who knows. It's really [84] important. But the court said, it doesn't cut it in this case because you haven't shown why you're not exempting these particular religious claimants.

Now, the *Gonzalez* court, the leading RFRA case, has adopted that analysis as the appropriate analysis for a compelling interest. That's the question you have to ask. To use the words of the *Gonzalez* case, the *Gonzalez* case said, look—

THE COURT: Do you see that as being doctrinally different than what the court did in applying the compelling interest test in *Lee*? I mean, I don't recall in *Lee* that there was anything where they said, well, let's think about whether we can exempt this particular guy who's employing two or three people.

MR. DUNCAN: You've anticipated what I was about to say. So here is what the *Gonzalez* court said about the *Lee* case. What does *Lee* mean? *Lee* said, okay, is mandatory participation in the Social Security tax systems indispensable? That's the word they used, is it "indispensable." And the court said, well, yeah, because we're looking at the way that system works and a mandatory buy-in for everybody is really important because otherwise it's just not going to work. It's not going to work to collect the money and distribute the money.

It doesn't work that way, right?

[85]

Ask the same question here. Is mandatory participation in this mandate indispensable to the system that the government has set up? The answer is no. Look at all the exemptions, exceptions, delays that the government has already—

THE COURT: As opposed to, I suppose, other requirements of the Act that require mandatory coverage somewhere, health insurance.

MR. DUNCAN: That's true, Your Honor. Yes, there are things that the law has put in place for everybody with few exceptions. But let's—so that's the question under *Lee*. Let's take what the government says about grandfathering.

So we say, look, the government's own statistics say there are 133 million individuals covered by plans right now that are grandfathered. In 2014, the government's mid-range projection is that 55 percent of those plans will still be grandfathered. So 55 percent of 133 million. That's a lot of people.

But consider this. The Affordable Care Act requires certain Affordable Care Act provisions to apply to grandfather plans. So, for instance, the famous you must cover your 26-year-old children on your health care plan; that applies to grandfather plans. No lifetime limits on coverage; that applies to grandfather plans. Pre-existing condition for minors; that applies to grandfather plans. You know what that means? That means the government said there are certain objectives in the ACA that we feel are really important, maybe [86] compelling. And they've applied them to grandfather plans, but not the mandate.

THE COURT: To get back to our earlier discussion, is it those requirements that have impacted this financial judgment about whether—

MR. DUNCAN: Yes. Those kinds of—those kinds of requirements. I mean, it's a very complicated decision about whether to get into the ACA world or not, and it's a financial decision.

THE COURT: I mean, I suppose the question to keep your existing plan, if it suddenly covers everybody's kids up to 26, is a different set of numbers than you had before.

MR. DUNCAN: It's going to make a lot of difference. All the different bells and whistles in the ACA are going to make a difference. But the point is, is that when the government says there are certain requirements we're even going to make grandfather plans cover in the ACA, and then they leave out the mandate, how can they come and say that it's a compelling interest? How can they say that without an exemption, that an exemption for the mandate will render the system unworkable? It's obviously not unworkable. This is the way the government is set up.

Here's the other point. And we've talked about this in our reply brief because it's—I mean, the government doesn't make it on general interest at all in contraception or women's [87] preventive services. But they haven't even attempted to articulate a compelling interest in emergency contraceptives. Here's what I mean by that. Plaintiffs here already cover, and have no objection for covering, the vast majority of preventive services. Gestational diabetes, STD screening, breast feeding support, well woman visits, they don't have any problems with covering that. That's going to be covered.

They don't have any problems with covering most FDA-approved contraceptives. Those are going to be covered.

THE COURT: Like what are you talking about?

MR. DUNCAN: The pill. The birth control pill is going to be covered under the plan after January 1. They have no religious objection to that. What they have a religious objection to are the handful of emergency contraceptives. Okay.

So the government needs to articulate a compelling interest in forcing this plaintiff to comply with the mandate. The interests that it has articulated are general with respect to preventive services generally and with respect to FDA-approved contraceptives in some cases. They haven't articulated a single interest about emergency contraceptives.

In other words, the plaintiffs are looking at this law and saying, why can't you just exempt us? We don't want to interfere with the vast majority of contraceptives. We don't want to interfere with most preventive services. Just exempt [88] us. Is there any reason to think that an exemption like that would undermine the system? And the answer is clearly not, because they've given exemptions for all manner of reasons throughout the system.

So the point is not why did they treat small employers differently, why did they treat grandfather plans differently, why did they treat certain religious employers differently. That's not the point. The point is, is that they chose to sort of stagger the coverage across the board, and now they are saying we have a compelling interest in not granting an exemption to these plaintiffs. And these plaintiffs, they don't implicate their interest, no interest I've heard articulated. Where is the interest in emergency contraceptives in the government's briefs? I don't see it anywhere.

So what that means for purposes of this case is compelling interest is very simple. It is highly unlikely that the government can articulate and prove a compelling interest in forcing these plaintiffs to cover these drugs. It's simply highly unlikely at this point. And it's the government's burden to show it even at this phase, and we believe that they have not.

Now moving on to least restrictive means. Let me just say straight out, the plaintiffs are not proposing that the government set up some alternate medical system to deliver these handful of drugs. Here's their burden on least [89] restrictive means. They have to present, quote, hard evidence, that's the *Heideman* case, hard evidence that there's no other plausible way of addressing the precise problem at issue here that is less restrictive of religious liberty. They have to produce hard evidence of that.

So first of all, let's identify what the particular problem is here. The problem is not Hobby Lobby doesn't provide preventive services for women. They do and they will. The problem is not Hobby Lobby does not provide FDA-approved contraceptives. They provide the vast majority of them, and they will.

The problem is they are not going to provide a handful of drugs. So the government's problem here is that—the real problem in this case is not just cost barriers generally to women's health, to preventive services. It's cost barriers to the employees of a company like Hobby Lobby, which is a company that has workers who obviously are already employed, they have generous health benefits. Those benefits cover all the mandated preventive services and the vast majority of FDA-approved contraceptives.

So what means—has the government chosen the least restrictive means to give these employees that additional handful of drugs? And I think the answer is clearly no. They've—in fact, they've chosen the most restrictive means. They've chosen the means of saying you must provide it on pain [90] of penalty to do it. They've chosen the means that's most restrictive of religious liberty.

So another way of saying that is, the means that they have chosen with respect to Hobby Lobby is as over-inclusive as you can imagine. Why is it over-inclusive? Because they are saying, you have to comply with this mandate in order to achieve our interests. And Hobby Lobby says, but we already are in line with your interests in 99.9 percent of the cases, all we object to is a handful of drugs. That doesn't mean that the government, you know, can meet its burden in a case in which a plaintiff says we won't provide any contraceptives. All it means is we have to address the plaintiff that's before the court today. And they haven't proven or even demonstrated that they are ready to prove—

THE COURT: What do you say about the government's argument that in terms of these alternate delivery systems, essentially, that it would require them to employ something separate or different from the system of employer-provided health care that is the focus of the Act?

MR. DUNCAN: Well, I mean, the government —a very simple answer to that is the government could simply exempt Hobby Lobby, right? That's a means that is less restrictive of Hobby Lobby's freedom, but the government's interests are still being furthered in 99.9 percent of the cases, right? In other words, the government has already set up a system of [91] exemptions.

THE COURT: Well, but I guess we've kind of covered this to some degree, but it does seem to me at some level, doesn't the government have to be in a position not merely to accommodate Hobby Lobby, but also others who are similarly situated?

MR. DUNCAN: Well, yes. We agree that it's others that are similarly situated. So the others that are similarly situated—

THE COURT: So it does overstate it to some extent to say that the only question is just what's involved with these particular parties in a particular case?

MR. DUNCAN: I think that's right, Your Honor. But let's not—let's not understate it, because Hobby Lobby provides—these are employees of Hobby Lobby who have jobs, who have health care benefits, who get almost all of the preventive coverages covered already. That's what's similarly situated, right? We have to look at has the government chosen the least restrictive means of furthering its interests with respect to people like that, right? And so—and you know, frankly, that's different from some of the cases out there.

There are some of the cases out there about not covering contraceptives at all. We don't think the government can meet its burden there. But the answer here is even clearer. You know, all they have to do is exempt Hobby Lobby. Their [92] interests are still furthered, they are just not forcing the coverage of these drugs.

You know, and as far as the alternate systems, look, I think everybody realizes the Affordable Care Act is engaged in a wholesale—a very dramatic restructuring of health insurance and health care in this country. So, for example, the government is having states or the federal government set up health care exchanges right now, right, that will go in effect in 2014. We just heard from the government that it's chosen, with respect to small employers, that if they don't provide any coverage their employees are going to go out on the exchanges.

So the government already has systems in place for providing alternative access to people. Exchanges, you know, all of the exemptions and sort of exceptions in the ACA, but consider this. Just common sense. If they are concerned about one specific subset of drugs to people who are already employed and who already have health benefits, why not give them a tax credit? Why not give them a tax subsidy to provide these minor—this minor sort of aspect of preventive care?

You know, the thing that's difficult about the government's argument, it's a little bit difficult to know how to respond to it. The government is acting as if Hobby Lobby is just saying no preventive care at all for women, we're going to leave them out of the equation. It's simply not the [93] plaintiff that's before the court. What we have here is a refusal on religious grounds to cover a specific subset of—

THE COURT: Let me ask you one question—

MR. DUNCAN: Sure.

THE COURT: —that's also not before us today—

MR. DUNCAN: Okay.

THE COURT: —pertinent to this motion, and I recognize that, but I'm curious about it. You have raised a claim in your amended complaint that had to do with essentially a compelled expression or a compelled speech-type claim—

MR. DUNCAN: Correct.

THE COURT: —relating to the counseling.

MR. DUNCAN: That's right.

THE COURT: What do you understand to be the requirement of the counseling that's involved here?

MR. DUNCAN: The counseling requirement is unclear. What seems clear to us is that to force someone to subsidize speech that they disagree with on religious grounds violates the free speech clause and the free exercise clause as well. We need to understand better what that counseling requirement is because on the face of the law it's just not clear what that means. But it's enough to raise—

THE COURT: So conceivably, it may not involve any counseling beyond just saying here's what the options are?

MR. DUNCAN: Who knows at this point. The law doesn't [94] specify, but it's enough to raise it in a complaint that it sounds like compelled subsidized speech. So it's a problem, but the problem is most—sort of a—it's most acute right now for the provision of the coverage itself, because that's clearly a violation of religious beliefs and it's mandated right now.

So I have nothing else on that except to say this. You know, the government makes sort of a big deal about saying, look, we've chosen to go through the employer system to provide this coverage. Well, you know, the fact that it's more convenient for the government doesn't exempt it from complying with RFRA and the First Amendment. After all, RFRA applies to all federal law. The ACA does not exempt itself, or any regulation under it, from the Religious Freedom Restoration Act.

So we are challenging the provision of the Religious Freedom Restoration—of the ACA that results in these preventive services being included. We're not just challenging regulation, we're challenging that ACA provision as applied to the plaintiffs through that regulation. The ACA violates RFRA because it includes this regulation in it.

So the government can't just say, well, the ACA sets up an employer system and so we've got to go through that.

THE COURT: Now, to the extent that your argument is that the ACA itself violates—

[95]

MR. DUNCAN: As applied.

THE COURT: Yeah. I mean, at least at a general theoretical level, seems to me like that's a hard argument to make. I mean, one congress can't bind a future congress.

MR. DUNCAN: Oh, I'm not arguing that, Your Honor. I'm just saying that the ACA has a preventive services requirement. It's been authoritatively interpreted by regulation to mean FDA-approved—to mean abortion-causing drugs. And so we're challenging both. That's the ACA as applied through the regulation.

Thank you, Your Honor.

THE COURT: Ms. Bennett, I would be particularly interested in your thoughts with respect to the argument that the compelling interest needs to be evaluated only in terms of a compelling interest in not granting this plaintiff an exemption. I'm guessing you see that differently.

MS. BENNETT: Yes, Your Honor, we do. We think it's this plaintiff and all similarly situated plaintiffs, and when we say "similarly situated," we don't think it means that the government has to evaluate how much every employer in America pays their employees, what sort of health insurance every employer in America gives to determine whether an interest is compelling under the specific facts of this case. "Similarly situated" means other employers, for-profit secular employers that have a religious objection to providing contraceptive [96] coverage.

And I don't think, Your Honor, that the government is required to draw distinctions between objecting to all contraceptive coverage versus only certain types of coverage. That would be an impossible standard for the government to meet.

Plus, I would point out, Your Honor, that the IOM Report is based on the need of these services, the range of services, the full range of FDA-approved contraceptive services. The IOM determined that those were necessary to pursue the government's compelling interests, and basically left it to a woman and her doctor to determine which of those is appropriate for her.

So the idea that the government would have to come in and show, you know, there's a compelling interest with respect to each specific drug in that list is frankly sort of absurd. There's no way—and then not only that, but with respect to each specific employer, that can't be the test, Your Honor.

And so we think the compelling interest applies to this plaintiff and all similarly situated, and by "similarly situated" as I said, we mean for-profit secular companies that have a religious objection to contraceptive coverage.

THE COURT: Mr. Duncan says that the plan that they have no objection to providing, I think his phrase was it covers 99.5 percent of the things that might arguably impact the public health interest here. Do you disagree with that [97] characterization?

MS. BENNETT: Your Honor, I think the IOM Report certainly is not limited to the health benefits or the necessity of preventative care generally for women. The IOM Report goes through specifically each type of recommendation they make. And so the IOM specifically made findings with respect to contraceptive coverage, sterilization procedures, and patient education and counseling. It wasn't just broadly that, you know, here are the—here are the services. So—

THE COURT: Well, I know. But, I mean, in terms of this characterization of what he views as the extent of the exemption he's asking for, he suggests that what Hobby Lobby wants here is an exemption directed to what he terms the emergency drugs.

MS. BENNETT: I mean, Your Honor, my understanding—I don't—I don't think I'm in a position to tell you what percentage of the health care that women of Hobby Lobby want would be these specific drugs versus other drugs or contraception versus other services—

THE COURT: Well, it's an unreasonable question, but I can still ask it.

MS. BENNETT: Well, Your Honor, I do think—I mean, I would note that I don't think their objection is just to emergency contraception, they also object to IUDs, not that it's relevant, but just to be clear, intrauterine devices, [98] which I don't think they define as emergency contraception. But nonetheless, I certainly can't give you a percentage of, you know, what percentage of health care costs that would be. All I can say, Your Honor, is the IOM Report is based on providing the full range of contraceptive coverage so that a woman can, with her doctor, decide which means, which mechanism is appropriate for her.

THE COURT: And I gather, then, that insofar as—if the question is what did congress direct in the ACA itself, what it directed was simply that there be a further judgment made by HHS or somebody as to what to cover and not cover?

MS. BENNETT: Right, Your Honor.

THE COURT: And then HHS in turn hired, or whatever they did—

MS. BENNETT: Right.

THE COURT: —with this entity you're talking about to come up with the specifics.

MS. BENNETT: Right. Yes, Your Honor. The statute refers to preventative services for women as set forth in guidelines adopted by HRSA. I do think, and we cite this in our brief, there's legislative history indicating that at least members of congress had the idea of family planning services generally in mind. But you're right, it adopts whatever—basically the statute leaves it to HRSA to adopt those guidelines, and HRSA in doing so contracted with the [99] Independent Institute of Medicine that, as Your Honor will note from the report, basically does a scientific review of all the literature and determines which services are necessary. And it is specific to contraception. It does look specifically at those services.

Just a few other points, Your Honor, if I could make. With respect to the idea that the government, you know, in showing a least restrictive means it just has to show a least restrictive means with respect to this particular employer, or even ones that are similarly situated in the sense that they, you know, pay a good wage, provide other types of coverage. Again, it's an impossible standard and it would be impossible to administer.

First of all, the plaintiffs suggest that we can just exempt Hobby Lobby. Well, that can't be least restrictive because it doesn't—it doesn't accomplish the government's compelling interests. A least restrictive means also has to accomplish the government's compelling interests. So the idea that the government could set up a system whereby employers could object to some drugs or all drugs based on varying religious beliefs, it would be administratively infeasible, not to mention the agencies wouldn't have authority to do that under the statute.

And then, Your Honor—

THE COURT: Mr. Duncan, while we're at that point, let [100] me ask you, with respect to the suggestion that the fix could be simply to exempt Hobby Lobby. If the concern is how do you get these preventive services to the female employees, a pure exemption doesn't accomplish that. What would you see as the alternate delivery system?

MR. DUNCAN: The question is, Your Honor—I mean, I don't know what the alternative delivery system is. The question is, does exempting Hobby Lobby undermine the government's interest to the extent that it can't do so? That's compelling interest in not exempting them.

Well, exempting Hobby Lobby takes off .5 percent, whatever it is, of the kinds of preventive services that the government is interested in furthering. So the idea that if you just exempt Hobby Lobby and somehow the government's compelling interests have been undermined, it just doesn't stand up to scrutiny.

THE COURT: Well, but, I mean, even if you focus on Hobby Lobby, assuming the government is able to establish the compelling interest in the delivery of these sorts of preventive services, however defined, presumably that would extend to the workforce of Hobby Lobby. You can solve the religious tension by exempting Hobby Lobby, but you would then have the Hobby Lobby employees without access to the services unless there was some alternate delivery vehicle.

MR. DUNCAN: Well, I'm not sure the government can [101] rely on that premise that there is somehow not access. Of course there's access. These are people who are employed with health care benefits already who have, you know, good wages and good jobs. The idea that they are cut off from access if they don't get the free coverage through the employer health plan, I don't know why the government can rely on that.

And the government doesn't say it's preventing—the government doesn't say that what it's doing is creating access. There's already access. The government is saying it's increasing access by lowering cost barriers. That's all the government is saying here.

The government has admitted in 90 percent of employer health plans, FDA-approved contraceptives are already covered. This is not an access issue. This is an issue of decreasing this barrier to access that the government has identified through co-pays and deductibles. That's all the government is saying, we're increasing access.

And our response to that is, you can't show that exempting Hobby Lobby undermines this whole increasing access thing. The government has to come forward with evidence that employees, at least in a comparable situation to Hobby Lobby, have some access problem that is solved by forcing their employer to cover these kind of drugs. The government hasn't produced any evidence like that at all.

MS. BENNETT: And, Your Honor, I'll just point out [102] that the IOM Report does show that cost-sharing requirements impose barriers to access, and when cost-sharing is imposed, women are less likely to use preventative care, and specifically less likely to use contraception. So we do think there's certainly evidence to suggest that if the employees of Hobby Lobby don't have access to this cost-free contraception, that they are less likely to use it or less likely to go to the doctor and obtain those sorts of services. So we do have evidence specific to that.

And, Your Honor, the idea that the government would somehow have to evaluate whether the specific employees of Hobby Lobby, we know they have over 13,000 employees, I don't know how many of them are women or how many dependents are covered, but the idea that the government would have to examine each of them, or all of them generally, to determine whether specifically they have access problems that are imposed by cost-sharing is not what the compelling interest test required.

The compelling interest test—the government only has to show a compelling interest with respect to plaintiffs and those that are similarly situated generally, meaning for-profit secular employers that object to this coverage. And we believe the IOM Report meets that burden.

Just, if I could address—Your Honor asked the question about the free speech claim. I just want to make clear, as you're aware, it's not an issue in this PI, but the guidelines [103] require coverage of patient education and counseling—I'm quoting, patient education and counseling for all women with reproductive capacity, end quote. Says nothing about the content of the education and counseling. So it's the government's position that this is not compelled speech. There's no ideology involved there. It's between a woman and her doctor what the content of that is, and plaintiffs aren't subsidizing any sort of political or ideological speech.

THE COURT: We'll save that for another day.

MS. BENNETT: Thank you, Your Honor.

THE COURT: We've kind of marched through this based on my questions and my structure here, but we've got time. I mean, is there some other aspect to this that either counsel wants to add that I brushed past?

MR. DUNCAN: No, Your Honor. I think we've covered it.

MS. BENNETT: Same here, Your Honor.

THE COURT: You're both fully exhausted?

MS. BENNETT: Yes, Your Honor.

MR. DUNCAN: Yes indeed.

THE COURT: All right. Well, I appreciate the input from both of you. You're both very knowledgable in terms of this area, and this is a difficult—as some of the cases talk about, it's kind of treacherous terrain when you're trying to figure out the interplay between religious exercise rights and [104] the implementation of other government plans and so on. It's difficult in any event, and, of course, we are here in kind of uncharted territory because, as Mr. Duncan has suggested, this is an area where the government's involvement and the nature of its involvement in the health care system has changed materially based on the ACA. So it raises some problems that are not only difficult but they are kind of new, and there's not a lot of guidance out there for it.

It does seem to me that, in terms of the standard here applicable to the preliminary injunction, I do tend to, at least I'm tentatively of the mind that this is going to require essentially the conventional showing by the plaintiff of the likelihood of success on the merits. Partly I base that on the recent Supreme Court case that at least raises some question in that regard, but more particularly, it seems to me that our circuit has said in several contexts that the more relaxed standard does not apply where you're challenging an aspect of overall statutory scheme in some sense. And it does seem to me that's what we're involved with here.

I'm not bothered, frankly, by the suggestion that this is disfavored in the sense of trying to alter the status quo. It seems to me that in terms of the effective dates of the Act and so on, that that's not a problem here.

But I do think that the various circuit authorities would make it inappropriate for me to use the relaxed standard, as [105] was the case in the Colorado case. I reach that with some hesitation because it does seem to me that Judge Kane's approach had a lot to commend it just in terms of the good sense of it. I mean, this obviously does raise a lot of new and different issues that have been addressed before, and so it's maybe an area where the more relaxed standard would make some sense. But I think I'm not at liberty to reinvent the standard just based on that.

It does seem to me that the plaintiff is likely to need to show a likelihood of success on the merits in the conventional fashion here, but that, of course, doesn't end the issue. They may well have done that, and I'll try to get that evaluated.

I appreciate that everybody has some time-related constraints here, and I will try to get a decision made as promptly as I can. If the circuit weighs in in the meantime, that may make my task easier, but I suspect that is unlikely to be the case.

MR. DUNCAN: May I just address that very quickly?

THE COURT: Sure.

MR. DUNCAN: Correct me if I'm wrong, but my understanding is that the *Hercules* appeal, which is an appeal by the government from the *Newland* decision, from Judge Kane's decision, the government has asked for a 60-day delay on its briefing. I'm sure it has perfectly good reasons to do that, but that means the briefing won't be done until sometime in [106] 2013, or even—I don't know how the briefing schedule is—the briefing schedule in that case is out. We're looking at a due date, a drop-dead date of January 1st. I just wanted to make sure the court understands that.

THE COURT: And I'm guessing the Tenth Circuit is probably just really wanting to have the benefit of my insights when they try to find a path through the forest anyway.

So anyway, I'll move forward promptly. As I say, I do appreciate the fact that we've got some time constraints here that are practical problems for everybody.

So again, I appreciate your well-done arguments and I'll try to get a decision as quickly as possible.

We'll be in recess.

(End of Proceedings)

* * * * *

REPORTER'S CERTIFICATE

I hereby certify that the aforegoing is a correct transcript from the record of the proceedings in the above-entitled matter.

/s/ B. JEANNE RING
B. JEANNE RING, RDR

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Civil Action No. CIV-12-1000-HE

HOBBY LOBBY STORES, INC., MARDEL, INC., DAVID GREEN, BARBARA GREEN, STEVE GREEN, MART GREEN, AND DARSEE LETT, PLAINTIFFS

v.

KATHLEEN SEBELIUS, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, HILDA SOLIS, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, UNITED STATES DEPARTMENT OF LABOR, TIMOTHY GEITHNER, SECRETARY OF THE UNITED STATES DEPARTMENT OF THE TREASURY, AND UNITED STATES DEPARTMENT OF THE TREASURY, DEFENDANTS

VERIFIED COMPLAINT
JURY DEMANDED

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Plaintiffs Hobby Lobby Stores) Inc., Mardet Inc., David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett, by and through their attorneys, allege and state as follows:

NATURE OF THE ACTION

1. This is a challenge to regulations issued under the 2010 Patient Protection and Affordable Care Act that would force religiously-motivated business owners

like Plaintiffs to violate their faith under threat of millions of dollars in fines.

2. Plaintiffs David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett ("the Green family") are committed evangelical Christians. Through various trusts, they own and operate plaintiff Hobby Lobby Stores) Inc. ("Hobby Lobby"), a privately held retail business headquartered in Oklahoma City. Hobby Lobby currently operates over 500 stores in over 40 states and has over 13,000 full-time employees.

3. Through various trusts, the Green family also owns and operates plaintiff Mardel, Inc. ("Mardel"), a privately held bookstore and education company headquartered in Hobby Lobby's Oklahoma City complex that sells a variety of Christian-themed materials. Mardel currently operates 35 stores in 7 states and has 372 full-time employees.

4. Unless context indicates otherwise, "Plaintiffs" refers collectively to the Green family, Hobby Lobby, and Mardel.

5. The Green family believes they are obligated to run their businesses in accordance with their faith. Commitment to Jesus Christ and to Biblical principles is what gives their business endeavors meaning and purpose.

6. The Green family's business practices therefore reflect their Christian faith in unmistakable and concrete ways. For example, they employ full-time chaplains to meet their employees' spiritual and emotional needs. They pay all of their employees well

above the minimum wage and provide them with excellent benefits. They monitor their merchandise, marketing, and operations to make sure all are consistent with their beliefs. They give millions of dollars from their profits to fund missionaries and ministries around the world. And, as is well known, they close all their stores on Sundays, even though they lose millions in annual sales by doing so.

7. The Green family's religious beliefs forbid them from participating in, providing access to, paying for, training others to engage in, or otherwise supporting abortion-causing drugs and devices.

8. The administrative rule at issue in this case ("the Mandate") runs roughshod over the Green family's religious beliefs, and the beliefs of millions of other Americans, by forcing them to provide health insurance coverage for abortion-inducing drugs and devices, as well as related education and counseling.

9. The Mandate illegally and unconstitutionally coerces the Green family to violate their deeply-held religious beliefs under threat of heavy fines, penalties, and lawsuits. The Mandate also forces the Green family to facilitate government-dictated speech incompatible with their own speech and religious beliefs. Having to pay fines for the privilege of practicing one's religion or controlling one's own speech is alien to our American traditions of individual liberty, religious tolerance, and limited government. It is also illegal and unconstitutional.

10. The Mandate does not apply to everyone equally. The government has not required every in-

surance plan in the country to cover these services, but has instead exempted numerous persons and groups, often for reasons of commercial convenience. Millions of employers may escape the mandate because of the age of their plans or because of the number of people they employ. Certain non-profit religious organizations have been exempted from the mandate altogether, and others have been given extra time to comply with it. But the government refuses to give any accommodation whatsoever to families like the Greens, who simply want to run their businesses in accordance with their beliefs.

11. Defendants have no power to determine that businesses and business owners like the Greens deserve third-class protection for their religious faith. Religious freedom is the birthright of every American. It does not belong solely to those organizations Defendants have chosen to favor.

12. Defendants' actions therefore violate Plaintiffs' rights to freedom of religion, speech, and association as secured by the First and Fifth Amendments to the United States Constitution and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq.

13. Furthermore, the Mandate is illegal because it was imposed by Defendants without prior notice or sufficient time for public comment, and otherwise violates the Administrative Procedure Act, 5 U.S.C. § 553.

14. Religious beliefs like those of the Green family concerning abortion are neither obscure nor unknown.

In formulating and finalizing the Mandate, the government acted with full knowledge that the Mandate would run counter to beliefs like theirs, shared by millions of Americans. And yet the government not only refused to exempt objecting business owners like the Greens, but it allowed plans to exclude these services for a wide range of reasons other than religion. The Mandate can therefore be interpreted as nothing other than a deliberate attack on the religious beliefs of the Greens and millions of other Americans.

15. Plaintiffs therefore seek declaratory and injunctive relief against the Mandate.

JURISDICTION AND VENUE

16. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and § 1361. This action arises under the Constitution and laws of the United States. This Court has jurisdiction to render declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 2000bb-l.

17. Venue lies in this district pursuant to 28 U.S.C. § 1391(e). Plaintiffs reside in this district. A substantial part of the events or omissions giving rise to the claim occurred in this district.

IDENTIFICATION OF PARTIES

18. Plaintiff David Green founded Hobby Lobby in 1970 and remains its CEO. He is also a trustee of one or more of the trusts described in paragraphs 2 and 3 of this Complaint. He is a Christian and, from the beginning, has sought to run Hobby Lobby in harmony

with God's laws and in a manner which brings glory to God.

19. Plaintiff Barbara Green is a trustee of one or more of the trusts described in paragraphs 2 and 3 of this Complaint. She is a Christian and, from the beginning, has sought to run Hobby Lobby in harmony with God's laws and in a manner which brings glory to God.

20. Plaintiff Steve Green is the President of Hobby Lobby and a trustee of one or more of the trusts described in paragraphs 2 and 3 of this Complaint. He is a Christian and, from the beginning, has sought to run Hobby Lobby in harmony with God's laws and in a manner which brings glory to God.

21. Plaintiff Mart Green is the Vice CEO of Hobby Lobby and the CEO of Mardel, a chain of education and supply stores providing Christian books and church supplies. He is also a trustee of one or more of the trusts described in paragraphs 2 and 3 of this Complaint. Mart is also founder of several Christian media companies and Chairman of the Board of Oral Roberts University. He is a Christian and, from the beginning, has sought to run Hobby Lobby, Mardel, and his other business ventures in harmony with God's laws and in a manner which brings glory to God.

22. Plaintiff Darsee Lett is Vice-President of Hobby Lobby and trustee of one or more of the trusts described in paragraphs 2 and 3 of this Complaint. She is a Christian and, from the beginning, has sought to run Hobby Lobby in harmony with God's laws and in a manner which brings glory to God.

23. Hobby Lobby is a privately held, for-profit corporation located in Oklahoma City and organized under Oklahoma law. Hobby Lobby is not a church, an integrated auxiliary of a church, or a convention or association of churches as defined by 26 U.S.C. § 6033(a)(3)(A)(i). Hobby Lobby is not a religious order as defined by 26 U.S.C. § 6033(a)(3)(A)(iii). Nor is it a church or a convention or association of churches as defined by 26 U.S.C. § 414(e).

24. Mardel is a privately held, for-profit corporation located in Oklahoma City and organized under Oklahoma law. Mardel is not a church, an integrated auxiliary of a church, or a convention or association of churches as defined by 26 U.S.C. § 6033(a)(3)(A)(i). Mardel is not a religious order as defined by 26 U.S.C. § 6033(a)(3)(A)(iii). Nor is it a church or a convention or association of churches as defined by 26 U.S.C. § 414(e).

25. Defendants are appointed officials of the United States government and United States governmental agencies responsible for issuing the Mandate.

26. Defendant Kathleen Sebelius is the Secretary of the United States Department of Health and Human Services ("HHS"). In this capacity, she has responsibility for the operation and management of HHS. Sebelius is sued in her official capacity only.

27. Defendant HHS is an executive agency of the United States government and is responsible for the promulgation, administration and enforcement of the Mandate.

28. Defendant Hilda Solis is the Secretary of the United States Department of Labor. In this capacity, she has responsibility for the operation and management of the Department of Labor. Solis is sued in her official capacity only.

29. Defendant Department of Labor is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the Mandate.

30. Defendant Timothy Geithner is the Secretary of the Department of the Treasury. In this capacity, he has responsibility for the operation and management of the Department. Geithner is sued in his official capacity only.

31. Defendant Department of Treasury is an executive agency of the United States government and is responsible for the promulgation, administration, and enforcement of the Mandate.

FACTUAL ALLEGATIONS

I. The Green Family and Hobby Lobby.

32. Hobby Lobby began as Greco Products, a decorative frame company. In 1970, David Green started the business with a six hundred dollar bank loan, building hobby frames in a garage and selling them to other retailers.

33. As the business grew, David Green re-named the company Hobby Lobby and opened the first retail store in Oklahoma City in 1972. From the beginning, Hobby Lobby was a family business. David and Bar-

bara worked in the store and packaged and shipped their frames to other retailers. Steve and Mart, in exchange for money to buy baseball cards, glued frames together at the family's kitchen table.

34. The store became successful. The Greens moved to a larger space, and then to an even larger one, and then began to open additional stores. They broadened their offerings to include a variety of art and craft supplies, home décor, and holiday decorations. Today, Hobby Lobby has grown into one of the nation's leading craft store chains, operating 514 stores in 41 states with 13,240 full-time employees.

35. Hobby Lobby has continued to expand and create new jobs, even during the recent economic downturn.

36. Hobby Lobby has always operated as a family business. David and Barbara Green did much of the work themselves in their first stores. As their children Steve, Mart, and Darsee grew older, the Greens introduced them to the business and trained them to run a retail chain. Today, Steve is the President of Hobby Lobby, Darsee is Vice-President, and Matt is Vice CEO.

37. In 1981, Plaintiff Mart Green founded Mardel, a bookstore and educational supply company that specializes in Christian materials, such as Bibles, books, movies, apparel, church and educational supplies, and homeschool curricula. Mardel operates 35 stores in 7 states and has 372 employees.

38. The members of the Green family operate Hobby Lobby and Mardel through a management trust, which owns all of the voting stock of these companies. Each member of the Green family is a trustee of the management trust. By its own terms, this trust exists first and foremost "to honor God with all that has been entrusted" to the Green family and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries." The trustees must sign a Trust Commitment, which among other things requires them to affirm the Green family statement of faith and to "regularly seek to maintain a close intimate walk with the Lord Jesus Christ by regularly investing time in His Word and prayer."

II. The Green Family's Religious Beliefs Related to Abortion-Causing Drugs and Devices.

39. Since the beginning, the Green family has operated Hobby Lobby according to their Christian faith. Christian beliefs and values inform their decisions and form the inspiration for their company. The family members use their profits to support Christian charities and ministries around the world. They believe that God has blessed them so that they might bless others.

40. For example, David and Barbara Green signed the Giving Pledge, agreeing to donate the majority of their wealth to philanthropy. In this pledge, the Greens stated, "We honor the Lord in all we do by operating the company in a manner consistent with Biblical principles. From helping orphanages in faraway lands to helping ministries in America, Hobby Lobby

has always been a tool for the Lord's work. For me and my family, charity equals ministry, which equals the Gospel of Jesus Christ."

41. Hobby Lobby bears the imprint of its owners' faith. As they explain on the company website, "The foundation of our business has been, and will continue to be strong values, and honoring the Lord in a manner consistent with Biblical principles."

42. Hobby Lobby's statement of purpose reads:

> In order to effectively serve our owners, employees, and customers the Board of Directors is committed to:
>
> Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.
>
> Offering our customers an exceptional selection and value.
>
> Serving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families.
>
> Providing a return on the owners' investment, sharing the Lord's blessings with our employees, and investing in our community.
>
> We believe that it is by God's grace and provision that Hobby Lobby has endured. He has been faithful in the past, we trust Him for our future.

43. Hobby Lobby's Christian underpinnings are apparent to customers shopping in its stores. Among other things, the stores use a carefully managed music playlist which prominently features inspirational Christian songs. They do not stock gruesome or bloody Halloween decorations, nor risqué greeting cards. They carry religiously themed merchandise, particularly in their Christmas and Easter seasonal sections, which occupy a large portion of each store.

44. Furthermore, the Green family's religious beliefs forbid them from facilitating activities they regard as immoral or harmful. For instance, they refuse to sell shot glasses at Hobby Lobby. They once declined an offer from a liquor store to take over one of their building leases, because they did not want to facilitate alcohol use in the neighborhood around the store. Taking the liquor store's offer would have saved them hundreds of thousands of dollars a month. Similarly, the family refused to allow their trucks to "backhaul" beer shipments for a major distributor, even though the profits from doing so would have been substantial.

45. Perhaps the most well-known expression of the Greens' religious beliefs is the decision to close Hobby Lobby stores on Sundays. The Greens believe that employees should not be asked to regularly work on Sundays, so they can enjoy a day of rest and spend the day with their families. They made this decision because they believed it was the right thing to do, even though it initially cost them millions in lost revenues.

46. Consistent with the Green family's religious beliefs, Hobby Lobby stores are open no more than 66 hours per week. They close at 8 p.m. so that employees can spend the evening with their families. Again, the Greens know they might earn more if they stayed open later, but they believe it is more important to respect their employees and their families.

47. Every Christmas and Easter, Hobby Lobby takes out full-page ads in all newspapers in which it advertises. These ads celebrate the religious nature of the holidays and direct readers who would like to learn more, or are in need of spiritual guidance, to a site where they can download a free Bible and to the phone number of an outside ministry which provides spiritual counseling. In recent years, they have also taken out ads on the Fourth of July, celebrating the Christian beliefs of many of our nation's founders. They maintain an archive of those ads on the company website: http://www.hobbylobby.com/holiday-messages/holiday_messages.cfm.

48. Hobby Lobby has always served a diverse customer base, many of whom do not share the owners' religious beliefs. It strives to welcome and show respect to people of all religious faiths, or no faith at all. The Green family and their employees respond respectfully to criticism they have received for their beliefs about faith and business. The Greens believe it would be wrong to erase their faith from the company they operate.

49. Like Hobby Lobby, Mardel is a company run in accordance with the Green family's (and CEO Mart

Green's) religious beliefs. Mardel is a bookstore and educational supply company that specializes in Christian materials, such as Bibles, books, movies, apparel, church and educational supplies, and homeschool curricula. Mardel describes itself as "a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support." It gives 10% of its net profits to help print Bibles translated by Wycliffe Bible Translators. Mardel's 372 employees receive their health insurance coverage through Hobby Lobby's self-insured plans.

50. The Green family believes that they have a religious obligation to treat their employees fairly and with respect, and to compensate good work with good wages and benefits. Over the years, they have looked for opportunities to raise wages, and have long provided minimum salaries well above any national or regional minimum wage. Despite the recession, they have increased wages for full-time employees for the last four years in a row. The wages for Hobby Lobby's full-time employees start at 80% above the federal minimum wage.

51. The Green family also employs company chaplains to minister to employees' personal needs. They provide religiously-inspired financial management classes for employees seeking to improve their family finances. They provide an on-site health clinic for their Oklahoma City employees. They provide conflict and dispute resolution classes based on Biblical principles. Employees are also offered an option to resolve employment disputes through various means, including Christian conciliation. Hobby Lobby wel-

comes employees of all faiths or no faith, and seeks to create a positive, family-friendly environment for its workers.

52. As part of their religious obligations, the Green family also provides excellent health insurance coverage to Hobby Lobby's and Mardel's employees through a self-insured plan. As in other aspects of the business, the Greens believe it is imperative that their employee benefits are consistent with their religious beliefs.

53. The Green family's religious beliefs prohibit them from deliberately providing insurance coverage for prescription drugs or devices inconsistent with their faith, in particular abortion-causing drugs and devices.

54. Hobby Lobby's insurance policies have long explicitly excluded—consistent with their religious beliefs—contraceptive devices that might cause abortions and pregnancy-termination drugs like RU-486.

55. Recently, after learning about the nationally prominent HHS mandate controversy, Hobby Lobby re-examined its insurance policies to ensure they continued to be consistent with its faith. During that re-examination, Hobby Lobby discovered that the formulary for its prescription drug policy included two drugs —Plan B and Ella—that could cause an abortion. Coverage of these drugs was not included knowingly or deliberately by the Green family. Such coverage is out of step with the rest of Hobby Lobby's policies, which explicitly exclude abortion-causing contraceptive devices and pregnancy-termination drugs. Hob-

by Lobby therefore immediately excluded the inconsistent drugs from its policies.

56. The Green family also believes it would violate their faith to deliberately provide health insurance that would facilitate access to abortion-causing drugs and devices, even if those items were paid for by an insurer or a plan administrator and not by Hobby Lobby itself.

57. The Greens have no religious objection to providing coverage for non-abortion-causing contraceptive drugs and devices.

58. The Green family and Hobby Lobby have expended significant resources working with Hobby Lobby's insurers and plan administrators to ensure that its health insurance policies reflect their religious beliefs.

59. Before the Mandate was issued, Hobby Lobby made the decision not to retain grandfathered status under the Affordable Care Act. Neither its 2011 nor its 2012 plan materials included a notice of grandfather status. Therefore Hobby Lobby's insurance plan is not grandfathered. *See* 45 C.F.R. § 147.140(a)(1)(i), 26 C.F.R. § 4.9815-1251T(a)(1)(i); 29 C.F.R. §2590.715-1251(a)(1)(i).

III. The Affordable Care Act

60. In March 2010, Congress passed, and President Obama signed into law, the Patient Protection and Affordable Care Act, Pub. L. 111-148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub. L. 111-152 (March 30, 2010), collectively known as the "Affordable Care Act."

61. The Affordable Care Act regulates the national health insurance market by directly regulating "group health plans" and "health insurance issuers."

62. The Act does not apply equally to all plans.

63. The Act does not apply equally to all insurers.

64. The Act does not apply equally to all individuals.

65. The Act applies differently to employers with fewer than 50 employees, not counting seasonal workers. 26 U.S.C. § 4980H(c)(2)(A).

66. According to the United States census, more than 20 million individual workers are employed by firms with fewer than 20 employees. http://www.census.gov/econ/smallbus.html. Employers with less than 50 employees would therefore employ an even higher number of workers.

67. Certain provisions of the Act do not apply equally to members of certain religious groups. *See, e.g.*, 26 U.S.C. §§ 5000A(d)(2)(a)(i) and (ii) (individual mandate does not apply to members of "recognized religious sect or division" that conscientiously objects to acceptance of public or private insurance funds); 26 U.S.C. § 5000A(d)(2)(b)(ii) (individual mandate does not apply to members of "health care sharing ministry" that meets certain criteria).

68. The Act's preventive care requirements do not apply to employers who provide so-called "grandfathered" health care plans.

69. Employers who follow HHS guidelines may continue to use grandfathered plans indefinitely.

70. HHS has predicted that a majority of large employers, employing more than 50 million Americans, will continue to use grandfathered plans through at least 2014, and that a third of small employers with between 50 and 100 employees may do likewise. http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have.grandfathered.html.

71. The Act is not generally applicable because it provides for numerous exemptions from its rules.

72. The Act is not neutral because some individuals and organizations, both secular and religious, enjoy exemptions from the law, while other religious individuals and organizations do not.

73. The Act creates a system of individualized exemptions.

74. The Department of Health and Human Services has the authority under the Act to grant compliance waivers to employers and other health insurance plan issuers ("HHS waivers").

75. HHS waivers release employers and other plan issuers from complying with the provisions of the Act.

76. HHS decides whether to grant waivers based on individualized waiver requests from particular employers and other health insurance plan issuers.

77. Upon information and belief, thousands of HHS waivers have been granted.

78. The Act is not neutral because some secular and religious groups and individuals have received statutory exceptions while other religious groups and individuals have not.

79. The Act is not neutral because some secular and religious groups and individuals have received HHS waivers while other religious groups and individuals have not.

80. The Act is not generally applicable because Defendants have granted numerous waivers from complying with its requirements.

81. The Act is not generally applicable because it does not apply equally to all individuals and plan issuers.

82. The Act is neither neutral nor generally applicable because Defendants have exempted certain religious employers, but not religious businesses and business-owners like Plaintiffs.

83. The Act is neither neutral nor generally applicable because Defendants have issued a "safe harbor" protecting certain non-exempt non-profit religious objectors from the Mandate, but not religious businesses and business-owners like Plaintiffs.

84. The Act is neither neutral nor generally applicable because Defendants have stated an intention to make certain non-exempt non-profit religious objectors effectively exempt through the ANPRM (described below), but not religious businesses and business-owners like Plaintiffs.

85. Defendants' waiver practices create a system of individualized exemptions.

IV. The Preventive Care Mandate

86. One of the provisions of the Affordable Care Act mandates that health plans "provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration," and directs the Secretary of Health and Human Services to determine what would constitute "preventative care under the mandate. 42 U.S.C § 300gg-13(a)(4).

87. On July 19, 2010, HHS, along with the Department of Treasury and the Department of Labor, published an interim final rule under the Affordable Care Act. 75 Fed. Reg. 41726 (2010).[1] The interim final rule required providers of group health insurance to cover preventive care for women as provided in guidelines to be published by the Health Resources and Services Administration at a later date. 75 Fed. Reg. 41759 (2010).

88. The Mandate also requires group health care plans and issuers to provide education and counseling for all women beneficiaries with reproductive capacity.

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[1] For ease of reading, references to "HHS" in this Complaint are to all three Departments.

89. The Mandate went into effect immediately as an "interim final rule."

90. HHS accepted public comments to the 2010 interim final rule until September 17, 2010. A number of groups filed comments warning of the potential conscience implications of requiring religious individuals and groups to pay for certain kinds of health care, including contraception, sterilization, and abortion.

91. HHS directed a private health policy organization, the Institute of Medicine ("IOM"), to suggest a list of recommended guidelines describing which drugs, procedures, and services should be covered by all health plans as preventive care for women. *See* http://www.hrsa.gov/womensguidelines.

92. In developing its guidelines, IOM invited a select number of groups to make presentations on the preventive care that should be mandated by all health plans. These were the Guttmacher Institute, the American Congress of Obstetricians and Gynecologists (ACOG), Prof. John Santelli, a Senior Fellow at the Guttmacher Institute, the National Women's Law Center, National Women's Health Network, Planned Parenthood Federation of America and Prof. Sara Rosenbaum, a proponent of government-funded abortion.

93. No religious groups or other groups that oppose government-mandated coverage of contraception, sterilization, abortion, and related education and counseling were among the invited presenters.

94. One year after the first interim final rule was published, on July 19, 2011, the IOM published its recommendations. It recommended that the preventive services include "[a]ll Food and Drug Administration approved contraceptive methods [and] sterilization procedures." Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (July 19, 2011).

95. FDA-approved contraceptive methods include birth-control pills; prescription contraceptive devices and injections; levonorgestrel, also known as the "morning-after pill" or "Plan B"; and ulipristal, also known as "Ella" or the "week-after pill"; and other drugs, devices, and procedures. The FDA birth control guide specifically notes that Plan B and Ella may work by preventing "attachment (implantation)" of a fertilized egg to a woman's uterus. *See* http://www.fda.gov/downloads/ForConsumers/ByAudience/for Women/FreePublications/UCM2820 14.pdf.

96. Thirteen days later, on August 1, 2011, HRSA issued guidelines adopting the IOM recommendations. *See* http://www.hrsa.gov/womensguidelines. On the same day HHS, the Department of Labor, and the Department of Treasury promulgated an amended interim final rule which reiterated the Mandate and added a narrow exemption for "religious employer[s]." 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130.

97. HHS did not take into account the concerns of religious organizations and individuals in the comments submitted before the Mandate was issued.

98. The Mandate was unresponsive to the concerns stated in the comments submitted by religious organizations and individuals.

99. When it issued the Mandate, HHS requested comments from the public by September 30, 2011, and indicated that comments would be available online.

100. Upon information and belief, over 100,000 comments were submitted against the Mandate and its narrow "religious employer" exemption.

101. On October 5, 2011, six days after the comment period ended, Defendant Sebelius gave a speech at a fundraiser for NARAL Pro-Choice America. She told the assembled crowd that "we are in a war."

102. The Mandate fails to take into account the statutory and constitutional conscience rights of religious individuals like the Green family, even though those rights were raised in the public comments.

103. The Mandate requires that Plaintiffs provide coverage or access to coverage for abortion-causing drugs and related education and counseling against their consciences in a manner that is contrary to law.

104. The Mandate constitutes government-imposed pressure and coercion on Plaintiffs to change or violate their religious beliefs.

105. The Mandate exposes Plaintiffs to substantial fines and other penalties and pressures for refusal to change or violate their religious beliefs.

106. The Mandate forces Plaintiffs to provide coverage or access to coverage for abortion-causing drugs

and devices, including Plan B and Ella, in violation of Plaintiffs' religious beliefs.

107. Plaintiffs have a sincere religious objection to providing coverage for Plan B and Ella since they believe those drugs could prevent a human embryo—which they understand to include a fertilized egg before it implants in the uterus—from implanting in the wall of the uterus, causing the death of the embryo.

108. Plaintiffs have a sincere religious objection to providing coverage for certain contraceptive intrauterine devices or "IUDs" since they believe those devices could prevent a human embryo from implanting in the wall of the uterus, causing the death of the embryo.

109. Plaintiffs consider the prevention by artificial means of the implantation of a human embryo to be an abortion.

110. Plaintiffs believe that Plan B, Ella and certain IUDs can cause the death of the embryo.

111. Plan B can prevent the implantation of a human embryo in the wall of the uterus.

112. Ella can prevent the implantation of a human embryo in the wall of the uterus.

113. Certain IUDs can prevent the implantation of a human embryo in the wall of the uterus.

114. Plan B, Ella, and certain IUDs can cause the death of the embryo.

115. The use of artificial means to prevent the implantation of a human embryo in the wall of the uterus

constitutes an "abortion" as that term is used in federal law.

116. The use of artificial means to cause the death of a human embryo constitutes an "abortion" as that term is used in federal law.

117. The Mandate forces Plaintiffs to provide insurance coverage or access to insurance coverage for abortion-causing drugs and devices, including Plan B and Ella, regardless of the ability of insured persons to obtain these drugs from other sources.

118. The Mandate forces Plaintiffs to provide insurance coverage or access to insurance coverage for education and counseling concerning abortion-causing drugs and devices that directly conflicts with their religious beliefs and teachings.

119. Providing this counseling and education is incompatible and irreconcilable with Plaintiffs' express messages and speech.

120. The Mandate forces Plaintiffs to choose between violating their religious beliefs or terminating employee health insurance coverage and incurring substantial fines.

121. Group health plans and issuers will be subject to the Mandate starting with the first insurance plan year that begins on or after August 1, 2012.

122. Plaintiffs have already had to devote significant institutional resources, including both staff time and funds, to determining how to respond to the Mandate. Plaintiffs anticipate continuing to make such

expenditures of time and money up until the time that the Mandate goes into effect.

V. The Narrow and Discretionary Religious Employer Exemption

123. The Mandate indicates that that the Health Resources and Services Administration ("HRSA") "may" grant religious exemptions to certain religious employers. 45 C.F.R. § 147.130(a)(iv)(A). Among other things, those employers must be "a non-profit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.130(a)(iv)(B).

124. As a for-profit company, Hobby Lobby does not qualify for this exemption.

125. After public outcry over the Mandate, Defendant Sebelius announced that "[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be provided an additional year, until August 1, 2013, to comply with the new law," on the condition that those employers certify they qualify for the extension.

126. Hobby Lobby does not qualify for this "safe harbor," since it is a for-profit company.[2]

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[2] *See* HHS, Guidance on Temporary Enforcement Safe Harbor, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Feb. 10, 2012), at 3, *available at* http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited Sept. 10, 2012). The government recently expanded the safe harbor, but it still does not

127. On February 10, 2012, President Obama held a press conference at which he announced an intention to initiate, at some unspecified future date, a separate rulemaking process that would work toward creating a different insurer-based mandate. This promised mandate would, the President stated, attempt to take into account the kinds of religious objections voiced against the original Mandate contained in the interim final rule.

128. On February 15, 2012, Defendants adopted as final, "without change," the narrow "religious employer" exemption. 77 Fed. Reg. 8725, 8727.

129. On March 16, 2012, Defendants issued an Advance Notice of Proposed Rulemaking ("ANPRM"). The ANPRM announced Defendants' intention to create an "accommodation" for non-exempt religious organizations under which Defendants would require a health insurance issuer (or third party administrator) to provide coverage for these drugs and services—without cost sharing and without charge—to employees covered under the organization's health plan. The ANPRM solicited public comments on structuring the proposed accommodation, and announced Defendants' intention to finalize an accommodation by the end of the Safe Harbor period. *See* https://s3.amazonaws.

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include for-profit businesses like Plaintiffs. *See* HHS, Guidance on Temporary Enforcement Safe Harbor, U.S. DEP'T OF HEALTH & HUMAN SERVS. (August 15, 2012), *available at* http://cciio.cms.gov/resources/files/prev-servicesguidance-08152012.pdf (last visited Sept. 10, 2012).

com/public-inspection.federalreisfed.gov/2012-06689.pdf (published on March 21, 2012).

130. The ANPRM did not announce any intention to alter the Mandate or its narrow "religious employer" exemption, which was made "final, without change" on February 15, 2012. All the ANPRM's suggestions for future rulemaking are limited to non-profit religious organizations. The government has made no promises, either in the ANPRM or anywhere else, to provide protection for religious business owners like Plaintiffs.

131. The plan year for Hobby Lobby's and Mardel's employee insurance plan begins on January 1 of each year.

132. The Mandate takes effect against Hobby Lobby's and Mardel's employee insurance plan on January 1, 2013.

133. On January 1, Plaintiffs will face an unconscionable choice: either violate the law, or violate their faith.

VI. The Mandate's Effect on the Plaintiffs and the Need for Immediate Relief

134. The Mandate constitutes government-imposed pressure on Plaintiffs to act contrary to their religious beliefs.

135. The Mandate exposes Plaintiffs to enormous fines and other penalties and pressures if it refuses to comply.

136. Hobby Lobby has about 13,240 full-time employees as of September 1, 2012.

137. Mardel has about 372 full-time employees as of September 1, 2012.

138. The Mandate imposes a burden on Plaintiffs' employee recruitment and retention efforts by creating uncertainty as to how they will be able to offer health insurance beyond 2012.

139. The Mandate places Plaintiffs at a competitive disadvantage in its efforts to recruit and retain employees.

140. Plaintiffs are planning now for the 2013 insurance plan year.

141. Every fall, Plaintiffs work with their insurance plan administrators to set up the plans for the coming year. The process is time consuming: Plaintiffs' HR department must work with its administrators on plan changes and on the production and distribution of plan materials and employee insurance cards.

142. Plaintiffs need immediate relief from the Mandate in order to arrange for and continue providing employee health insurance to their employees. Delay could lead to a lapse in coverage, placing the health and well-being of thousands of employees and their families in jeopardy. Denial of immediate relief will force Plaintiffs to choose between their religious beliefs and the prospect of crippling fines, regulatory penalties, and lawsuits.

143. The consequences for Plaintiffs' employees would be severe. Thousands of families rely on Plaintiffs' insurance plans.

144. The consequences for Plaintiffs' businesses would be enormous. For example, with over 13,000 full-time employees, Hobby Lobby faces fines of about $26 million dollars per year if it drops employee insurance altogether, and additional fines of about $1.3 million per *day* if it chooses to offer insurance that does not include all of the mandated drugs and services. Plaintiffs will be subject to those penalties on January 1, 2013.

CLAIMS

COUNT I

Violation of the Religious Freedom Restoration Act
Substantial Burden

145. Plaintiffs incorporate by reference all preceding paragraphs.

146. Plaintiffs' sincerely held religious beliefs prohibit them from providing coverage or access to coverage for abortion-causing drugs or devices or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise.

147. The Mandate creates government-imposed coercive pressure on Plaintiffs to change or violate their religious beliefs.

148. The Mandate chills Plaintiffs' religious exercise.

149. The Mandate exposes Plaintiffs to substantial fines for their religious exercise.

150. The Mandate exposes Plaintiffs to substantial competitive disadvantages, in that they may no longer be permitted to offer health insurance.

151. The Mandate imposes a substantial burden on Plaintiffs' religious exercise.

152. The Mandate furthers no compelling governmental interest.

153. The Mandate is not narrowly tailored to any compelling governmental interest.

154. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

155. The Mandate and Defendants' threatened enforcement of the Mandate violate Plaintiffs' rights secured to them by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq.

156. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT II

Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Substantial Burden

157. Plaintiffs incorporate by reference all preceding paragraphs.

158. Plaintiffs' sincerely held religious beliefs prohibit them from providing coverage or access to coverage for abortion-causing drugs or devices or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise.

159. Neither the Affordable Care Act nor the Mandate is neutral.

160. Neither the Affordable Care Act nor the Mandate is generally applicable.

161. Defendants have created categorical exemptions and individualized exemptions to the Mandate.

162. The Mandate furthers no compelling governmental interest.

163. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

164. The Mandate creates government-imposed coercive pressure on Plaintiffs to change or violate their religious beliefs.

165. The Mandate chills Plaintiffs' religious exercise.

166. The Mandate exposes Plaintiffs to substantial fines for their religious exercise.

167. The Mandate exposes Plaintiffs to substantial competitive disadvantages, in that they may no longer be permitted to offer health insurance.

168. The Mandate imposes a substantial burden on Plaintiffs' religious exercise.

169. The Mandate is not narrowly tailored to any compelling governmental interest.

170. The Mandate and Defendants' threatened enforcement of the Mandate violate Plaintiffs' rights secured to them by the Free Exercise Clause of the First Amendment to the United States Constitution.

171. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT III

Violation of the First Amendment to the United States Constitution
Free Exercise Clause
Intentional Discrimination

172. Plaintiffs incorporate by reference all preceding paragraphs.

173. Plaintiffs sincerely held religious beliefs prohibit them from providing coverage or access to coverage for abortion-causing drugs or devices or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise.

174. Despite being informed in detail of these beliefs beforehand, Defendants designed the Mandate and the religious exemption to the Mandate in a way that made it impossible for Plaintiffs to comply with both their religious beliefs and the Mandate.

175. Defendants promulgated both the Mandate and the religious exemption to the Mandate in order to suppress the religious exercise of Plaintiffs and others.

176. The Mandate and Defendants' threatened enforcement of the Mandate thus violate the Plaintiffs rights secured to them by the Free Exercise Clause of the First Amendment to the United States Constitution.

177. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT IV

Religious Discrimination— Violation of the First and Fifth Amendments to the United States Constitution Free Exercise and Establishment Clauses; Due Process and Equal Protection

178. Plaintiffs incorporate by reference all preceding paragraphs.

179. By design, Defendants imposed the Mandate on some religious individuals and organizations but not on others, resulting in discrimination among religious objectors.

180. The Mandate vests HRSA with unbridled discretion in deciding whether to allow exemptions to some, all, or no organizations meeting the definition of "religious employers."

181. Religious liberty is a fundamental right.

182. The "religious employer" exemption protects many religious objectors, but not Plaintiffs.

183. The "safe harbor" protects many religious objectors, but not Plaintiffs.

184. The ANPRM promises protection to many religious objectors, but not Plaintiffs.

185. The Mandate and Defendants' threatened enforcement of the Mandate thus violate Plaintiffs' rights secured to them by the Free Exercise and Establishment Clauses of the First Amendment to the United States Constitution and by Due Process Clause of the Fifth Amendment to the United States Constitution.

186. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT V

Violation of the First Amendment to the United States Constitution
Freedom of Speech
Compelled Speech

187. Plaintiffs incorporate by reference all preceding paragraphs.

188. Plaintiffs believe and profess that providing abortion-causing drugs and devices violates their religious beliefs.

189. The Mandate would compel Plaintiffs to cooperate in activities through its provision of health insurance that are violations of Plaintiffs' religious beliefs.

190. The Mandate would compel Plaintiffs to provide education and counseling related to abortion-causing drugs and devices.

191. Defendants' actions thus violate Plaintiffs' right to be free from compelled speech as secured to it by the First Amendment to the United States Constitution.

192. The Mandate's compelled speech requirement is not narrowly tailored to a compelling governmental interest.

193. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT VI

Violation of the First Amendment to the United States Constitution
Freedom of Speech
Expressive Association

194. Plaintiffs incorporate by reference all preceding paragraphs.

195. The Mandate would compel Plaintiffs to cooperate in activities through their provision of health insurance that are violations of Plaintiffs' religious beliefs.

196. The Mandate would compel Plaintiffs to provide, through their provision of health insurance, education and counseling related to abortion-causing drugs and devices.

197. Defendants' actions thus violate Plaintiffs' right of expressive association as secured to it by the First Amendment of the United States Constitution.

198. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT VII

Violation of the Administrative Procedure Act
Lack of Good Cause

199. Plaintiffs incorporate by reference all preceding paragraphs.

200. Defendants' stated reasons that public comments were unnecessary, impractical, and opposed to the public interest are false and insufficient, and do not constitute "good cause."

201. Without proper notice and opportunity for public comment, Defendants were unable to take into account the full implications of the regulations by completing a meaningful "consideration of the relevant matter presented." Defendants did not consider or respond to the voluminous comments they received in opposition to the interim final rule.

202. Therefore, Defendants have taken agency action not in observance with procedures required by law, and Plaintiffs are entitled to relief pursuant to 5 U.S.C. § 706(2)(D).

203. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT VIII

Violation of the Administrative Procedure Act
Arbitrary and Capricious Action

204. Plaintiffs incorporate by reference all preceding paragraphs.

205. In promulgating the Mandate, Defendants failed to consider the constitutional and statutory implications of the mandate on Plaintiffs and similar organizations and individuals.

206. Defendants' explanation for their decision not to exempt Plaintiffs and similar religious individuals from the Mandate runs counter to the evidence submitted by religious individuals during the comment period.

207. Thus, Defendants' issuance of the interim final rule was arbitrary and capricious within the meaning of 5 U.S.C. § 706(2)(A) because the rule fails to consider the full extent of the Mandate's implications and does not take into consideration the evidence against it.

208. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT IX

Violation of the Administrative Procedure Act
Agency Action Not in Accordance with Law
Weldon Amendment
Religious Freedom Restoration Act
First Amendment to the United States Constitution

209. Plaintiffs incorporate by reference all preceding paragraphs.

210. The Mandate is contrary to the provisions of the Weldon Amendment of the Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, Public Law 110 329, Div. A, Sec. 101, 122 Stat. 3574, 3575 (Sept. 30, 2008).

211. The Weldon Amendment provides that "[n]one of the funds made available in this Act [making appropriations for Defendants Department of Labor and Health and Human Services] may be made available to a Federal agency or program . . . if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions."

212. The Mandate requires issuers, including Plaintiffs, to provide coverage or access to coverage of all FDA-approved "contraceptives."

213. Some FDA-approved "contraceptives" cause abortions.

214. As set forth above, the Mandate violates RFRA and the First Amendment.

215. Under 5 U.S.C. § 706(2)(A), the Mandate is contrary to existing law, and is in violation of the APA.

216. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

COUNT X

Violation of the Administrative Procedure Act
Agency Action Not in Accordance with Law
Affordable Care Act

217. Plaintiffs incorporate by reference all preceding paragraphs.

218. The Mandate is contrary to the provisions of the Affordable Care Act.

219. Section 1303(b)(1)(A) of the Affordable Care Act states that "nothing in this title"—*i.e.*, title I of the Act, which includes the provision dealing with "preventive services"—"shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year."

220. Section 1303 further states that it is "the issuer" of a plan that "shall determine whether or not the plan provides coverage" of abortion services.

221. Under the Affordable Care Act, Defendants do not have the authority to decide whether a plan covers abortion; only the issuer does.

222. The Mandate requires issuers, including Plaintiffs, to provide coverage or access to coverage for all

Federal Drug Administration-approved contraceptives.

223. Some FDA-approved contraceptives cause abortions.

224. Under 5 U.S.C. § 706(2)(A), the Mandate is contrary to existing law, and is in violation of the APA.

225. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that the Court:

a. Declare that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violate the First and Fifth Amendments to the United States Constitution;

b. Declare that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violate the Religious Freedom Restoration Act;

c. Declare that the Mandate was issued in violation of the Administrative Procedure Act;

d. Issue a permanent injunction prohibiting enforcement of the Mandate against Plaintiffs and other individuals and organizations that object on religious grounds to providing insurance coverage for abortion-causing drugs and devices, and related education and counseling;

e. Award Plaintiffs the costs of this action and reasonable attorney's fees; and

f. Award such other and further relief as it deems equitable and just.

JURY DEMAND

Plaintiffs request a trial by jury on all issues so triable.

* * * * *

Respectfully submitted this 12th day of September, 2012.

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VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on Sept. 12, 2012

/s/ DAVID GREEN
DAVID GREEN*

**I certify that I have the signed original of this document, which is available for inspection at any time by the Court or a party to this action.*

VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on Sept. 12, 2012

/s/ BARBARA GREEN
BARBARA GREEN*

**I certify that I have the signed original of this document, which is available for inspection at any time by the Court or a party to this action.*

VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the Best of my knowledge.

Executed on Sept. 12, 2012

/s/ STEVE GREEN
STEVE GREEN*

**I certify that I have the signed original of this document, which is available for inspection at any* *time by the Court or a party to this action.*

VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I declare under penalty of peljury that the foregoing is true and correct to the best of my knowledge.

Executed on Sept. 12, 2012

/s/ MART GREEN
MART GREEN

**I certify that I have the signed original of this document, which is available for inspection at any time by the Court or a party to this action.*

VERIFICATION OF COMPLAINT ACCORDING TO 28 U.S.C. § 1746

I declare under penalty of perjury that the foregoing is true and correct to the best or my knowledge.

Executed on Sept. 12, 20 12

/s/ DARSEE LETT
DARSEE LETT*

**I certify that 1 have the signed original of this document, which is available for inspection at any time by the Court or a party to this action.*

(ORDER LIST: 571 U.S.)

TUESDAY, NOVEMBER 26, 2013
CERTIORARI GRANTED

* * * * *

13-354	SEBELIUS, SEC. OF H&HS, ET AL V. HOBBY LOBBY STORES, INC.
13-356	CONESTOGA WOOD SPECIALITIES V. SEBELIUS, SEC. OF H&HS, ET AL.

The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument.

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

FILED
JAN 10 2014

No. 13-354

In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1(a) and (b). The question presented is whether RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners.

PARTIES TO THE PROCEEDINGS

Petitioners are Kathleen Sebelius, Secretary of Health and Human Services; the Department of Health and Human Services; Thomas E. Perez, Secretary of Labor; the Department of Labor; Jacob J. Lew, Secretary of the Treasury; and the Department of the Treasury.

Respondents are Hobby Lobby Stores, Inc.; Mardel, Inc.; David Green; Barbara Green; Mart Green; Steve Green; and Darsee Lett.

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In the Supreme Court of the United States

No. 13-354

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-166a) is reported at 723 F.3d 1114. The opinion of the district court (Pet. App. 167a-199a) is reported at 870 F. Supp. 2d 1278. A prior decision of the court of appeals denying an injunction pending appeal is unreported but is available at 2012 WL 6930302. Justice Sotomayor's in-chambers opinion denying an injunction pending appeal is reported at 133 S. Ct. 641.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2013. The petition for a writ of certiorari was filed on September 19, 2013, and granted on November 26, 2013. This Court's jurisdiction rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are set forth in the appendix to this brief. See App., *infra*, 1a-45a.

STATEMENT

1. Most Americans with private health coverage obtain it through an employer-sponsored group health plan. Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance Proposals* 4 & Tbl. 1-1 (2008). The cost of such coverage is typically covered by a combination of employer and employee contributions, *id.* at 4, with the employer's share serving as "part of an employee's compensation package," *Liberty Univ., Inc.* v. *Lew*, 733 F.3d 72, 91 (4th Cir.) (citation omitted), cert. denied, 134 S. Ct. 683 (2013). The federal government subsidizes group health plans through favorable tax treatment. While employees pay income and payroll taxes on their cash wages, they typically do not pay taxes on their employer's contributions to their health coverage. 26 U.S.C. 106.

Congress has established certain minimum coverage standards for group health plans. For example, in 1996, Congress required such plans to cover certain benefits for mothers and newborns. 29 U.S.C. 1185; 42 U.S.C. 300gg-4; see 26 U.S.C. 9811. In 1998, Congress required coverage of reconstructive surgery after covered mastectomies. 29 U.S.C. 1185b; 42 U.S.C. 300gg-6.

2. In the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (Affordable

Care Act or Act),[1] Congress provided for additional minimum standards for group health plans and health insurers offering coverage in the group and individual markets.

a. The Act requires non-grandfathered group health plans to cover certain preventive-health services without cost sharing—that is, without requiring plan participants and beneficiaries to make copayments or pay deductibles or coinsurance. 42 U.S.C. 300gg-13 (Supp. V 2011) (preventive-services coverage provision). This provision applies to (among other types of health coverage) employment-based group health plans covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, see 29 U.S.C. 1185d (Supp. V 2011), and it can thus be enforced by plan participants and beneficiaries pursuant to ERISA's enforcement mechanisms. See 29 U.S.C. 1132(a)(1)(B) and (3).[2]

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[1] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[2] The Secretary of Labor may likewise bring an ERISA enforcement action with respect to such a group plan. 29 U.S.C. 1132(a)(5). The preventive-services coverage provision is also enforceable through the imposition of taxes on the employers that sponsor such plans. 26 U.S.C. 4980D; see 26 U.S.C. 9815(a)(1), 9834. (Payment of such a tax by an employer, however, would not relieve a plan of its legal obligation to cover recommended preventive-health services without cost sharing, which would remain as a freestanding ERISA requirement for such group health plans, see 29 U.S.C. 1185d (Supp. V 2011).) In addition, with respect to health insurers in the individual and group markets, States may enforce the Act's health insurance market reforms, including the preventive-services coverage provision. 42 U.S.C. 300gg-22(a)(1) (Supp. V 2011). If the Secretary of Health and Human Services determines that a State "has failed to substantially enforce" one of the insurance market reforms with

"Prevention is a well-recognized, effective tool in improving health and well-being and has been shown to be cost-effective in addressing many conditions early." Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 16 (2011) (IOM Report). Nonetheless, the American health-care system has "fallen short in the provision of such services" and has "relied more on responding to acute problems and the urgent needs of patients than on prevention." *Id.* at 16-17.

To address this problem, the Act and its implementing regulations require coverage of a wide range of preventive services without cost, including services such as cholesterol screening, colorectal cancer screening, and diabetes screening for those with high blood pressure, 42 U.S.C. 300gg-13(a)(1) (Supp. V 2011); see 75 Fed. Reg. 41,741-41,744 (July 19, 2010); routine vaccination to prevent vaccine-preventable diseases, such as measles and tetanus, 42 U.S.C. 300gg-13(a)(2) (Supp. V 2011); see 75 Fed. Reg. at 41,740, 41,745-41,752; and "evidence-informed preventive care and screenings" for infants, children, and adolescents, 42 U.S.C. 300gg-13(a)(3) (Supp. V 2011); see 75 Fed. Reg. at 41,753-41,755.

Further, and as particularly relevant here, the Act requires coverage, "with respect to women, [of] such additional preventive care and screenings * * * as provided for in comprehensive guidelines supported" by the Health Resources and Services Administration (HRSA), which is a component of the Department of

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respect to such insurers, she conducts such enforcement herself and may impose civil monetary penalties. 42 U.S.C. 300gg-22(a)(2) (Supp. V 2011); see 42 U.S.C. 300gg-22(b)(1)(A) (Supp. V 2011); 42 U.S.C. 300gg-22(b)(2) (Supp. V 2011).

Health and Human Services (HHS). 42 U.S.C. 300gg-13(a)(4) (Supp. V 2011). Congress included this provision because "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); see IOM Report 18. In particular, "[w]omen of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein). And women often find that copayments and other cost sharing for important preventive services "are so high that they avoid getting [the services] in the first place." *Id.* at 29,302 (statement of Sen. Mikulski); see IOM Report 19-20.

Because HRSA did not have such comprehensive guidelines for preventive services for women, HHS requested that the Institute of Medicine (Institute or IOM) develop recommendations for it. 77 Fed. Reg. 8725-8726 (Feb. 15, 2012); IOM Report 1-2. The Institute is part of the National Academy of Sciences, a "semi-private" organization Congress established "for the explicit purpose of furnishing advice to the Government." *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 460 & n.11 (1989) (citation omitted); see IOM Report iv.

To formulate recommendations, the Institute convened a group of experts, "including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines." IOM Report 2. The Institute defined preventive services as measures "shown to improve well-being, and/or decrease the likelihood or delay the onset of a targeted disease or condition." *Id.* at 3. Based on the Institute's review of the evidence, it recommended a number of preventive services for women, such as screening for gestational diabetes for pregnant women, screening and counseling for domestic violence, and at least one well-woman preventive care visit a year. *Id.* at 8-12.

The Institute also recommended access to the "full range" of "contraceptive methods" approved by the Food and Drug Administration (FDA), as well as sterilization procedures and patient education and counseling for all women with reproductive capacity. IOM Report 10; see *id.* at 102-110. FDA-approved contraceptive methods include oral contraceptive pills, diaphragms, injections and implants, emergency contraceptive drugs, and intrauterine devices (IUDs). FDA, *Birth Control: Medicines To Help You*, http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm (last updated Aug. 27, 2013) (*Birth Control Guide*).

In making that recommendation, the Institute noted that nearly half of all pregnancies in the United States are unintended and that unintended pregnancies can have adverse health consequences for both mothers and children. IOM Report 102-103. In addition, the Institute observed, use of contraceptives leads to longer intervals between pregnancies, which "is important because of the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced." *Id.* at 103.

HRSA adopted women's preventive-health guidelines consistent with the Institute's recommendations, including a guideline recommending access to all FDA-approved contraceptive methods as prescribed by a health-care provider. HRSA, HHS, *Women's Preventive Services Guidelines*, App., *infra*, 40a-45a.

The relevant regulations adopted by the three Departments implementing this portion of the Act (HHS, Labor, and Treasury) require non-grandfathered group health plans to cover, among other preventive services, the contraceptive services recommended in the HRSA guidelines. 45 C.F.R. 147.130(a)(1)(iv) (HHS); 29 C.F.R. 2590.715-2713(a)(1)(iv) (Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (Treasury) (collectively referred to in this brief as the contraceptive-coverage provision).

b. The implementing regulations authorize an exemption from the contraceptive-coverage provision for the group health plan of a "religious employer." 45 C.F.R. 147.131(a). A religious employer is defined as a non-profit organization described in the Internal Revenue Code provision that refers to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. *Ibid.* (cross-referencing 26 U.S.C. 6033(a)(3)(A)(i) and (iii)).

The implementing regulations also provide accommodations for the group health plans of religious non-profit organizations that have religious objections to providing coverage for some or all contraceptive services. 45 C.F.R. 147.131(b). After such an organization accepts an accommodation, the women who participate in its plan will generally have access to contraceptive coverage without cost sharing though an alternative mechanism established by the regulations, under which the organization does not contract, arrange, pay, or refer for contraceptive coverage. 78 Fed. Reg. 39,870, 39,872, 39,874-39,886 (July 2, 2013).

c. The preventive-services coverage provision in general, and the contraceptive-coverage provision in particular, apply only if an employer offers a group health plan. Employers, however, are not required to offer group health plans. Certain employers with more than 50 full-time-equivalent employees are subject to a tax if they do not offer coverage, 26 U.S.C. 4980H, and they thus are afforded a choice between offering a group health plan and the prospect of paying the tax. See *Liberty Univ.*, 733 F.3d at 98; cf. *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2596-2597 (2012).

3. Respondents are two for-profit corporations—Hobby Lobby Stores, Inc., and Mardel, Inc.—and five individuals who indirectly own the corporations (collectively referred to as the Greens).[3] Hobby Lobby is a national chain of more than 500 arts-and-crafts stores with more than 13,000 full-time employees. Pet. App. 171a. Mardel is a chain of 35 book stores specializing in Christian materials and has 372 employees. *Ibid.* Employees of both corporations obtain health coverage through the self-insured Hobby Lobby group health plan. *Id.* at 14a.

The Greens maintain the sincere religious conviction "that human life begins at conception," that is, "when sperm fertilizes an egg." Pet. App. 9a, 14a. After learning about the contraceptive-coverage provision, Hobby Lobby "re-examined its insurance policies," discovered that the policies already covered certain FDA-approved contraceptives to which the Greens object, and proceeded to exclude those contraceptives from coverage. J.A. 139-140 (Verified Compl. para. 55). Respondents also initiated this suit, J.A.

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[3] The Greens are trustees of a management trust that owns and operates Hobby Lobby and Mardel. Pet. App. 8a, 171a; see Pet. 9 n.4.

124-169, contending that the requirement that the Hobby Lobby group health plan cover all forms of FDA-approved contraceptives as prescribed by a physician violates rights of the corporations and the Greens under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, which provides that the government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. 2000bb-1(a) and (b). Specifically, respondents contend that RFRA entitles the Hobby Lobby plan to an exemption from the contraceptive-coverage provision because the Greens object to "facilitating" coverage of four FDA-approved contraceptives (two types of IUDs and two emergency contraceptives, Plan B and ella). Pet. App. 14a.[4]

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[4] According to FDA-approved product labels, a copper IUD is a device inserted into the uterus by a healthcare provider that works by interfering with sperm transport and fertilization of an egg and possibly by preventing implantation (of a fertilized egg in the uterus). FDA-approved label for ParaGard T 380A Intrauterine Copper Contraceptive 3 (June 11, 2013), http://www.accessdata.fda.gov/drugsatfda_docs/label/2013/018680s066lbl.pdf. An IUD with progestin is a device inserted into the uterus by a healthcare provider that works by thickening cervical mucus preventing passage of sperm into the uterus, inhibiting sperm capacitation or survival, and altering the endometrium. FDA-approved label for Mirena (levonorgestrel-releasing intrauterine system) 18 (Aug. 7, 2013), http://www.accessdata.fda.gov/drugsatfda_docs/label/2013/021225s032lbl.pdf; FDA-approved label for Skyla (levonorgestrel-releasing intrauterine system) § 12.1 (Sept. 13, 2013), http://www.accessdata.fda.gov/drugsatfda_docs/label/2013/203159s002lbledt1.pdf. Plan B is an emergency contraceptive in pill form that works principally by preventing ovulation or fertilization by altering tubal transport of sperm and/or ova; it may

The district court denied respondents' motion for a preliminary injunction, holding that they had not established a likelihood of success on the merits of their claims. Pet. App. 167a-199a.

4. The court of appeals denied respondents' motion for an injunction pending appeal. 2012 WL 6930302. Respondents then applied to this Court for emergency relief, which Justice Sotomayor denied. 133 S. Ct. 641 (2012).

5. In a divided decision, the en banc court of appeals reversed the judgment of the district court. Pet. App. 1a-166a.

a. After addressing jurisdictional issues, the majority held that the respondent corporations are likely to succeed on the merits of their RFRA claims. Pet. App. 6a, 23a-61a. The court first held that "for-profit corporations, such as Hobby Lobby and Mardel, are persons exercising religion for purposes of RFRA." *Id.* at 23a; see *id.* at 23a-43a. Because the Greens believe that life begins at conception, see *id.* at 9a, the

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inhibit implantation (of a fertilized egg in the uterus) by altering the endometrium, but it is not effective once the process of implantation has begun. FDA-approved label for Plan B (levonorgestrel) tablets, 0.75mg, 4 (July 10, 2009), http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021045s015lbl.pdf. Ella, another emergency contraceptive, is a pill that works by inhibiting or delaying ovulation and may also work by altering the endometrium in a way that may affect implantation (of the fertilized egg in the uterus). FDA-approved label for ella (ulipristal acetate) tablet § 12.1 (May 2, 2012), http://www.accessdata.fda.gov/drugsatfda_docs/label/2012/022474s002lbl.pdf.

Although respondents describe these devices and drugs as "abortion-causing" (J.A. 147-148 (Verified Compl. para. 106)), federal law, which defines pregnancy as beginning at implantation, does not so classify them. See, *e.g.*, 62 Fed. Reg. 8611 (Feb. 25, 1997); 45 C.F.R. 46.202(f).

court declared that "[t]he corporate plaintiffs believe life begins at conception," *id.* at 50a, and concluded that the contraceptive-coverage provision "requires Hobby Lobby and Mardel to * * * compromise their religious beliefs." *Id.* at 52a. The court held that "Hobby Lobby and Mardel have established a substantial burden as a matter of law." *Ibid.*

Applying RFRA's compelling-interest test, the court of appeals held that the interests advanced by the contraceptive-coverage provision cannot be compelling because there is a regulatory exemption from that requirement for the plans offered by religious employers; because plans are not subject to the preventive-services coverage provision (and certain other ACA requirements) if they retain grandfathered status; and because of what the court described as an exemption for plans offered by employers with fewer than 50 full-time-equivalent employees. Pet. App. 58a-59a.

b. Judge Gorsuch (joined by two other judges) concurred, Pet. App. 77a-94a, positing that "the Greens themselves, as individuals, are also entitled to relief," *id.* at 77a.

c. Chief Judge Briscoe, joined by Judge Lucero, dissented in relevant part. Pet. App. 103a-138a. Rejecting the corporations' claims, Chief Judge Briscoe reasoned that, "during the 200-year span between the adoption of the First Amendment and RFRA's passage," this Court "consistently treated free exercise rights as confined to individuals and non-profit religious organizations." *Id.* at 115a. Chief Judge Briscoe thus found "no plausible basis for inferring that Congress intended or could have anticipated that for-profit corporations would be covered by RFRA." *Id.*

at 118a (internal quotation marks and citation omitted).

Chief Judge Briscoe further concluded that the majority's substantial-burden analysis disregarded "basic principles of corporation law," by treating "the religious beliefs of the individual plaintiffs as those of Hobby Lobby and Mardel." Pet. App. 130a-131a. She also rejected the idea that "company [owners'] religious beliefs and practices are implicated by the autonomous health care decisions of company employees" to use their health coverage in ways that offend an owner's religious beliefs. *Id.* at 137a-138a (brackets in original; citation omitted).

6. On remand, the district court entered a preliminary injunction. 2013 WL 3869832 (July 19, 2013). The government's appeal from that order is stayed pending this Court's decision in this case. See Order, *Hobby Lobby Stores, Inc.* v. *Sebelius*, No. 13-6215 (10th Cir. Sept. 26, 2013).

SUMMARY OF ARGUMENT

The Greens' sincerely held religious opposition to certain forms of contraception is not subject to question in these proceedings, and their personal beliefs merit the full measure of protection that the Constitution and laws provide. But the *Greens'* beliefs, although deeply held, do not justify an injunction under the Religious Freedom Restoration Act exempting *Hobby Lobby* and *Mardel* from an obligation to comply with a generally applicable law that regulates only those corporations and not their individual owners. Granting the relief respondents seek for profit-making corporate entities engaged in commercial activity would expand the scope of RFRA far beyond anything Congress contemplated; would disregard deeply engrained principles of corporation law that should inform the interpretation of RFRA as they do federal statutes generally; and would deny to thousands of employees (many of whom may not share the Greens' religious beliefs) statutorily-guaranteed access to benefits of great importance to health and well-being.

1. Respondents Hobby Lobby and Mardel, for-profit corporations conducting commercial enterprises, are not persons exercising religion within the meaning of RFRA. Congress enacted RFRA to restore this Court's free-exercise jurisprudence from before *Employment Division* v. *Smith*, 494 U.S. 872 (1990), and directed courts to look to those decisions for guidance when resolving RFRA claims. None of this Court's pre-*Smith* decisions held, or even suggested, that for-profit corporations exercise religion. Instead, those decisions recognized free-exercise rights of individuals, churches, and religious communities. Because Congress intended RFRA to restore, not dramatically extend, pre-*Smith* law, the statute should be interpreted to embody the same limitation.

The corporate-respondents' RFRA claim fails for the independent reason that it attributes the religious beliefs of the corporate shareholders to the corporate-respondents themselves. That approach violates the long-settled principle of corporation law (against the backdrop of which RFRA was enacted) that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001).

2. Respondents' alternative suggestion that the Greens may challenge the contraceptive-coverage provision in their individual capacities likewise suffers from threshold defects. The challenged provision imposes no personal obligations on the Greens; it instead regulates only the corporations they own and the group health plan the corporations sponsor. The provision therefore does not burden the Greens' individual exercise of religion in any cognizable sense, and RFRA does not entitle them to an exemption *for the corporations* based on their *individual* religious beliefs.

3. The particular burden about which respondents complain also does not qualify as a substantial burden within the meaning of RFRA. A group health plan covers many items and services, and participants and their dependents, in consultation with their health-care providers, decide which ones to use. Those decisions by independent third parties are not attributable to the employer that finances the plan or to the individuals who own the company, and the connection is too indirect as a matter of law to impose a substantial burden.

4. The contraceptive-coverage provision in any event is supported by compelling interests and is the least restrictive means of achieving them. The preventive-services coverage provision grants participants and beneficiaries in the Hobby Lobby group health plan privately-enforceable benefits as part of a comprehensive insurance scheme, and the exemption respondents seek would deny those individuals the health coverage to which they are legally entitled as part of their employment compensation. This Court's religion-clause jurisprudence does not compel that

employees be denied statutory benefits, or forced to bear other costs, to accommodate an employer's sincerely held religious beliefs. The provision also serves compelling interests in public health and gender equality. Those interests are supported by a wealth of empirical data demonstrating that providing women access to contraceptives without cost-sharing has significant health benefits for them and their children, and, conversely, that financial barriers to such access can result in significant health problems.

Respondents' only proffered alternative—direct government provision of contraceptive services to corporate-respondents' employees—is not a less restrictive means within the meaning of RFRA. The less-restrictive means test under RFRA cannot be used to require creation of entirely new programs. Moreover, in both the preventive-services coverage provision and the Act generally, Congress built upon the system of employment-based coverage and private insurance, rather than replacing it with government-provided benefits. Respondents' proffered alternative would conflict with that goal.

ARGUMENT

I. THE RESPONDENT-CORPORATIONS FAIL TO STATE A CLAIM UNDER RFRA

A. RFRA Does Not Grant Free-Exercise Rights To For-Profit Corporations

The claims of the respondent for-profit corporations fail at the threshold because they are not persons exercising religion within the meaning of RFRA.

1. Congress enacted RFRA "to restore the compelling interest test" applied by this Court in free-exercise cases decided before *Employment Division*

v. *Smith*, 494 U.S. 872 (1990). 42 U.S.C. 2000bb(b)(1); see 42 U.S.C. 2000bb(a)(4) and (5); *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006) (*O Centro*). In *Smith*, this Court held that the Free Exercise Clause does not require religion-based exemptions from neutral laws of general applicability. See 494 U.S. at 876-890. RFRA "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*," providing that "the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability,'" unless the government satisfies a compelling-interest test. *O Centro*, 546 U.S. at 424 (quoting 42 U.S.C. 2000bb-1(a)). Given this restorative purpose, Congress expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993) (Senate Report); see H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same).

2. The respondent-corporations are not "person[s] exercis[ing] religion" (42 U.S.C. 2000bb-1(a)) within the meaning of RFRA. None of this Court's pre-*Smith* decisions held (or even suggested) that for-profit corporations exercise religion within the meaning of the Free Exercise Clause.

Under pre-*Smith* decisions, individuals could seek certain exemptions from generally applicable regulations that burdened their exercise of religion. The two cases that Congress cited in RFRA itself are illustrative. See 42 U.S.C. 2000bb(b)(1) (citing *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972)). In *Sherbert*, the Court held that a state government could not deny unemployment compensation to an individual who was discharged by her employer because she would not work on her Sabbath. 374 U.S. at 399-410. In *Yoder*, the Court held that a state government could not compel Amish parents to send their children to high school. 406 U.S. at 234-235.

Under the Court's free-exercise case law, churches and religious communities can also assert free-exercise claims. For example, in *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993) (*Lukumi*), a church successfully challenged a local ordinance that made it unlawful for its members to perform the ritual animal sacrifice that is part of the Santeria religion. *Id.* at 525, 531-540, 542-547.[5] Accordingly, when this Court later applied RFRA in *O Centro*, it held that RFRA allowed "a Christian Spiritist sect" to obtain an exemption from a federal law (the Controlled Substances Act, 21 U.S.C. 801 *et seq.*) that prevented its members from receiving communion in the form of a sacramental tea. 546 U.S. at 425, 427-439.

In contrast, no pre-*Smith* case held, or even suggested, that for-profit corporations have religious beliefs that could in turn be impermissibly burdened under the First Amendment by general corporate regulation. The two cases on which the court of appeals relied for the contrary proposition, Pet. App. 35a-36a (citing *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), and *United States* v. *Lee*, 455 U.S. 252 (1982)),

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[5] *Lukumi* was decided after *Smith*, but ruled for the plaintiffs on the ground that the challenged statute targeted plaintiffs' religious practices for disfavored treatment, thus making it subject to the compelling-interest test (which it failed). See *Lukumi*, 508 U.S. at 532-540, 542-547.

rejected free-exercise claims raised by *individuals*. In *Braunfeld*, the Court rejected the free-exercise claim asserted by Orthodox Jewish individuals who faced criminal prosecution if they sold their goods on Sundays, even though the Sunday closing law placed substantial pressure on them "to give up their [Saturday] Sabbath observance, a basic tenet of the Orthodox Jewish faith." 366 U.S. at 602 (plurality opinion). And, in *Lee*, the Court rejected an Amish carpenter's claim that he had a free-exercise right to be exempted from the requirement to pay Social Security taxes on behalf of his Amish employees. 455 U.S. at 256-261. *Braunfeld* and *Lee* did not involve for-profit corporations, but rather individual sole proprietors who faced personal liability under the regulations they challenged. See *Braunfeld*, 366 U.S. at 601; Appellant's Br. 5-6, *Braunfeld*, *supra*, (No. 67); see also *Lee*, 455 U.S. at 254; Appellee's Br. 1, *Lee*, *supra* (No. 80-767).

On the same day the Court issued its decision in *Braunfeld*, it separately addressed a similar free-exercise challenge to a Sunday closing law advanced by an incorporated kosher supermarket. See *Gallagher* v. *Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617 (1961). A plurality of the Court determined that it "need not decide" whether the corporation could assert a free-exercise claim because, in *Braunfeld*, the Court had rejected the claim "on the merits." *Gallagher*, 366 U.S. at 631. The express reservation of the question in *Gallagher* confirms that this Court's pre-*Smith* decisions had not afforded free-exercise rights to for-profit corporations.

3. There is no reason to think that Congress intended RFRA to grant for-profit corporations rights that previously had been reserved to individuals and

religious non-profit institutions. For-profit corporations "are different from religious non-profits in that they use labor *to make a profit*, rather than to perpetuate a religious values-based mission." *Gilardi* v. *United States Dep't of Health & Human Servs.*, 733 F.3d 1208, 1242 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part), petition for cert. pending, No. 13-567 (filed Nov. 5, 2013); see *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 344 (1987) (Brennan, J., concurring in the judgment) ("[U]nlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce.").

It has long been understood that when corporations enter the commercial world for profit, they necessarily "submit themselves to legislation—such as Title VII, the Fair Labor Standards Act, the Americans with Disabilities Act, and the Affordable Care Act—designed to protect the health, safety, and welfare of employees." *Gilardi*, 733 F.3d at 1242-1243 (Edwards, J., concurring in part and dissenting in part); see pp. 38-46, *infra* (discussing compelling interest in protecting statutory rights of corporate-respondents' employees).

The idea that federal law would require corporate employees (such as the 13,000 employees of Hobby Lobby) to give up statutorily protected rights in order to accommodate the asserted exercise of religion of a for-profit corporation would have been a foreign concept to the Congress that enacted RFRA. Congress had at that time enacted religion-based exemptions for employers in some employment-regulation statutes, but those exemptions were all limited to churches and other religious non-profit institutions. *E.g.*, 42 U.S.C. 2000e-1(a) (Title VII exemption from prohibition against employment discrimination based on religion for "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on * * * of its activities"); see 1A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 80, at 61 (perm. ed., rev. vol. 2010) (noting that a "religious corporation" is a "special class of nonprofit corporation[]").

While Title VII's exemption for religious employers burdens employees whose religion differs from that of their employer, Congress viewed that burden as a cost that was justified to protect "religious organizations['] * * * interest in autonomy in ordering their internal affairs." *Amos*, 483 U.S. at 340, 341 (Brennan, J., concurring in the judgment). That understanding is consistent with the First Amendment's "special solicitude to the rights of religious organizations." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 706 (2012) (*Hosanna-Tabor*). By contrast, neither this Court's cases nor pre-RFRA federal employment statutes provided for-profit corporations an exemption from generally applicable law on the premise that the corporation was exercising religion. There is no reason to conclude that Congress intended RFRA to embody a fundamentally different understanding.

3. The "limitation of RFRA's applicability to individuals and non-profit religious organizations is reinforced by examining the legislative history of RFRA."

Pet. App. 115a (Briscoe, C.J., dissenting in relevant part). The committee reports, hearings, and debates are filled with references to individuals and religious institutions, but "[e]ntirely absent from the legislative history * * * is any reference to for-profit corporations." *Id.* at 116a.

This Court reviewed RFRA's legislative record in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), and observed that "[m]uch of the discussion centered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs." *Id.* at 530-531. The hearings and committee reports also showed concern that "zoning regulations and historic preservation laws * * * have adverse effects on churches and synagogues." *Id.* at 531. "But nowhere" in RFRA's legislative history "is there any suggestion that Congress foresaw, let alone intended that, RFRA would cover for-profit corporations." Pet. App. 117a (Briscoe, C.J., dissenting in relevant part).

Had Congress, in enacting RFRA, intended to extend free-exercise rights to for-profit corporations for the first time in our Nation's history, there would surely have been some express mention of that intent in either the statutory text or in the legislative history. See *Chisom* v. *Roemer*, 501 U.S. 380, 396 (1991); see also *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). There is none.

4. The court of appeals mistakenly believed that Congress's use of the term "person" in RFRA compels the conclusion that the statute grants rights to for-profit corporations. Pet. App. 24a. The court of appeals relied on the Dictionary Act, which states that the term "person" in a federal statute includes corpo-

rations unless "the context indicates otherwise." *Ibid.* (quoting 1 U.S.C. 1).

The court of appeals' "focus on personhood is too narrow; instead, [a court] must construe the term 'person' together with the phrase 'exercise of religion.'" *Gilardi*, 733 F.3d at 1211. The Dictionary Act does not address the question whether for-profit corporations are "person[s]" that engage in the "exercise of religion" in the sense Congress intended in RFRA. See 42 U.S.C. 2000bb-1(a) and (c). Nor does RFRA's definition of "exercise of religion" speak to that issue. *Gilardi*, 733 F.3d at 1211-1212. RFRA, as amended by the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, simply states that "exercise of religion" "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000bb-2(4), 2000cc-5(7)(A).

Because the text of neither RFRA nor the Dictionary Act supports the conclusion that for-profit corporations are "person[s]" that themselves engage in the "exercise of religion" in the sense Congress intended, the Court must turn to "the full body" of "free-exercise caselaw" that pre-dated *Smith*. *Gilardi*, 733 F.3d at 1212. And, as discussed above, "during the 200-year span between the adoption of the First Amendment and RFRA's passage," this Court "consistently treated free exercise rights as confined to individuals and non-profit religious organizations." Pet. App. 115a (Briscoe, C.J., dissenting in relevant part). RFRA must be interpreted to reflect the same limitation.

B. RFRA Does Not Authorize Claims That Disregard Fundamental Tenets Of American Corporation Law

The corporate-respondents' RFRA claim fails for the further reason that the claim "treat[s] the religious beliefs of the individual plaintiffs as those of Hobby Lobby and Mardel." Pet. App. 130a-131a (Briscoe, C.J., dissenting in relevant part). Based on "*[t]he Green family's* religious beliefs," respondents contend that *Hobby Lobby* is entitled to an exemption to the contraceptive-coverage provision "consistent with *its* faith." J.A. 139 (Verified Compl. paras. 53, 55).

That approach runs afoul of basic principles of corporation law that inform the interpretation of federal statutes, including RFRA. As this Court has emphasized, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001) (*Cedric Kushner*); see *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003). "One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946) (per curiam).

Few norms are more deeply ingrained into the fabric of American law than the principle that "a corporation and its stockholders are deemed separate entities." *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 442 (1934). And this Court has consistently interpreted federal statutes in a manner that respects this bedrock norm. For example, in *Cedric Kushner*, the Court held that the owner of a corporation can be liable under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, for conducting the affairs of the corporation through a pattern of racketeering activity. The Court noted that RICO requires some "distinctness between the RICO defendant and the RICO enterprise," 533 U.S. at 162 (citation omitted), and concluded that this distinctness requirement was met. The Court explained that the "corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Id.* at 163.

In *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470 (2006), the Court relied on the same principle to reject a civil rights claim brought by the sole shareholder of a closely held corporation because the alleged injury was suffered only by the corporation. The shareholder alleged a violation of 42 U.S.C. 1981, which protects the right of all persons to "make and enforce contracts" without respect to race, based on the defendant's alleged breach of its contract with the corporation because of the shareholder's race. 546 U.S. at 474-475 (quoting 42 U.S.C. 1981). This Court unanimously held that the shareholder did not have a cause of action because the right to make and enforce the contract belonged to the corporation, rather than to the owner. See *id.* at 477. The Court reasoned that "it is fundamental corporation and agency law—indeed, it can be said to be the whole purpose of corporation and agency law—that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts." *Ibid.* Just as the shareholder's decision to operate his business as a corporation "protected his personal assets, even though he 'negotiated, signed, performed, and sought to enforce' contracts" for the corporation, "[t]he corporate form and the rules of agency similarly den[ied] him rights under those contracts." *Ibid.*

Similarly, in *United States* v. *Bestfoods*, 524 U.S. 51 (1998), this Court interpreted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, in light of the background principle that a parent corporation is distinct from its subsidiaries and thus not liable for its subsidiaries' actions. See 524 U.S. at 61. "Although this respect for corporate distinctions when the subsidiary is a polluter has been severely criticized in the literature," the Court concluded that "nothing in CERCLA purports to reject this bedrock principle, and against this venerable common-law backdrop, the congressional silence is audible." *Id.* at 62.[6]

The same reasoning applies here. Nothing in RFRA purports to reject the bedrock principle that a corporation is legally distinct from its owners. There is thus no basis on which to impute the individual-respondents' religious beliefs to the corporate-respondents. The court of appeals deemed it significant that Hobby Lobby and Mardel are "closely held" and that the owners are "unanimous" in their religious beliefs. Pet. App. 42a. But, as this Court's *Cedric Kushner* decision illustrates, the tenet that a corporation is distinct from its owners applies even when the corporation has only a *single* shareholder. 533 U.S. at 160, 163; accord *Domino's Pizza*, 546 U.S. at 472, 477. No matter their small number, family relationships, or unanimity, corporate shareholders are not the corporation.[7]

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[6] Like that of every other State, the law of Oklahoma, where Hobby Lobby is incorporated, reflects the same principles, specifying that corporations, including family-owned ones, are legal entities that are "separate and distinct" from their shareholders. *Sautbine* v. *Keller*, 423 P.2d 447, 451 (Okla. 1966).

II. THE GREENS' EXERCISE OF RELIGION IS NOT BURDENED BY REGULATION OF THE CORPORATE-RESPONDENTS, AND THE GREENS ARE NOT ENTITLED TO RELIEF THAT EXEMPTS THE CORPORATIONS FROM FEDERAL LAW

Respondents contend that "the Greens themselves have an independently valid claim under RFRA" because Hobby Lobby and Mardel "cannot comply with the contraceptive-coverage requirement unless the Greens, 'as the controlling owners and operators,' personally 'direct the corporations to [do so].'" Resp. Cert. Br. 27 (brackets in original) (quoting Pet. App. 86a (Gorsuch, J., concurring)). This contention fails both because regulation of the corporations does not, as a matter of law, burden the religious exercise of their owners and because the relief respondents seek—an injunction exempting *the corporations* from the contraceptive-coverage provision—does not follow from the injury they allege.

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[7] The court of appeals' implicit suggestion (Pet. App. 42a-43a & n.12) that its holding was limited to corporations that are not publicly-traded, even if analytically sound, would still allow for significant RFRA-created gaps in employment regulation. In 2008, *Forbes* estimated that the largest privately-held corporations in the United States employed 6.2 million people and had $1.8 trillion in revenue. See *America's Largest Private Companies*, Forbes (Nov. 6, 2008), www.forbes.com/2008/11/03/largest-private-companies-biz-privates08-cx_sr_1103private_land.html.

Federal law does not require *the Greens* to provide health insurance, particular health benefits, or any other form of compensation to the corporations' employees. The Greens do not personally employ the 13,000 individuals who work for Hobby Lobby; the corporation does. See *Sipma* v. *Massachusetts Cas. Ins. Co.*, 256 F.3d 1006, 1010 (10th Cir. 2001) ("Because a corporation enters into contracts in a capacity separate and distinct from its shareholders, the corporation, not the shareholder, is the employing party in an employment relationship."). It is Hobby Lobby that sponsors the group health plan, and "it is that health plan which is now obligated by the Affordable Care Act and resulting regulations to provide contraceptive coverage." *Grote* v. *Sebelius*, 708 F.3d 850, 857 (7th Cir. 2013) (Rovner, J., dissenting); see 29 U.S.C. 1132(d)(1) (a group health plan is a legal entity distinct from its sponsoring employer under ERISA).

The Greens would face no personal liability for any failure by Hobby Lobby and its group health plan to comply with the contraceptive-coverage provision. The Hobby Lobby plan (not the Greens) would be subject to a suit by a plan participant or beneficiary or other enforcement action under ERISA for any failure to provide statutorily required benefits. See 29 U.S.C. 1185d (Supp. V 2011); see also 29 U.S.C. 1132(a)(1)(B), (3), and (5). The corporate-respondents (not the Greens) would be subject to any tax penalty for such a failure. See 26 U.S.C. 4980D; see also 26 U.S.C. 9815(a)(1), 9834.

It follows that RFRA grants the Greens as individuals no right to challenge an obligation that applies only to the corporate-respondents. The Greens "conduct business through [corporations], thereby obtaining both the advantages and disadvantages of the corporate form." *Conestoga Wood Specialties Corp.* v. *Secretary of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir.), cert. granted, 134 S. Ct. 678 (2013). The corporations they formed are distinct legal entities, and nothing in RFRA overrides that bedrock principle of corporation law.

The longstanding shareholder standing rule, under which "shareholders of a corporation cannot bring claims intended to redress injuries to a corporation, even when the corporation is closely held," *Autocam Corp.* v. *Sebelius*, 730 F.3d 618, 622 (6th Cir. 2013), petition for cert. pending, No. 13-482 (filed Oct. 15, 2013), reflects this same corporate-law principle. That rule "recognizes that corporations are entities separate from their shareholders in contradistinction with partnerships or other unincorporated associations." *Smith Setzer & Sons, Inc.* v. *South Carolina Procurement Review Panel*, 20 F.3d 1311, 1317 (4th Cir. 1994). Although the rule "is regularly encountered in traditional business litigation, it also has been uniformly applied on the infrequent occasions it has arisen in suits against the state for statutory or constitutional violations." *Ibid.*; see *Diva's, Inc.* v. *City of Bangor*, 411 F.3d 30, 35, 42 (1st Cir. 2005) (dismissing sole shareholder's First Amendment claim for lack of standing); *Guides, Ltd.* v. *Yarmouth Grp. Prop. Mgmt., Inc.*, 295 F.3d 1065, 1070, 1071-1073 (10th Cir. 2002) (race discrimination claim); *Potthoff* v. *Morin*, 245 F.3d 710, 717-718 (8th Cir. 2001) (First Amendment claim); *Chance Mgmt., Inc.* v. *South Dakota*, 97 F.3d 1107, 1115 (8th Cir. 1996) (Privileges and Immunities Clause claim), cert. denied, 519 U.S. 1149 (1997); *Smith Setzer & Sons, Inc.*, 20 F.3d at 1317 (same).

Respondents contend that the Greens may assert claims as individuals because they work as officers and managers of the corporations and the provision "requires [them as individuals] * * * directly and personally to take *affirmative* action contrary to their religious beliefs." Resp. Cert. Br. 28 (quoting Pet. App. 161a (Matheson, J., concurring in part and dissenting in part)); see Pet. App. 78a (Gorsuch, J., concurring).

As an initial matter, respondents' premise is incorrect. The provision imposes obligations on the corporations as employers. Nothing in federal law requires the Greens to play any particular role at the corporations, much less in one related to employee benefits. Further, self-insured group health plans (like the one for the corporate-respondents) are not generally administered directly by corporate managers but instead by third-party administrators, which "are hired by plan sponsors to process claims and administer other administrative aspects of employee benefit plans." 78 Fed. Reg. at 39,879 n.40; see *id.* at 39,880.

Even putting aside those issues, respondents' argument based on the Greens' role as managers does not overcome respondents' conflation problem; it compounds that problem. As owners, the Greens are distinct from the corporation. As managers, they have an additional, but equally distinct role. A manager takes actions on behalf of the corporation itself, not on behalf of himself as an individual. See *Autocam*, 730

F.3d at 623. A manager, like a shareholder, cannot seek to exempt the corporation from regulation on the basis of his individual beliefs. And, if a person who is a manager of a corporation also is a fiduciary of an ERISA plan sponsored by the corporation, his duties in that capacity run solely to the participants and beneficiaries of the plan, following the terms of the plan insofar as they are consistent with ERISA itself. See 29 U.S.C. 1104(a).

Respondents' contrary position (Resp. Cert. Br. 28) would seemingly mean that *any* human resources manager who objects to the contraceptive-coverage provision could sue under RFRA to seek an exemption *for the corporation* that employs him, on the ground that he is the "human actor[]" (Pet. App. 78a (Gorsuch, J., concurring)) responsible for corporate compliance with a requirement to which he has a religious objection. Such a remedy would be unprecedented, and nothing in RFRA purports to authorize it.

Federal law does provide for accommodations of employees' religious beliefs in the workplace, but it does so in a dramatically different way than respondents advocate. Title VII of the Civil Rights Act of 1964 provides that an employee's "religious observance and practice, as well as belief," should be reasonably accommodated unless the employer can show that doing so would pose an "undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j); see *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 73-74 (1977) (*TWA*).

Congress did not intend RFRA to change or "affect[]" that settled "religious accommodation" provision in Title VII. Senate Report 13. Before RFRA was enacted, this Court held that a reasonable accommodation under Title VII cannot come "at the expense" of other employees. *TWA*, 432 U.S. at 81. In *TWA*, this Court rejected a Title VII religious accommodation claim of an employee whose religion prohibited him from working on his Sabbath. *Id.* at 76-85. The Court explained that, if the employer were to "allocate days off in accordance with the religious needs of its employees," that would come "at the expense of others who had strong, but perhaps nonreligious, reasons for not working on weekends." *Id.* at 80-81. "Title VII does not contemplate such unequal treatment." *Id.* at 81. The Court found it "anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others." *Ibid.* Title VII's religious accommodation provision would never be interpreted to permit an objecting employee to secure an exemption from federal law for his employer, much less one that would come at the expense of his fellow employees.

III. RESPONDENTS' RELIGIOUS EXERCISE IS NOT SUBSTANTIALLY BURDENED WITHIN THE MEANING OF RFRA

Respondents' RFRA claims also fail because the particular burden about which they complain does not quality as a "substantial[] burden" within the meaning of RFRA. 42 U.S.C. 2000bb-1(a); see 42 U.S.C. 2000bb-1(b).

The Greens believe that life begins "from the moment of conception" (Resp. Cert. Br. 3), and they object to drugs and devices that could "prevent the implantation of a human embryo in the wall of the uterus" (J.A. 148-149 (Verified Compl. para. 115)). They contend that it would substantially burden their religious exercise for the group health plan sponsored by the corporations they own to provide health coverage that "would facilitate access" by employees to such drugs and devices. J.A. 140 (Verified Compl. para. 56). Those sincere religious beliefs are, of course, entitled to respect.

Under RFRA, courts are not to inquire into the validity of a religious tenet or evaluate whether it is "central" to a plaintiff's "system of religious belief." 42 U.S.C. 2000cc-5(7)(A); see 42 U.S.C. 2000bb-2(4). That is consistent with the longstanding free-exercise principle that courts may not question where a plaintiff "dr[aws] the line" in defining his own religious belief. *Thomas* v. *Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981). But that is a separate question from whether a plaintiff's religious exercise is substantially burdened, which necessarily entails a judgment concerning the legal and practical context in which the plaintiff's claim arises. See *Kaemmerling* v. *Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (court "[a]ccept[ed] as true the factual allegations that [plaintiff's] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"). The substantial-burden question is a legal one for a court.

The answer to that legal question must be guided by principles regarding which injuries are cognizable and which are not. For example, such principles may exclude claims where the relationship between the claimed injury and the challenged governmental action is too attenuated, as well as claims involving the actions and rights of independent actors and affected third parties. Likewise, a proffered burden may be deemed not substantial in cases where the nature of applicable legal regimes and societal expectations necessarily impose objective outer limits on when an individual can insist on modification of, or heightened justifications for, governmental programs that may offend his beliefs. Under these principles, respondents have not alleged a substantial burden as a matter of law.

Hobby Lobby pays money into an undifferentiated fund to finance covered benefits under its ERISA-regulated health plan. Decisions whether to claim such benefits are made by independent third parties: plan participants and beneficiaries (acting in consultation with their health-care providers), who have their own rights under the group health plan and ERISA, see pp. 38-46, *infra*. "No individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action." *Grote*, 708 F.3d at 865 (Rovner, J., dissenting); cf. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 654-655 (2002) ("[W]e have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement."). Indeed, federal law "imposes a wall of confidentiality between an employee's health care decisions * * * and the employer," so the companies would not even know whether any employee was using the contraceptives to which respondents object. *Grote*, 708 F.3d at 858

(Rovner, J., dissenting); see 45 C.F.R. 164.508, 164.510. And, for the reasons discussed above, the Greens as owners of incorporated entities are a further step removed from the employees' decision than are the employing companies themselves.

RFRA does not protect against the burden on religious exercise that "arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own." *O'Brien* v. *United States Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012), appeal docketed, No. 12-3357 (8th Cir. argued Oct. 24, 2013). In this respect, respondents' RFRA claim is analogous to free-exercise claims that this Court has rejected as overly attenuated as a matter of law. In *Tilton* v. *Richardson*, 403 U.S. 672 (1971), for example, taxpayers claimed that "the Free Exercise Clause is violated because they are compelled to pay taxes, the proceeds of which in part finance grants" to religiously-affiliated colleges and universities to which they objected. *Id.* at 689 (plurality opinion). The Court rejected that claim because the taxpayers were "unable to identify any coercion directed at the practice or exercise of their religious beliefs." *Ibid.*; see *Lemon* v. *Kurtzman*, 403 U.S. 602, 664-665 (1971) (White, J., concurring in the judgment in *Tilton*). RFRA's legislative history expressly states that the statute was not intended to "change the law" as articulated in *Tilton*. Senate Report 12.

Likewise, in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), plaintiffs challenging a state program providing textbooks to religious schools contended that the program violated the Free Exercise Clause because, "[t]o the extent books are furnished for use in a sectarian school operated by members of one faith, members of other faiths and non-believers are thereby forced to contribute to the propagation of opinions which they disbelieve" and that this was "no less an interference with religious liberty than forcing a man to attend a church." Br. of Appellants 35, *Allen, supra* (No. 660). The Court rejected that contention, holding that such a claim of indirect financial support did not constitute coercion of plaintiffs "as individuals in the practice of their religion." *Allen*, 392 U.S. at 249; see *Hein* v. *Freedom from Religion Found., Inc.*, 551 U.S. 587, 609-610 (2007) (plurality opinion) (there is "no taxpayer standing to sue under Free Exercise Clause").

Respondents rely on *Thomas* for the proposition that the Court must accept not only their definition of their sincerely held religious belief but also their position that their religious exercise would be substantially burdened by the provision they challenge. See Resp. Cert. Br. 31. That interpretation of *Thomas* cannot be squared with *Tilton* and *Allen*. *Thomas* involved a State's "denial of unemployment compensation benefits to * * * a Jehovah's Witness who terminated his job because his religious beliefs forbade participation in the production of armaments." 450 U.S. at 709. The lower court had concluded that the plaintiff's objection was not truly religious because, had it been, he would have also objected to working for a steel company whose product was used to make the armaments. *Id.* at 714-715. This Court rejected that approach, holding that "[c]ourts should not undertake to dissect religious beliefs" and stating that the plaintiff "drew a line, and it [was] not for [the

Court] to say that the line he drew was an unreasonable one." *Id.* at 715.

In holding that courts may not define or question an individual's sincere religious beliefs, the Court in *Thomas* did not suggest that the courts must accept an individual's contention that a burden on his religious exercise is sufficiently substantial to entitle him to relief. Such a rule would mean that a plaintiff could easily circumvent *Allen* and *Tilton* by contending that the required payment of taxes, some portion of which goes to religious exercise with which the taxpayer disagrees, substantially burdens the taxpayer's own religious exercise.

Respondents' reading of *Thomas* is further undermined by *Bowen* v. *Roy*, 476 U.S. 693 (1986), and *Hernandez* v. *Commissioner*, 490 U.S. 680 (1989), both of which were decided after *Thomas*. In *Roy*, the Court rejected a parent's Free Exercise Clause challenge to the government's internal use of his child's Social Security number, holding that the government's internal conduct "[did] not itself in any degree impair [the parent's] 'freedom to believe, express, and exercise' his religion." 476 U.S. at 700-701. The Court acknowledged that the parent's "religious views may not accept this distinction between individual and governmental conduct." *Id.* at 701 n.6. But rather than holding that the Court was likewise required to elide this distinction because the parent's religious beliefs did, the Court held that, "for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference." *Ibid.*

In *Hernandez*, the Court rejected a free-exercise challenge to the Internal Revenue Service's determination that taxpayers could not "deduct as charitable contributions payments made to branch churches of the Church of Scientology" in order to receive certain services. 490 U.S. at 684; see *id.* at 698-700. The Court, citing *Thomas*, noted that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Id.* at 699. The Court, however, carefully distinguished that prohibited subject matter from the separate and permissible inquiry into "whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one." *Ibid.* The Court ultimately found it unnecessary to decide that separate question, but only after explaining its "doubts" on that score because of the indirect nature of the asserted burden. *Ibid.*

Under these precedents, it is for the Court to decide whether the claimed burden on respondents' religious exercise qualifies as substantial for purposes of RFRA. For the reasons given above, it does not.

IV. RESPONDENTS' CLAIMS WOULD FAIL EVEN IF THE CONTRACEPTIVE-COVERAGE PROVISION WERE SUBJECT TO RFRA'S COMPELLING-INTEREST TEST

The corporate-respondents would not be exempt from the contraceptive-coverage provision even if it were subject to the compelling-interest test under RFRA. See 42 U.S.C. 2000bb-1(b). The contraceptive-coverage provision advances compelling governmental interests and is the least restrictive means to achieve them.

A. The Contraceptive-Coverage Provision Advances Compelling Governmental Interests

1. Protection of rights of corporate-respondents' employees in a comprehensive insurance system

a. The Affordable Care Act and its preventive-services coverage provision advance the compelling interest in ensuring a "comprehensive insurance system with a variety of benefits available to all participants." *Lee*, 455 U.S. at 258. Individualized religion-based exemptions to that system would directly and materially harm the very individuals the scheme was intended to benefit—including the more than 13,000 employees of Hobby Lobby and Mardel and their covered family members.

Congress provided those plan participants and beneficiaries a privately-enforceable right to coverage of recommended preventive services without cost sharing. RFRA relief for respondents would extinguish that right, and potentially limit the freedoms of these individuals, who would be required to pay for these services out of pocket or go without them if they could not afford to pay.[8] The government is thus able to show that "the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant" before the court, *O Centro*, 546 U.S. at 430-431. The corporations the Greens own employ individuals whom the requested exemption will tangibly harm.

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[8] The cost of an IUD (including required medical examination, insertion, and follow-up visits) is between $500 and $1000. See Planned Parenthood, *IUD: Where Can I Get an IUD? How Much Does an IUD Cost?*, http://www.plannedparenthood.org/health-topics/birth-control/iud-4245.htm (last visited Jan. 3, 2014).

The court of appeals believed that the interests of corporate-respondents' employees are entitled to no weight under RFRA, opining that "[a]ccommodations for religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere." Pet. App. 60a-61a. But this Court has never permitted a secular employer to obtain a religious accommodation that comes at the expense of employees.[9] In *Lee*, for example, the Court emphasized that exempting the employer from the obligation to pay Social Security taxes would "operate[] to impose the employer's religious faith on the employees," 455 U.S. at 261, who would lose the Social Security benefits to which they were entitled by federal law. The Court held that the Free Exercise Clause did not require such an outcome, emphasizing that, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Ibid.*

Congress likewise safeguarded the interests of employees when it amended the Social Security Act after *Lee* to respond to that decision. See Technical and

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[9] Indeed, the Court has held that, under certain circumstances, an accommodation that imposes burdens on employees can violate the Establishment Clause. Compare *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 708-711 (1985) (holding that statute requiring employers to accommodate an employee's Sabbath observance without regard to the burden such an accommodation would impose on the employer or other employees violated the Establishment Clause), with *Amos*, 483 U.S. at 334-340 (concluding that Title VII's exemption for religious employers from its prohibition on religious discrimination does not violate the Establishment Clause as applied to non-profit activities of a church).

Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 8007(a), 102 Stat. 3781; Miscellaneous and Technical Social Security Act Amendments of 1989, Pub. L. No. 101-239, Tit. X, § 10204(b), 103 Stat. 2474; see also 26 U.S.C. 3127. The amended statute permits Amish sole proprietors and partnerships (but *not* Amish-owned corporations) to obtain an exemption from the obligation to pay Social Security taxes *only* for employees who are co-religionists and who likewise seek an exemption and agree to give up their Social Security benefits. See 26 U.S.C. 3127(a)(2) and (b)(1) (cross-referencing waiver provision in 26 U.S.C. 1402(g)(1)(B)). Thus, employers with sincere religious beliefs have no right to a religiously-based exemption that would deprive employees of Social Security benefits without the employee's consent—an exemption analogous to the one respondents seek here.

Both of the free-exercise decisions cited in RFRA itself, see 42 U.S.C. 2000bb(b)(1), also emphasized the importance of third-party interests to the free-exercise analysis. In *Sherbert*, the Court accepted the free-exercise claim only after stressing that "recognition of the [employee's] right to unemployment benefits under the state statute" did not "serve to abridge any other person's religious liberties." 374 U.S. at 409. In *Yoder*, the Court held that the Free Exercise Clause required an exemption from compulsory education laws for Amish parents only after determining that the parents had "carried" the "difficult burden of demonstrating the adequacy of their alternative mode of continuing informal vocational education," thus establishing that there was only a "minimal difference between what the State would require and what the Amish already accept." 406 U.S. at 235-236; see *id.* at

222. The Court in *Yoder* also emphasized that its holding would not extend to a case in which an Amish child affirmatively wanted to attend school over his parents' objection. See *id.* at 231-232.[10]

Given that Congress intended RFRA to reflect the approach of these pre-*Smith* cases, see p. 16, *supra*, RFRA cannot properly be interpreted to require relief that would impose burdens on private third parties, such as those imposed here on corporate-respondents' 13,000 employees and their covered family members. The Court in *Cutter* has already so held in rejecting an Establishment Clause challenge to RLUIPA, which was modeled on RFRA and includes the same substantial-burden and compelling-interest tests. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 719-726 (2005); see also *O Centro*, 546 U.S. at 436. The Court in *Cutter* held that RLUIPA did not "founder on shoals [the Court's] prior decisions have identified" because, "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries[.]" 544 U.S. at 720; see *id.* at 722 ("[A]n accommodation must be measured so that it does not override other significant interests.").

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[10] The understanding of the free exercise of religion as not extending to actions that burden third parties is consistent with the views of the founding generation. See *Braunfeld*, 366 U.S. at 604 (plurality opinion) (noting Thomas Jefferson's view that the First Amendment's Religion Clauses "restored to man all his natural rights" but "no natural right in opposition to his social duties") (emphasis omitted) (quoting Letter from Thomas Jefferson to Comm. of the Danbury Baptist Ass'n (Jan. 1, 1802), in 8 *The Writings of Thomas Jefferson* 113 (H.A. Washington ed. 1854)); Thomas Jefferson, *Notes on the State of Virginia* 159 (William Peden ed. 1955) ("[I]t does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.") (endnote omitted); Letter from James Madison to Edward Livingston (July 10, 1822), in 3 *Letters and Other Writings of James Madison*, at 274 (1865) ("I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace.").

b. The importance of protected employee interests is further established in this context by the preventive-services coverage provision's status as, among other things, an amendment to the comprehensive employee-benefit scheme of ERISA. See 29 U.S.C. 1185d (Supp. V 2011). "While [RFRA] adopts a 'compelling governmental interest' standard, '[c]ontext matters in the application of that standard." *Cutter*, 544 U.S. at 722-723 (citation omitted; brackets in original). Part of that context here is ERISA, "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). In enacting ERISA, Congress found "that the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans," which "are affected with a national public interest." 29 U.S.C. 1001(a). Congress "declared" that ERISA's "policy" was in part to "protect * * * the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. 1001(b).

ERISA allocates rights and responsibilities among private parties (employers, group health plans, and employees), not just between the government and those parties. The preventive-services coverage provision establishes rights that ERISA plan participants and beneficiaries may enforce against group health plans without any involvement by the government. See 29 U.S.C. 1132(a)(3) ("civil action may be brought * * * by a participant [or] beneficiary * * * to enjoin any act or practice which violates any provision of [ERISA]" or "to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of [ERISA]"); see also 29 U.S.C. 1132(a)(1)(B) and (5); 29 U.S.C. 1001(b) (stating that a "policy" of ERISA is to provide participants and beneficiaries "appropriate remedies, sanctions, and ready access to the Federal courts").

RFRA's purpose was "only to overturn the Supreme Court's decision in *Smith*" and not to "unsettle other areas of law." Senate Report 12. There is no reason to conclude that Congress intended to disrupt the ordering of private rights and responsibilities between employer and employee (and between an ERISA plan and its participants and beneficiaries) under ERISA by allowing RFRA to be used to impose a patchwork of exceptions to those private obligations and deprive participants and beneficiaries of statutorily-guaranteed benefits.

The incompatibility between ERISA's privately-enforceable employee benefit scheme and respondents' demand for a religiously-based exemption is further underscored by the serious question as to whether RFRA applies in litigation between private parties. The majority of courts of appeals to address that question have held that it does not, relying principally on the RFRA provision stating that an individual "whose religious exercise has been burdened" in violation of RFRA may "obtain appropriate relief against *a government*," 42 U.S.C. 2000bb-1(c) (emphasis added), rather than a private party, and the provisions stating that the compelling-interest provision requires the "*[g]overnment*," not a private party, to come "forward with the evidence," 42 U.S.C. 2000bb-1(b) (emphasis added), 2000bb-2(3). See *General Conference Corp. of Seventh-day Adventists* v. *McGill*, 617 F.3d 402, 409-412 (6th Cir. 2010), cert. denied, 131 S. Ct. 2097 (2011); *Tomic* v. *Catholic Diocese*, 442 F.3d 1036, 1042 (7th Cir. 2006); *Sutton* v. *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834-843 (9th Cir. 1999).[11]

In *Korte* v. *Sebelius*, 735 F.3d 654 (2013), the Seventh Circuit directed entry of preliminary injunctions barring the government from enforcing the contraceptive-coverage provision against the for-profit corporations involved in that case. See *id.* at 687. Yet, if an employee of one of those corporations sued one of the corporations' group health plans for its failure to provide recommended contraceptive coverage, as she would be entitled to do under ERISA, see, *e.g.*, 29 U.S.C. 1132(a)(1)(B) and (a)(3), that circuit's precedent would make RFRA irrelevant in that private-party action, see *Tomic*, 442 F.3d at 1042. The employee thus would presumably prevail on her ERISA claim against the plan, and she would be entitled to appropriate equitable relief directing provision of the benefit. The prospect of such an anomalous result flowing from use of RFRA to create exemptions to the regulation of privately-enforceable employee benefits under ERISA is another reason for concluding that Congress could not have intended that result.

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[11] Over a dissent from then-Judge Sotomayor, the Second Circuit reached the opposite conclusion in *Hankins* v. *Lyght*, 441 F.3d 96, 103-104 (2006); cf. *id.* at 114-115 (Sotomayor, J., dissenting), but a subsequent opinion from that court expressed "doubts" that *Hankins* was correctly decided, see *Rweyemamu* v. *Cote*, 520 F.3d 198, 203 & n.2 (2008).

c. If respondents were to prevail here, myriad other religious objections by employers could provide bases for RFRA claims for exemptions from ERISA-required coverage (and other employee-protection statutes). In this "cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld*, 366 U.S. at 606 (plurality opinion), employers might assert religious objections to coverage of "virtually all conventional medical treatments," including immunizations, blood transfusions, antidepressants, medications derived from pigs, and gene therapy. *Grote*, 708 F.3d at 866 (Rovner, J., dissenting); see Pet. App. 128a n.8 (Briscoe, C.J., dissenting in relevant part). The result would be a patchwork of unpredictably incomplete coverage for employees dictated by the religious beliefs of their employers' shareholders.

These are not the kind of "slippery-slope concerns that could be invoked in response to any RFRA claim for an exception to a generally applicable law" and that the Court found misplaced in *O Centro*. 546 U.S. at 435-436. The Court made clear in *O Centro* that "the Government can demonstrate a compelling interest in uniform application of a *particular program* by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *Id.* at 435 (emphasis added); see *id.* at 436. And it cited as an example *Lee*'s conclusion that "mandatory participation is indispensable to the fiscal vitality of the social security system" and that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.* at 435 (quoting *Lee*, 455 U.S. at 258, 260). In this case, the "particular program"—a uniform set of privately-enforceable employee benefits under ERISA—would not function as Congress intended if it were subject to employer opt-outs of the kind sought by respondents. Cf. *Lee*, 455 U.S. at 259-260 ("[I]t would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.").

2. Public health

The contraceptive-coverage provision directly and materially advances the public health, which is unquestionably a compelling governmental interest. *E.g.*, *Mead* v. *Holder*, 766 F. Supp. 2d 16, 43 (D.D.C.), aff'd *sub nom. Seven-Sky* v. *Holder*, 661 F.3d 1 (D.C. Cir. 2011), cert. denied, 133 S. Ct. 63 (2012). "A woman's ability to control whether and when she will become pregnant has highly significant impacts on her health, her child's health, and the economic well-being of herself and her family." *Korte*, 735 F.3d at 725 (Rovner, J., dissenting). Physician and public health organizations, such as the American Medical Association, the American Academy of Pediatrics, and the March of Dimes accordingly "recommend the use of family planning services as part of preventive care for women." IOM Report 104. This is not a "broadly formulated interest[] justifying the general applicability of government mandates," *O Centro*, 546 U.S. at 431, but rather a concrete and specific one, supported by a wealth of empirical evidence.

a. Use of contraceptives reduces the incidence of unintended pregnancies, which comprise nearly half of all pregnancies in the United States. IOM Report 102-103. A woman with an unintended pregnancy "may not immediately be aware that [she is] pregnant, and thus delay prenatal care." 78 Fed. Reg. at 39,872; see IOM Report 103. A woman who does not know she is pregnant is also more likely to engage in "behaviors during pregnancy, such as smoking and consumption of alcohol, that pose pregnancy-related risks." 78 Fed. Reg. at 39,872; see IOM Report 103. As a result, "[s]tudies show a greater risk of preterm birth and low birth weight among unintended pregnancies." 78 Fed. Reg. at 39,872; see IOM Report 103. And because contraceptives reduce the number of unintended pregnancies, they "reduce the number of women seeking abortions." 78 Fed. Reg. at 39,872.

b. Contraceptive use also "helps women improve birth spacing and therefore avoid the increased risk of adverse pregnancy outcomes that comes with pregnancies that are too closely spaced." 78 Fed. Reg. at 39,872; see IOM Report 103. In particular, short intervals between pregnancies "have been associated with low birth weight, prematurity, and small-for-gestational age births." 78 Fed. Reg. at 39,872.

c. "[P]regnancy may be contraindicated for women with serious medical conditions such as pulmonary hypertension * * * and cyanotic heart disease, and for women with the Marfan Syndrome." IOM Report 103-104; see 78 Fed. Reg. at 39,872.

d. "[T]here are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy." 78 Fed. Reg. at 39,872. For example, contraceptives can prevent certain cancers, menstrual disorders, and pelvic pain. *Ibid.*; see IOM Report 107.

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Contraceptive services are a highly effective means of preventing unintended pregnancies. See IOM Report 104-107; see *id.* at 105 ("The failure rates of all FDA-approved methods in both U.S. and international populations have been well documented and are negligible with proper use."). They therefore directly and tangibly help women avoid the health problems for themselves and their children discussed above.

The court of appeals opined that the burden placed on Hobby Lobby employees by respondents' requested exemption would not be significant because they "ask only to be excused from covering four contraceptive methods out of twenty." Pet. App. 60a. But contraceptive methods are not interchangeable. "For women with certain medical conditions or risk factors, some contraceptive methods may be contraindicated"; those women and their health-care providers thus need an array of options "so that an appropriate method can be selected for the individual." IOM Report 105; see 78 Fed. Reg. at 39,872. In addition, some contraceptive methods are more effective than others. For example, the IUD (one of the methods respondents seek to exclude from coverage) has a "failure rate[] of 1 percent or less in the first 12 months of use," significantly lower than that of some alternative methods. IOM Report 105. In addition, unlike some alternative methods, the copper IUD does not rely on hormones, which are sometimes associated with side effects such as high blood pressure, blood clots, heart attacks, or strokes. See *Birth Control Guide*. Accordingly, the Institute of Medicine recommended access to *all* FDA-approved contraceptive methods. IOM Report 10, 104-110.

Moreover, the court of appeals' reasoning is not confined to claims involving four contraceptives, as demonstrated concretely by its subsequent decision in *Newland* v. *Sebelius*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013), which affirmed a preliminary injunction that allows a for-profit corporation to exclude *all* forms of contraception from coverage under its group health plan. See *Newland* v. *Sebelius*, 881 F. Supp. 2d 1287, 1292 (D. Colo. 2012). The Seventh and D.C. Circuits likewise accepted RFRA claims asserted by plaintiffs who oppose all forms of contraceptive coverage. See *Korte*, 735 F.3d at 662-663; *Gilardi*, 733 F.3d at 1210. But see *Autocam*, 730 F.3d at 621 (rejecting such a claim involving all FDA-approved contraceptives).

3. Equal access for women to health-care services

The contraceptive-coverage provision also advances the government's related compelling interest in assuring that women have equal access to recommended health-care services. 78 Fed. Reg. at 39,872, 39,887; see *Roberts* v. *United States Jaycees*, 468 U.S. 609, 626 (1984) (discussing the fundamental "importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women," and noting that "[a]ssuring women equal access to * * * goods, privileges, and advantages clearly furthers compelling state interests").

Congress enacted the women's preventive-services coverage provision because "women have different health needs than men, and these needs often generate additional costs." 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); see IOM Report 18.

"Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." 155 Cong. Rec. at 29,070 (statement of Sen. Feinstein); see Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending By Gender and Age: 2004 Highlights*, ("Females 19-44 years old spent 73 percent more per capita [on health care expenses] than did males of the same age."). These disproportionately high costs have a tangible impact: women often find that copayments and other cost sharing for important preventive services "are so high that they avoid getting [the services] in the first place." 155 Cong. Rec. at 29,302 (statement of Sen. Mikulski); see IOM Report 19 ("[W]omen are consistently more likely than men to report a wide range of cost-related barriers to receiving or delaying medical tests and treatments and to filling prescriptions for themselves and their families."). Studies have demonstrated that "even moderate copayments for preventive services" can "deter patients from receiving those services." IOM Report 19.

The court of appeals opined that the requested exemption for corporate-respondents would not frustrate the government's objectives because the exemption would "not prevent employees from using their own money to purchase the contraceptives at issue here." Pet. App. 60a. By this logic, there would be no basis for requiring a group health plan to cover any particular item or service; it is always the case that employees deprived of coverage could spend "their own" money instead. That reasoning is flatly at odds with Congress's objective to increase access to recommended preventive services by eliminating all associated out-of-pocket costs. And it ignores the fact that women deprived of coverage may not be able to afford to pay for the relevant services on their own.

4. The government's compelling interests are not undermined by other features of the Act and its implementing regulations

The court of appeals stated that "the interest here cannot be compelling" because the contraceptive-coverage provision does not apply to exempted religious institutions, employers with grandfathered group health plans, and small employers. Pet. App. 58a; see *id.* at 61a. The court was mistaken.

a. The regulatory exemption for religious employers extends to "churches and other houses of worship" and their integrated auxiliaries. 78 Fed. Reg. at 39,874; see 45 C.F.R. 147.131(a).[12] As the Seventh Circuit explained, there is a long tradition of protecting the autonomy of a church through exemptions of this kind. See *Korte*, 735 F.3d at 677. The Religion

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[12] The regulations also authorize an accommodation for certain religious non-profit organizations, see p. 7, *supra*, but, outside of the limited circumstances in which such an employer utilizes a "church plan" exempt from regulation under ERISA, see *Little Sisters of the Poor Home for the Aged* v. *Sebelius*, No. 13-cv-2611, 2013 WL 6839900, at *10, *13-*14 (D. Colo. Dec. 27, 2013), temporary injunction granted, No. 13A691, 2013 WL 6869391 (Dec. 31, 2013) (Sotomayor, J., in chambers), this accommodation ensures that employees will retain access to contraceptive coverage without cost sharing though an alternative mechanism established by the regulations. This accommodation for eligible organizations is itself subject to a number of RFRA challenges by objecting religious non-profit employers that seek a complete exemption. See, *e.g.*, *Little Sisters*, *supra*; *University of Notre Dame* v. *Sebelius*, No. 3:13-cv-01276, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013), injunction pending appeal denied, No. 13-3853 (7th Cir. Dec. 30, 2013).

Clauses of the First Amendment give "'special solicitude to the rights of religious organizations' *as* religious organizations, respecting their autonomy to shape their own missions, conduct their own ministries, and generally govern themselves in accordance with their own doctrines as religious institutions." *Ibid.* (quoting *Hosanna-Tabor*, 132 S. Ct. at 706). In establishing the religious-employer exemption, the Departments explained that "[h]ouses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection" and that those employees "would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874.

It would be perverse to hold that the government's provision of a targeted religious exemption for churches and houses of worship eliminates the compelling interests in the underlying regulations, thus effectively extending the same exemption, through RFRA, to anyone else who wants it. Such a reading of RFRA would *discourage* the government from accommodating religion, the opposite of what Congress intended in enacting the statute.

Indeed, *Lee* rejected an accommodation claim on the ground that it would undermine the comprehensive and mandatory nature of Social Security, 455 U.S. at 258, even as it emphasized that Congress *had* provided religion-based exemptions for self-employed individuals, *id.* at 260-261. "Confining [the exemption] to the self-employed provided for a narrow category which was readily identifiable," *ibid.*, and Congress's inclusion of such an exemption did not undermine the government's interest in enforcing the law outside the exemption's confines.

Likewise, Congress has exempted non-profit religious institutions from certain employment regulations. See p. 20, *supra*. These religious exemptions have never been extended to any entity operating in the "commercial, profit-making world." *Amos*, 483 U.S. at 337. Nor have they been invoked as a basis to require additional religion-based exemptions for for-profit entities.

b. The court of appeals also opined that the government's asserted interests "cannot be compelling" because of the Affordable Care Act's grandfathering provision. Pet. App. 58a; see 42 U.S.C. 18011 (Supp. V 2011), 45 C.F.R. 147.140(g). That provision has the effect of allowing a transition period for compliance with a number of the Act's requirements (not just the contraceptive-coverage and other preventive-services provisions) until a plan makes one or more specified changes, such as an increase in cost-sharing requirements above a certain threshold, a decrease in employer contributions beyond a certain threshold, or the elimination of certain benefits. The impact of this grandfathering provision is thus "temporary, intended to be a means for gradually transitioning employers into mandatory coverage." *Gilardi*, 733 F.3d at 1241 (Edwards, J., concurring in part and dissenting in part). Consistent with that purpose, the percentage of employees in grandfathered plans is steadily declining, having dropped from 56% in 2011 to 48% in 2012 to 36% in 2013. Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2013 Annual Survey* 7, 196.

The compelling nature of an interest is not diminished merely because the government phases in a regulation advancing it in order to avoid undue disruption. *Cf. Heckler* v. *Mathews*, 465 U.S. 728, 746-748 (1984) (noting that "protection of reasonable reliance interests is * * * a legitimate governmental objective" that Congress may permissibly advance through phased implementation of regulatory requirements). Congress specified that various crucial Affordable Care Act provisions would not be immediately effective. For example, the minimum coverage provision, 26 U.S.C. 5000A, which this Court upheld in *National Federation of Independent Business* v. *Sebelius*, 132 S. Ct. 2566, 2594-2598 (2012), as well as the guaranteed-issue and community-rating insurance market reforms at the heart of the Act, did not take effect until 2014, four years after enactment. *Id.* at 2580; see 42 U.S.C. 300gg-1, 300gg-3, 300gg-4(a) (Supp. V 2011) (guaranteed-issue provision); see also 42 U.S.C. 300gg(a)(1), 300gg-4(b) (Supp. V 2011) (community-rating provision). These post-2010 effective dates do not in any way call into question the compelling nature of the interests that these key provisions advance.

c. The court of appeals was wrong as a factual matter to suggest (Pet. App. 58a) that plans offered by employers with fewer than 50 employees are exempt from the preventive-services coverage provision. The provision applies without regard to the size of the employer, 42 U.S.C. 300gg-13 (Supp. V 2011), as the majority appeared to recognize elsewhere in its opinion, Pet. App. 13a. Employers with fewer than 50 full-time-equivalent employees are exempt from a *different* provision, 26 U.S.C. 4980H, which subjects certain large employers to a tax if they fail to offer full-time employees (and their dependents) adequate health coverage, 26 U.S.C. 4980H(c)(2)(A). But small employers that do provide coverage must comply with the preventive-services coverage provision. See *Gilardi*, 733 F.3d at 1241 (Edwards, J., concurring in part and dissenting in part). Small businesses offering group health coverage that does not comply with the provision are subject to all the statutory enforcement mechanisms. See p. 3 & n.2, *supra*.

By the court of appeals' logic, *none* of the Act's provisions regulating group health plans would be supported by a compelling interest, given that small employers face no penalty for failing to offer a plan in the first place. Yet federal statutes often include exemptions for small employers, and such provisions have never been held to undermine the interests served by those statutes. For example, when Title VII was first enacted, the statute's prohibitions on employment discrimination did not apply to employers with fewer than 25 employees. See *Arbaugh* v. *Y&H Corp.*, 546 U.S 500, 505 n.2 (2006). Even now, those prohibitions do not apply to employers with fewer than 15 employees. See *id.* at 504-505. This exception for small employers does not call into question the government's compelling interests in eradicating employment discrimination. Similarly, the Social Security Act, 42 U.S.C. 301 *et seq.*, originally did not cover agricultural or domestic workers. See *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 584 (1937); see *Lee*, 455 U.S. at 258 n.7 (noting additional ways in which Social Security Act's coverage was "broadened" over the years). Yet those initial exemptions for large categories of employees did not undermine the compelling interests underlying the statute.

The court of appeals' analysis on this question also overlooks the fact that Congress expected the employees of small businesses that choose not to offer group health coverage to receive the required preventive services coverage through other means. Such employees may obtain coverage on a health insurance exchange, and all policies offered on exchanges will provide contraceptive coverage without cost sharing. See 45 C.F.R. 147.130; see also 26 U.S.C. 36B (providing tax credits for eligible individuals for insurance purchased on exchanges); 26 U.S.C. 5000A (minimum coverage provision).

This case bears no resemblance to *Lukumi* and *O Centro*, on which the court of appeals relied when analyzing the preventive-service coverage provision's "exemptions." Pet. App. 58a-59a. In *Lukumi*, exemptions in the statute resulted in a "gerrymander," through which "few if any killings of animals [were] prohibited other than Santeria sacrifice." 508 U.S. at 536; see *id.* at 534 ("The record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances."). And, in *O Centro*, the exemption from the Controlled Substances Act that was sought by 130 members of a Christian Spiritist sect for the sacramental use of hoasca was "essentially indistinguishable" from the exemption for the sacramental use of peyote that had already been granted to hundreds of thousands of members of Native American tribes. *Gilardi*, 733 F.3d F. 3d at 1241 (Edwards, J., concurring in part and dissenting in part); see *O Centro*, 546 U.S. at 433. Here, unlike in *Lukumi*, there is no suggestion that the government has "targeted a specific religious group" (J.A. 59 (acknowledgement of respondents' counsel)), and, unlike in *O Centro*, the exemption that respondents seek is fundamentally different from the statutory and regulatory provisions to which they attempt to analogize it.

B. Respondents' Alternative Proposal Is Not A Less Restrictive Means

Respondents also contend that the government has a less restrictive means of advancing its interests, namely distributing contraceptives to Hobby Lobby and Mardel employees itself. See Resp. Cert. Br. 34-35. But RFRA's less-restrictive means test does not require *Congress* to create or expand federal programs.

In the Affordable Care Act generally, and in the preventive-services coverage provision in particular, Congress chose to build on the existing system of workplace-based health coverage and private insurance, rather than replace that system with a government-run one. Congress set certain minimum, privately-enforceable standards for those private plans in order to advance the statute's public-health and employee- and policy-holder-protection goals. The preventive-services coverage provision is the least restrictive means of doing so. That is especially true given that an objecting employer retains the option of choosing not to offer a group health plan at all (thus allowing its employees to obtain individual coverage on the insurance exchanges, where many will qualify for subsidies) and potentially being subject to a tax instead. See 26 U.S.C. 4980H; p. 8, *supra*.

Respondents' contention that the contraceptive-coverage provision is invalid because the government could instead itself provide contraceptive services to corporate-respondents' employees is also impossible to reconcile with *Lee*. On their theory, the government itself should have financed Social Security benefits directly to Lee's employees, as a less restrictive alternative to requiring that Lee pay Social Security taxes. The Court did not find such a government-funded scheme to be a less restrictive alternative in *Lee*, and it should not do so here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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STATUTORYAND REGULATORY APPENDIX

1. 42 U.S.C. 300gg-13 (Supp. V 2011) provides:

Coverage of preventive health services

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

(1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;

(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[1]

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[2]

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guide-

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[1] So in original. The word "and" probably should not appear.

[2] So in original. The period probably should be a semicolon.

lines supported by the Health Resources and Services Administration for purposes of this paragraph.[2]

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009.

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

(b) Interval

(1) In general

The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) or (a)(2) or a guideline under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.

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[2] So in original. The period probably should be a semicolon.

(2) Minimum

The interval described in paragraph (1) shall not be less than 1 year.

(c) Value-based insurance design

The Secretary may develop guidelines to permit a group health plan and a health insurance issuer offering group or individual health insurance coverage to utilize value-based insurance designs.

2. 42 U.S.C. 2000bb provides:

Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify bur-

dens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

3. 42 U.S.C. 2000bb-1 provides:

Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

4. 42 U.S.C. 2000bb-2 provides:

Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

5. 42 U.S.C. 2000bb-3 provides:

Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

6. 42 U.S.C. 2000bb-4 provides:

Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

7. 45 C.F.R. 147.130 provides:

Coverage of preventive health services.

(a) *Services*—(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 147.131, a group health plan, or a health insurance issuer offering group or individual health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task

Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration.

(A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.

(B) For purposes of this subsection, a "religious employer" is an organization that meets all of the following criteria:

(*1*) The inculcation of religious values is the purpose of the organization.

(*2*) The organization primarily employs persons who share the religious tenets of the organization.

(*3*) The organization serves primarily persons who share the religious tenets of the organization.

(*4*) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(2) *Office visits*—(i) If an item or service described in paragraph (a)(1) of this section is billed separately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) ***Facts.*** An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) *Conclusion.* In this *Example 1*, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2. (i) ***Facts.*** Same facts as *Example 1.* As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) *Conclusion.* In this *Example 2*, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) *Conclusion.* In this *Example 3*, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4. (i) *Facts.* A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) *Conclusion.* In this *Example 4*, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement for the office visit charge.

(3) *Out-of-network providers.* Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) *Reasonable medical management.* Nothing prevents a plan or issuer from using reasonable medical management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) *Services not described.* Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immuniza-

tion Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) *Timing*—(1) *In general.* A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years (in the individual market, policy years) that begin on or after September 23, 2010, or, if later, for plan years (in the individual market, policy years) that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) *Changes in recommendations or guidelines.* A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) *Recommendations not current.* For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) *Applicability date.* The provisions of this section apply for plan years (in the individual market, for policy years) beginning on or after September 23, 2010. *See* § 147.140 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

8. 45 C.F.R. 147.131 provides:

Exemption and accommodations in connection with coverage of preventive health services.

(a) *Religious employers.* In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

(b) *Eligible organizations.* An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) *Contraceptive coverage—insured group health plans*—(1) *General rule.* A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (b)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) *Payments for contraceptive services*—(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (b)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) *Notice of availability of separate payments for contraceptive services—insured group health plans and student health insurance coverage.* For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/ institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) *Reliance*—(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

(f) *Application to student health insurance coverage.* The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.

9. 29 C.F.R. 2590.715-2713 provides:

Coverage of preventive health services.

(a) *Services*—(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 2590.715–2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i) Evidence-based items or services that have in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual involved (except as otherwise provided in paragraph (c) of this section);

(ii) Immunizations for routine use in children, adolescents, and adults that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved (for this purpose, a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention is considered in effect after it has been adopted by the Director of the Centers for Disease Control and Prevention, and a recommendation is considered to be for routine use if it is listed on the Immunization Schedules of the Centers for Disease Control and Prevention);

(iii) With respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in comprehensive guidelines supported by the Health Resources and Services Administration; and

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) *Office visits*—(i) If an item or service described in paragraph (a)(1) of this section is billed sep-

arately (or is tracked as individual encounter data separately) from an office visit, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(ii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is the delivery of such an item or service, then a plan or issuer may not impose cost-sharing requirements with respect to the office visit.

(iii) If an item or service described in paragraph (a)(1) of this section is not billed separately (or is not tracked as individual encounter data separately) from an office visit and the primary purpose of the office visit is not the delivery of such an item or service, then a plan or issuer may impose cost-sharing requirements with respect to the office visit.

(iv) The rules of this paragraph (a)(2) are illustrated by the following examples:

Example 1. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider. While visiting the provider, the individual is screened for cholesterol abnormalities, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit and for the laboratory work of the cholesterol screening test.

(ii) *Conclusion.* In this *Example 1*, the plan may not impose any cost-sharing requirements with respect to the separately-billed laboratory work of the cholesterol screening test. Because the office visit is billed separately from the cholesterol screening test, the plan may impose cost-sharing requirements for the office visit.

Example 2. (i) *Facts.* Same facts as Example 1. As the result of the screening, the individual is diagnosed with hyperlipidemia and is prescribed a course of treatment that is not included in the recommendations under paragraph (a)(1) of this section.

(ii) *Conclusion.* In this *Example 2*, because the treatment is not included in the recommendations under paragraph (a)(1) of this section, the plan is not prohibited from imposing cost-sharing requirements with respect to the treatment.

Example 3. (i) *Facts.* An individual covered by a group health plan visits an in-network health care provider to discuss recurring abdominal pain. During the visit, the individual has a blood pressure screening, which has in effect a rating of A or B in the current recommendations of the United States Preventive Services Task Force with respect to the individual. The provider bills the plan for an office visit.

(ii) *Conclusion.* In this *Example 3*, the blood pressure screening is provided as part of an office visit for which the primary purpose was not to deliver items or services described in paragraph (a)(1) of this section. Therefore, the plan may impose a cost-sharing requirement for the office visit charge.

Example 4. (i) *Facts*. A child covered by a group health plan visits an in-network pediatrician to receive an annual physical exam described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. During the office visit, the child receives additional items and services that are not described in the comprehensive guidelines supported by the Health Resources and Services Administration, nor otherwise described in paragraph (a)(1) of this section. The provider bills the plan for an office visit.

(ii) *Conclusion*. In this *Example 4*, the service was not billed as a separate charge and was billed as part of an office visit. Moreover, the primary purpose for the visit was to deliver items and services described as part of the comprehensive guidelines supported by the Health Resources and Services Administration. Therefore, the plan may not impose a cost-sharing requirement with respect to the office visit.

(3) *Out-of-network providers*. Nothing in this section requires a plan or issuer that has a network of providers to provide benefits for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider. Moreover, nothing in this section precludes a plan or issuer that has a network of providers from imposing cost-sharing requirements for items or services described in paragraph (a)(1) of this section that are delivered by an out-of-network provider.

(4) *Reasonable medical management*. Nothing prevents a plan or issuer from using reasonable medi-

cal management techniques to determine the frequency, method, treatment, or setting for an item or service described in paragraph (a)(1) of this section to the extent not specified in the recommendation or guideline.

(5) *Services not described.* Nothing in this section prohibits a plan or issuer from providing coverage for items and services in addition to those recommended by the United States Preventive Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, or provided for by guidelines supported by the Health Resources and Services Administration, or from denying coverage for items and services that are not recommended by that task force or that advisory committee, or under those guidelines. A plan or issuer may impose cost-sharing requirements for a treatment not described in paragraph (a)(1) of this section, even if the treatment results from an item or service described in paragraph (a)(1) of this section.

(b) *Timing*—(1) *In general.* A plan or issuer must provide coverage pursuant to paragraph (a)(1) of this section for plan years that begin on or after September 23, 2010, or, if later, for plan years that begin on or after the date that is one year after the date the recommendation or guideline is issued.

(2) *Changes in recommendations or guidelines.* A plan or issuer is not required under this section to provide coverage for any items and services specified in any recommendation or guideline described in paragraph (a)(1) of this section after the recommendation

or guideline is no longer described in paragraph (a)(1) of this section. Other requirements of Federal or State law may apply in connection with a plan or issuer ceasing to provide coverage for any such items or services, including PHS Act section 2715(d)(4), which requires a plan or issuer to give 60 days advance notice to an enrollee before any material modification will become effective.

(c) *Recommendations not current.* For purposes of paragraph (a)(1)(i) of this section, and for purposes of any other provision of law, recommendations of the United States Preventive Services Task Force regarding breast cancer screening, mammography, and prevention issued in or around November 2009 are not considered to be current.

(d) *Applicability date.* The provisions of this section apply for plan years beginning on or after September 23, 2010. *See* § 2590.715–1251 of this Part for determining the application of this section to grandfathered health plans (providing that these rules regarding coverage of preventive health services do not apply to grandfathered health plans).

10. 29 C.F.R. 2590.715-2713A provides:

Accommodations in connection with coverage of preventive health services.

(a) *Eligible organizations.* An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) *Contraceptive coverage—self-insured group health plans*—(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that—

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in § 2510.3-16 of this chapter and § 2590.715-2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) *Contraceptive coverage—insured group health plans*—(1) *General rule.* A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715-

2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) *Payments for contraceptive services*—(i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 2590.715-2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) *Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans.* For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) *Reliance—insured group health plans*—(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715-2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

11. 26 C.F.R. 54.9815-2713 provides:

Coverage of preventive health services.

(a) *Services*—(1) *In general.* Beginning at the time described in paragraph (b) of this section and subject to § 54.9815-2713A, a group health plan, or a health insurance issuer offering group health insurance coverage, must provide coverage for all of the following items and services, and may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible) with respect to those items and services:

(i)-(iii) [Reserved]

(iv) With respect to women, to the extent not described in paragraph (a)(1)(i) of this section, evidence-informed preventive care and screenings provided for in binding comprehensive health plan coverage guidelines supported by the Health Resources and Services Administration, in accordance with 45 CFR 147.131(a).

(2) *Office visits.* [Reserved]

(3) *Out-of-network providers.* [Reserved]

(4) *Reasonable medical management.* [Reserved]

(5) *Services not described.* [Reserved]

(b) *Timing.* [Reserved]

(c) *Recommendations not current.* [Reserved]

(d) *Effective/applicability date.* April 16, 2012.

12. 26 C.F.R. 54.9815-2713A provides:

Accommodations in connection with coverage of preventive health services.

(a) *Eligible organizations.* An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 54.9815–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self-certification must be executed by a person authorized to make the certifica-

tion on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) *Contraceptive coverage—self-insured group health plans*—(1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) of this section are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 54.9815-2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that—

(A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(B) Obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and 26 CFR 54.9815-2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such pay-

ments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) *Contraceptive coverage*—insured group health plans—(1) *General rule.* A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) *Payments for contraceptive services* (i) A group health insurance issuer that receives a copy of the self-certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815-2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 54.9815-2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 9815. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 54.9815-2713(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) *Notice of availability of separate payments for contraceptive services—self-insured and insured group health plans.* For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) *Reliance—insured group health plans* (1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 54.9815–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

Health Resources and Services Administration, Department of Health and Human Services

Women's Preventive Services Guidelines

Affordable Care Act Expands Prevention Coverage for Women's Health and Well-Being

The Affordable Care Act—the health insurance reform legislation passed by Congress and signed into law by President Obama on March 23, 2010—helps make prevention affordable and accessible for all Americans by requiring health plans to cover preventive services and by eliminating cost sharing for those services. Preventive services that have strong scientific evidence of their health benefits must be covered and plans can no longer charge a patient a copayment, coinsurance or deductible for these services when they are delivered by a network provider.

Women's Preventive Services Guidelines Supported by the Health Resources and Services Administration

Under the Affordable Care Act, women's preventive health care—such as mammograms, screenings for cervical cancer, prenatal care, and other services—generally must be covered by health plans with no cost sharing. However, the law recognizes and HHS understands the need to take into account the unique health needs of women throughout their lifespan.

The HRSA-supported health plan coverage guidelines, developed by the Institute of Medicine (IOM), will help ensure that women receive a comprehensive set of preventive services without having to pay a co-payment, co-insurance or a deductible. HHS commissioned an

IOM study to review what preventive services are necessary for women's health and well-being and therefore should be considered in the development of comprehensive guidelines for preventive services for women. HRSA is supporting the IOM's recommendations on preventive services that address health needs specific to women and fill gaps in existing guidelines.

Health Resources and Services Administration Women's Preventive Services Guidelines

Non-grandfathered plans (plans or policies created or sold after March 23, 2010, or older plans or policies that have been changed in certain ways since that date) generally are required to provide coverage without cost sharing consistent with these guidelines in the first plan year (in the individual market, policy year) that begins on or after August 1, 2012.

Type of Preventive Service	HHS Guideline for Health Insurance Coverage	Frequency
Well-woman visits.	Well-woman preventive care visit annually for adult women to obtain the recommended preventive services that are age and developmentally	Annual, although HHS recognizes that several visits may be needed to obtain all necessary recommended preventive services, depend-

	appropriate, including preconception care and many services necessary for prenatal care. This well-woman visit should, where appropriate, include other preventive services listed in this set of guidelines, as well as others referenced in section 2713.	ing on a woman's health status, health needs, and other risk factors.* (see note)
Screening for gestational diabetes.	Screening for gestational diabetes.	In pregnant women between 24 and 28 weeks of gestation and at the first prenatal visit for pregnant women identified to be at high risk for diabetes.

Human papillomavirus testing.	High-risk human papillomavirus DNA testing in women with normal cytology results.	Screening should begin at 30 years of age and should occur no more frequently than every 3 years.
Counseling for sexually transmitted infections.	Counseling on sexually transmitted infections for all sexually active women.	Annual.
Counseling and screening for human immune-deficiency virus.	Counseling and screening for human immune-deficiency virus infection for all sexually active women.	Annual.
Contraceptive methods and counseling. ** (see note)	All Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with	As prescribed.

	reproductive capacity.	
Breastfeeding support, supplies, and counseling.	Comprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the postpartum period, and costs for renting breastfeeding equipment.	In conjunction with each birth.
Screening and counseling for interpersonal and domestic violence.	Screening and counseling for interpersonal and domestic violence.	

* *Refer to guidance issued by the Center for Consumer Information and Insurance Oversight entitled Affordable Care Act Implementation FAQs, Set 12, Q10. In addition, refer to recommendations in the July 2011 IOM report entitled Clinical Preventive Services for Women: Closing the Gaps concerning distinct preventive services that may be obtained during a well-woman preventive services visit.*

** *The guidelines concerning contraceptive methods and counseling described above do not apply to women* *who are participants or beneficiaries in group health plans sponsored by religious employers. Effective August 1, 2013, a religious employer is defined as an employer that is organized and operates as a non-profit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. HRSA notes that, as of August 1, 2013, group health plans established or maintained by religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the requirement to cover contraceptive services under section 2713 of the Public Health Service Act, as incorporated into the Employee Retirement Income Security Act and the Internal Revenue Code. HRSA also notes that, as of January 1, 2014, accommodations are available to group health plans established or maintained by certain eligible organizations (and group health insurance coverage provided in connection with such plans), as well as student health insurance coverage arranged by eligible organizations, with respect to the contraceptive coverage requirement. See Federal Register Notice: Coverage of Certain Preventive Services Under the Affordable Care Act (PDF 327 KB)*

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 13-354

In the
Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH
AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

HOBBY LOBBY STORES, INC., MARDEL, INC.,
DAVID GREEN, BARBARA GREEN, STEVE GREEN,
MART GREEN, and DARSEE LETT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, provides that the government "shall not substantially burden a person's exercise of religion" unless that burden satisfies strict scrutiny. *Id.* § 2000bb-1(a), (b). Respondents are a family and their closely held businesses, which they operate according to their religious beliefs. A regulation under the Patient Protection and Affordable Care Act requires Respondents to provide insurance coverage for all FDA-approved "contraceptive methods [and] sterilization procedures." 78 Fed. Reg. 39870, 39870 (July 2, 2013) (citing 42 U.S.C. § 300gg-13(a)(4)). Respondents' sincere religious beliefs prohibit them from covering four out of twenty FDA-approved contraceptives in their self-funded health plan. If Respondents do not cover these contraceptive methods, however, they face severe fines.

The question presented is whether the regulation violates RFRA by requiring Respondents to provide insurance coverage for contraceptives in violation of their religious beliefs, or else pay severe fines.

RULE 29.6 DISCLOSURE

Respondent Hobby Lobby Stores is a privately held Oklahoma corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Mardel is a privately held Oklahoma corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondents David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett are individual persons.

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INTRODUCTION

On the merits, this is one of the most straightforward violations of the Religious Freedom Restoration Act this Court is likely to see. Respondents' religious beliefs prohibit them from providing health coverage for contraceptive drugs and devices that end human life after conception. Yet, the government mandate at issue here compels them to do just that, or face crippling fines, private lawsuits, and government enforcement. That is a textbook "substantial burden" on religious exercise under RFRA. Indeed, the government has effectively acknowledged this substantial burden by exempting countless non-profit entities with the same basic religious objection. And it has exempted plans covering tens of millions of people for reasons no more compelling than administrative convenience. Given these myriad exemptions, the mandate cannot possibly be the least restrictive means of achieving any compelling government interest—and it is certainly not some universal policy that cannot tolerate additional exemptions. If RFRA means anything, it means the government cannot hand out exceptions for secular reasons and then insist that "uniformity" forecloses similar exceptions for religious exercise. But the mandate does precisely that.

Understandably eager to avoid the merits, the government directs considerable effort to driving an artificial wedge between the corporate Respondents and their owners. But that distinction is illusory; *both* the corporations and their owners are entitled to relief under RFRA. Corporations frequently engage in religious exercise, as even the government concedes in the case of non-profits, and no constitutional right turns on a corporation's tax status. Ultimately, whether it is the individuals, the corporations, or both who are exercising religion, the government cannot simply wish away the reality that its policies substantially burden Respondents' religious exercise in a wholly unjustified manner.

STATEMENT OF THE CASE

A. Statutory Background

1. The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), provides that: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." *Id.* § 2000bb-1(a). Upon showing a substantial burden, RFRA entitles a claimant to an exemption unless the government can satisfy strict scrutiny. That is, the government must prove that "application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(b). RFRA constrains all federal laws and regulations, unless Congress explicitly exempts them. *Id.* § 2000bb-3(a)-(b); see generally *Gonzales* v. *O Centro*, 546 U.S. 418 (2006).

RFRA directly responded to this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), which held that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Id.* at 879 (quotation marks omitted). In so holding, *Smith* declined to apply the strict scrutiny approach of cases like *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and

Wisconsin v. *Yoder*, 406 U.S. 205 (1972). Through RFRA, Congress sought "to restore the compelling interest test * * * and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Congress determined this "compelling interest test * * * is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* § 2000bb(a)(5). RFRA thus mandates "case-by-case consideration of religious exemptions" under strict scrutiny. *O Centro*, 546 U.S. at 436.

2. This dispute arises from a regulation promulgated under the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 ("ACA").

The ACA is an exceptionally complex piece of legislation with many novel, overlapping mandates and exemptions. "The Act's 10 titles stretch over 900 pages and contain hundreds of provisions." *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2580 (2012) ("*NFIB*"). The ACA "requires most Americans to maintain 'minimum essential' health insurance coverage," which they may do through employer-based coverage, through Medicaid or Medicare, or by "purchas[ing] insurance from a private company." *Ibid.* In addition to this "individual mandate," the ACA also imposes an "employer mandate," which requires certain employers to provide "minimum essential" health coverage to employees. 26 U.S.C. § 4980H.

The ACA also contains new substantive requirements for group health plans. One category of mandatory benefits is women's "preventive care and screenings," which must be covered without cost-sharing. 42 U.S.C. § 300gg-13(a)(4). Rather than defining this category, Congress delegated that authority to the Health Resources and Services Administration ("HRSA"), a sub-agency within HHS. HRSA, in turn, asked the Institute of Medicine ("IOM"), part of the "semi-private" National Academy of Sciences, "to develop recommendations to help implement these requirements." Pet.Br.5; Pet.App.9a-10a; see generally IOM, *Clinical Preventive Services for Women: Closing the Gaps* (2011) ("IOM Report"). In August 2011, HRSA adopted the IOM's recommendations without change. HRSA, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines.

The end result of this regulatory process is that "non-grandfathered [health] plans * * * generally are required to provide coverage without cost sharing" of "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[1] *Ibid.* "Four of the twenty approved methods—two types of intrauterine devices (IUDs) and the emergency contraceptives commonly known as Plan B and Ella—can function by preventing the implantation of a fertilized egg."[2] Pet.App.10a. This requirement to cover FDA-approved drugs and devices is the contraceptive-coverage mandate at issue here.

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[1] FDA-approved methods include male and female condoms, diaphragms, sponges, cervical caps, spermicides, the pill, the mini-pill, the continuous-use pill, patches, vaginal rings, progestin shots, implantable rods, sterilization surgery for men and women, and sterilization implants for women. FDA, *Birth Control Guide* (May 2013), http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm. The contraceptive-coverage mandate does not include contraceptive methods for men. 78 Fed. Reg. 39870, 39870 n.1 (July 2, 2013).

The government has exempted a vast array of employers from this mandate for both religious and secular reasons. First, HHS recognized that the mandate would significantly impact religious believers. See 45 C.F.R. § 147.131(a) (authorizing "an exemption * * * with respect to a group health plan established or maintained by a religious employer * * * with respect to any requirement to cover contraceptive services"). Accordingly, it established exemptions for "religious employers," defined as non-profit organizations "described in a provision of the Internal Revenue Code that refers to churches, their integrated auxiliaries, conventions or associations of churches, and to the exclusively religious activities of any religious order." Pet.App.11a-12a; see 45 C.F.R. § 147.131(a); 26 U.S.C. § 6033(a)(3)(A)(i), (iii).

Second, HHS has provided an "accommodation" for other religious non-profit organizations whose religious beliefs prevent them from complying with all or part of the mandate, allowing them to route contraceptive payments through their insurer or plan administrator. 45 C.F.R. § 147.131(b).[3]

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[2] As it has throughout this litigation, the government concedes that the drugs and devices at issue can prevent uterine implantation of an embryo. See Pet.Br.9 n.4 (conceding that Plan B (levonorgestrel), Ella (ulipristal acetate) and copper IUDs like ParaGard may act by "preventing implantation (of a fertilized egg in the uterus)"; *ibid.* (admitting that IUDs with progestin "alter[ ] the endometrium"); see also FDA, *Birth Control Guide*, *supra*. The en banc Tenth Circuit found "no material dispute" on this issue. Pet.App.10a n.3.

Third, wholly apart from any religious concerns and for the sake of administrative convenience, "grandfathered" plans may indefinitely avoid the mandate by not making certain changes after March 2010. See 42 U.S.C. § 18011(a)(2) ("Preservation of right to maintain existing coverage"). This exemption has no time limit, allows the addition of new employees, and is keyed to medical inflation. 42 C.F.R. § 147.140(a)-(b), (g). While grandfathered plans must comply with certain other ACA requirements—such as covering dependents to age 26, covering preexisting conditions, and reducing waiting periods, 42 U.S.C. § 18011(a)(4); 75 Fed. Reg. 34538, 34542 Tbl. 1 (June 17, 2010)—grandfathered plans need not cover contraceptives or any other women's preventive service. 75 Fed. Reg. at 34540.

Fourth, small businesses with fewer than fifty employees—96% of all firms in the United States—are exempt from the ACA requirement that employers provide health insurance to their employees.[4] Small businesses can thus avoid the mandate and any penalty by not providing insurance to their employees.

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[3] Hundreds of non-profit religious organizations have challenged the "accommodation," and in nineteen out of twenty decided cases it has been enjoined. Reply Br.3-4 nn.2-3, *Little Sisters of the Poor* v. *Sebelius*, No. 13A691 (U.S. Jan. 3, 2014) (collecting cases); Order, *Little Sisters*, No. 13A691 (Jan. 24, 2014) (enjoining accommodation pending appeal).

[4] 26 U.S.C. § 4980H; *The Affordable Care Act Increases Choice and Saving Money for Small Business*, WhiteHouse.Gov 2, http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf.

Based on the government's own estimates, "the contraceptive-coverage requirement presently does not apply to tens of millions of people." Pet.App.58a; see also, *e.g.*, 75 Fed. Reg. at 34552 Tbl.3 (55% of large employer plans would retain grandfathered status in 2013); Pet.Br.53 (36% of Americans covered through their employers were in grandfathered health plans in 2013).

The government, however, has refused to provide any exemption for for-profit entities and their owners who object on religious grounds to providing the mandated contraceptives. 78 Fed. Reg. 39870, 39875 (July 2, 2013) (noting that exemption does not apply to for-profit employers).

B. Factual Background

1. Respondents are David and Barbara Green; their children, Steve Green, Mart Green, and Darsee Lett; and their family businesses, Hobby Lobby Stores, an arts-and-crafts chain, and Mardel, a chain of Christian bookstores.[5]

Founded in 1970 by David Green, Hobby Lobby has grown from a single arts-and-crafts store in Oklahoma City into a nationwide chain with over 500 stores and more than 13,000 full-time employees. In 1981, Mart Green founded Mardel, an affiliated chain of Christian bookstores, which now has thirty-five stores and about 400 full-time employees. Hobby Lobby and Mardel remain closely held family businesses, organized as general corporations under Oklahoma law, and exclusively controlled by the Greens. JA129-30, 134. David Green is Hobby Lobby's CEO, his son Steve is President, his daughter Darsee is Vice President, and his son Mart is Vice CEO of Hobby Lobby and CEO of Mardel. JA129-30. For federal tax purposes, Hobby Lobby is a subchapter-S corporation. Pet.App.7a-8a.

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[5] In this brief, "the Greens" refers collectively to the Green family members. "Respondents" refers collectively to the Greens, Hobby Lobby, and Mardel. The undisputed material facts are taken from Respondents' Verified Complaint. JA124-69.

2. "The Greens have organized their businesses with express religious principles in mind." Pet.App.8a. Hobby Lobby's official statement of purpose commits the company to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." JA134-35. The Greens operate Hobby Lobby and Mardel through a management trust they created, of which each Green is a trustee. Pet.App.8a; JA129-30, 134. The Greens each signed a Statement of Faith and a Trustee Commitment obligating them to conduct the businesses according to their religious beliefs, to "honor God with all that has been entrusted" to them, and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries." JA134.

"[T]he Greens allow their faith to guide business decisions for both companies." Pet.App.8a. All Hobby Lobby stores close on Sundays, at a cost of millions per year, to allow employees a day of rest. Each Christmas and Easter, Hobby Lobby buys hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior." *E.g.*, *Easter 2013*

Advertisement, http://www.hobbylobby.com/assets/images/holiday_messages/messages/2013e.jpg. Store music features Christian songs. Employees have cost-free access to chaplains, spiritual counseling, and religiously-themed financial courses. And company profits provide millions of dollars every year to ministries. Pet.App.8a; JA134-39. Mardel primarily sells Christian materials and describes itself as "a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support." Pet.App.8a; JA137-38.

Respondents also refrain from business activities forbidden by their religious beliefs. For example, to avoid promoting alcohol, Hobby Lobby does not sell shot glasses. Hobby Lobby once declined a liquor store's offer to take over one of its building leases, costing it hundreds of thousands of dollars a year. Similarly, Hobby Lobby does not allow its trucks to "back-haul" beer and so loses substantial profits by refusing offers from distributors. Pet.App.8a; JA136.

In the same way, Respondents' faith affects the insurance offered in Hobby Lobby's self-funded health plan. Respondents believe that human beings deserve protection from the moment of conception, and that providing insurance coverage for items that risk killing an embryo makes them complicit in abortion. Pet.App.50a-51a. Hobby Lobby's health plan therefore excludes drugs that can terminate a pregnancy, such as RU-486. The plan likewise excludes four drugs or devices that can prevent an embryo from implanting in the womb—namely, Plan B, Ella, and two types of intrauterine devices. Indeed, when Respondents discovered that two of these drugs had been included—without their knowledge—in the plan formulary, they immediately removed them. Pet.App.174a.

3. Respondents' religious beliefs will not allow them to do precisely what the contraceptive-coverage mandate demands—namely, provide in Hobby Lobby's health plan the four objectionable contraceptive methods. But the government makes non-compliance costly. The statute imposes a fine of $100 per day for each "individual to whom such failure relates." 26 U.S.C. § 4980D(b)(1). Because Respondents' plan covers over 13,000 individuals, this fine could amount to over $1.3 million per day or nearly $475 million per year. Pet.App.15a; JA154. In addition, the Labor Department and private plaintiffs may sue Respondents for failure to provide all FDA approved contraceptive methods. 29 U.S.C. § 1132.

If Respondents instead ceased providing any health insurance to their employees, they would owe a lower but still substantial penalty of $26 million per year, see 26 U.S.C. § 4980H, and would face severe disruption to their business. Dropping insurance would place them at a competitive disadvantage, and hobble their employee recruitment and retention efforts. Pet.App.51a; JA153. It would also harm the employees who currently depend on Hobby Lobby's generous health insurance—and would undermine Respondents' desire to provide health benefits for their employees, which is itself religiously motivated. *Ibid.*

Despite their sincere religious objections to facilitating abortion, Respondents do not qualify for any exemption from the mandate. Having altered their plan terms before the mandate was promulgated, Hobby Lobby's health plan is not "grandfathered," Pet.App.14a; JA140, and with well over 50 employees, they must offer qualifying insurance. 26 U.S.C. § 4980H. As for-profit businesses, neither Hobby Lobby nor Mardel is covered by the religious employer exemption or the accommodation. Pet.App.13a-14a. Consequently, Respondents must either violate their faith by covering the mandated contraceptives, or subject their family businesses to crippling consequences.

C. Procedural History

1. On September 12, 2012, Respondents sued in the United States District Court for the Western District of Oklahoma, challenging the mandate under RFRA, the First Amendment, and the Administrative Procedure Act, 5 U.S.C. § 553. See JA128. They simultaneously moved for a preliminary injunction, JA9, which the district court denied. The court held that Hobby Lobby and Mardel, as for-profit corporations, have no free exercise rights and thus are not "persons" under RFRA. Pet.App.188a. Additionally, the court concluded that the Greens individually could not show a "substantial burden" on their religious exercise, because the mandate's burden on them was only "indirect and attenuated." Pet.App.194a.

2. The Tenth Circuit granted initial en banc hearing and reversed. Pet.App.5a, 16a. By a 5-3 majority, the en banc court held that Hobby Lobby and Mardel were "persons" capable of religious exercise and could therefore sue under RFRA. Pet.App.24a (interpreting 42 U.S.C. § 2000bb-1(a)). The en banc

court also rejected the government's argument that RFRA excludes religious exercise by for-profit corporations. Pet.App.33a. Additionally, four judges found that the Greens could sue individually under RFRA. Pet.App.78a (op. of Gorsuch, J., joined by Kelly and Tymkovich, JJ.); *id.* 162a (op. of Matheson, J.).[6]

The en banc court next held that Hobby Lobby and Mardel were likely to succeed on their RFRA claim. The court first recognized Respondents' sincere religious belief (which the government did not dispute) that providing the mandated coverage would make them morally complicit in abortion. Pet.App.50a-51a. The court then held that the mandate imposed a "substantial burden" on Respondents' exercise of religion because it pressured them to violate that belief. Pet.App.50a-51a. Because the mandate forced Respondents to either "compromise their religious beliefs," "pay close to $475 million more in taxes every year, or pay roughly $26 million more in annual taxes and drop health-insurance benefits for all employees," the court found it "difficult to characterize the pressure as anything but substantial." Pet.App.51a-52a.

The court rejected the government's argument that the burden on Respondents was too attenuated, and therefore insubstantial, because an employee's decision to use contraception could not properly be attributed to her employer. Pet.App.54a-56a. The court found this reasoning "fundamentally flawed," because it "requires an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs." Pet.App.44a.

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[6] These four judges rejected the government's argument based on the prudential "shareholder standing rule" because that rule "does not bar corporate owners from bringing suit if they have 'a direct and personal interest in a cause of action.'" Pet.App.86a (quoting *Franchise Tax Bd.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990)); *id.* 161a (same). As explained below, the government has abandoned its shareholder standing argument. See *infra* n.15.

The court then concluded that the mandate failed strict scrutiny. The government's asserted interests in "public health and gender equality" were not compelling "because they are 'broadly formulated,'" because the government offered "almost no justification for not 'granting specific exemptions to particular religious claimants,'" and because "the contraceptive-coverage requirement presently does not apply to tens of millions of people." Pet.App.57a-58a (quoting *O Centro*, 546 U.S. at 431). The court also held that the mandate was not the least restrictive means of achieving those over-broad interests because the government did "not articulate why accommodating [Respondents'] limited request fundamentally frustrates its goals." Pet.App.60a.[7]

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act protects Respondents' religious exercise. RFRA covers any "person's exercise of religion," 42 U.S.C. § 2000bb-1(a), but it does not separately define "person." The Dictionary Act thus supplies the meaning of the term, which is specifically designed to include both natural persons (like the Greens) and corporations (like Hobby Lobby and Mardel). This understanding is supported by RFRA's context and this Court's jurisprudence, which has long protected the exercise of religion by corporations and in commercial contexts. Indeed, the government is forced to concede that RFRA applies to non-profit corporations and offers no support for the notion that a corporation's ability to exercise constitutional rights turns on its tax status. RFRA therefore clearly protects both the individual and the corporate Respondents. And the government's attempt to drive a wedge between the Greens and their businesses—where only the former have rights and only the latter suffer burdens—is a misguided shell game. The fact remains that the Greens exercise their faith through Hobby Lobby and Mardel, and those beliefs are entitled to protection under a statute that draws no distinction between natural or corporate persons, let alone between for-profit and non-profit corporations.

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[7] Because a majority did not resolve the remaining injunction factors, the court remanded. Pet.App.66a. Subsequently, the district court entered a preliminary injunction, which the government then appealed. Pet.Br.12. All lower court proceedings have been stayed pending this Court's disposition of the case. *Ibid.*

The contraceptive mandate substantially burdens Respondents' exercise of religion. Respondents' faith prohibits them from facilitating abortion, and specifically from providing health coverage for the four mandated drugs and devices that can end life after conception. The government does not dispute that these are sincere religious beliefs or that they deserve protection—indeed, the government accommodates the same religious beliefs of certain non-profit corporations. Yet, the mandate compels Respondents to do precisely what their religion prohibits or face draconian consequences—including millions in fines, private lawsuits, and government enforcement actions. This is the paradigmatic substantial burden under RFRA. The government's attempt to re-characterize the mandate as concerned only with the exchange of money ignores the mandate's purpose and effect: to force employers to provide *specific* contraceptives. And the government's suggestion that the burden is too "attenuated" to warrant relief is just a backdoor effort to question the sincerity of Respondents' religious beliefs. Respondents object to being forced to facilitate abortion by providing abortifacients, and that objection does not turn on the independent decisions of their employees.

The government has not come close to carrying its burden of demonstrating that the mandate satisfies strict scrutiny. First, the government's articulated compelling interests are woefully deficient. Two—public health and gender equality—are defined so broadly that they could never satisfy strict scrutiny. There are countless less restrictive means to achieve these broadly defined goals without implicating Respondents' religious exercise. The third is newly minted for this Court, and is therefore forfeited. But that newly articulated interest—the promotion of a "comprehensive" scheme of providing benefits to all—actually highlights the most glaring problem with the government's defense of the mandate: the government has already granted a bevy of exceptions to the mandate, for reasons ranging from religious accommodation to administrative convenience. Having granted multiple exemptions for multiple reasons, the government cannot validly fall back on a compelling interest in comprehensiveness. This case is the polar opposite of the social security system, where the government can credibly insist that everyone must contribute and even a modest exception for employers endangers the system. Indeed, if RFRA means anything, it makes crystal clear that when the government grants exceptions for secular reasons, it cannot insist on enforcing that law in the name of comprehensiveness when it substantially burdens sincerely-held religious beliefs.

ARGUMENT

I. The Religious Freedom Restoration Act Protects Respondents' Exercise Of Religion.

A. Both the Corporate and Individual Respondents Are "Persons Exercising Religion" Under RFRA.

1. RFRA protects any "person's exercise of religion." 42 U.S.C. § 2000bb-1(a), (b). Because RFRA does not specifically define "person," the Dictionary Act's definition of the term controls. See, *e.g.*, *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 275 (1947). The Dictionary Act provides that: "In determining the meaning of any Act of Congress, unless the context indicates otherwise, * * * the word[] 'person' * * * include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Thus, as a matter of simple statutory interpretation, RFRA protects both the individual and corporate Respondents' religious exercise. This conclusion should "end the matter." Pet.App.24a.

Nothing else in RFRA suggests any limitation on the Dictionary Act's definition. When applying the Dictionary Act, the relevant "context" is "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Rowland* v. *Cal. Men's Colony*, 506 U.S. 194, 199 (1993). If anything, RFRA's context *confirms* that the Dictionary Act's broad definition controls. The statute contains no specialized or limited definition of "person," while it specifically defines other terms. See, *e.g.*, 42 U.S.C. § 2000bb-2(1)-(4) (defining "government," "covered entity," "demonstrates," and "exercise of religion"). And it defines "exercise of religion" capaciously to include "*any* exercise of religion." 42 U.S.C. § 2000bb-2(4) (cross-referencing Religious Land Use and Institutionalized Persons Act ("RLUIPA")); *id.* § 2000cc-5(7)(A)-(B) (emphasis added). What is more, the Dictionary Act includes all manner of artificial entities within its broad definition without so much as hinting that anything turns on their tax status. Indeed, religion is commonly exercised by and through corporations, associations, and societies—which, of course, is why the government rightly concedes that *non-profit* corporations come within RFRA's ambit.

Thus, no plausible reading of RFRA's text, context, and history would exclude Respondents from its protection. In fact, the congressional debates leading up to RLUIPA displayed an undisputed public understanding that the language in RFRA "protected for-profit corporations and their owners." Christian Legal Soc'y *Amicus* Br.32.

2. Congress knows how to limit statutory protections to a subset of artificial entities or "persons," and it chose not do so in RFRA. For instance, Congress expressly limited religious

exemptions in Title VII and the ADA to "a religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a); *id.* § 12113(d)(1), (2). "Congress [wa]s aware of" these limited exemptions, but "chose not to" employ such limited formulations in RFRA. *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, __ U.S. __, No. 12-1036, slip op. at 6-7 (U.S. 2014) (quoting *Hall* v. *United States*, 132 S. Ct. 1882, 1889 (2012)). And when "Congress decline[s] to include an exemption," that "indicates that Congress intended no such exception." *Elgin* v. *Dep't of Treasury*, 132 S. Ct. 2126, 2134-35 (2012). Congress is thus "quite capable of narrowing the scope of a statutory entitlement * * * when it wants to," and it has chosen not to do so here. Pet.App.27a. That choice must be respected.

The government ignores this legislative choice. Indeed, one way to understand the flaws with the government's approach is that it attempts through regulation to accommodate only a subset of those entitled to a statutory exemption under RFRA. See *supra* p. 5 (describing narrowly-defined class of "religious employers"). But when Congress makes a broad accommodation for all persons whose religious exercise is substantially burdened, an agency is not free to offer a regulatory exemption only to a narrowly defined subset of such persons.

3. The government offers no contrary analysis of RFRA's text and context. Instead, it asserts that RFRA protects only "individuals and religious nonprofit institutions" because no pre-*Smith* case held "that for-profit corporations have religious beliefs." Pet.Br.17, 18-19. But the place to look for the scope of RFRA's coverage is its text, which broadly protects

any religious exercise. RFRA does not offer only begrudging protection such that a plaintiff must identify a right to religious exercise clearly established by a pre-*Smith* holding. Accordingly, the burden of the government's argument is to establish that the exercise of religion by a for-profit corporation is such an oxymoron that Congress could not have included it when broadly protecting the religious exercise of all persons, including corporations.

In any event, far from holding that religion and commercial activity are incompatible, this Court's pre-*Smith* cases squarely recognized that religious exercise may legitimately occur in the sphere of for-profit business. In *United States* v. *Lee*, for instance, the Court addressed a claim by an Amish carpenter and farmer that "both payment and receipt of social security benefits is forbidden by the Amish faith." 455 U.S. 252, 254, 257 (1982). The Court concluded that compelling the employer to "participat[e] in the social security system interferes with [his] free exercise rights," despite the obvious for-profit nature of his business. *Id.* at 257. Similarly, in *Braunfeld* v. *Brown*, the Court entertained a challenge to a Sunday closing law by Orthodox Jewish "merchants * * * engage[d] in the retail sale of clothing and home furnishings." 366 U.S. 599 (1961). There, too, this Court recognized that the law burdened free exercise rights because it made "religious beliefs more expensive." *Id.* at 605. Although both laws ultimately withstood strict scrutiny, there was no doubt that the claimants were exercising their religious beliefs through for-profit commercial activities.

The government does not resist this conclusion but instead offers the fig leaf that *Lee* and *Braunfeld* involved "individual sole proprietors," rather than corporations. Pet.Br.18. This is a classic distinction without a difference. None of this Court's cases, before or after *Smith*, suggests that an entity's particular *form* determines whether it or its owners can exercise religion. To the contrary, the Court has unanimously recognized the free exercise rights of a "not-for-profit corporation organized under Florida law," *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 525 (1993); "a New Mexico corporation on its own behalf," *O Centro Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft*, 389 F.3d 973 (10th Cir. 2004), *aff'd*, *O Centro*, 546 U.S. 418; and an "ecclesiastical corporation," *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012), *reversing EEOC* v. *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010). This recognition dates back to the earliest decades of the Republic. In 1815, this Court explained that "the legislature may * * * enable all sects to accomplish the great objects of religion by giving them *corporate rights* for the manag[e]ment of their property, and the regulation of their temporal as well as spiritual concerns." *Terrett* v. *Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815) (Story, J.) (emphasis added).

Indeed, in *Gallagher* v. *Crown Kosher Super Market, Inc.*, 366 U.S. 617, 618-19 (1961), five members of the Court assumed that a commercial corporation owned by four Orthodox Jewish shareholders could challenge a Sunday closing law under the Free Exercise Clause. The government's claim that *Gallagher* made an "express reservation" of whether for-profit corporations can exercise religion simply misreads the decision. Pet.Br.18. Four Justices in *Gallagher* stated that, given the companion decision in *Braunfeld*, they "need not decide whether appellees have standing to raise these questions." 366 U.S. at 631 (op. of Warren, C.J., joined by Black, Clark, and Whittaker, JJ.). But the government overlooks the fact that five other Justices (Frankfurter, Harlan, Douglas, Brennan, and Stewart) *did* reach the question and concluded that the corporation was exercising religion by closing on the Jewish Sabbath.[8] See also Orthodox Union *Amicus* Br. 8-11; Ethics & Public Policy *Amicus* Br.16-20.

Finally, the government's restrictive approach to RFRA misconceives the statutory framework. Even setting aside that this Court's pre-*Smith* precedents support Respondents, RFRA "is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions." H.R. Rep. No. 103-88, at 7 (1993); see also S. Rep. No. 103-111, at 9 (1993). The statute restored "the compelling interest test as set forth in" this Court's pre-*Smith* case law. 42 U.S.C. § 2000bb(b)(1). But Congress never intended to restrict RFRA's protection only to the specific facts of those earlier cases. See, *e.g.*, H.R. Rep. No. 103-88, at 6-7 (noting "expectation" that courts would find "guidance" in pre-*Smith* cases but "neither approv[ing] nor disapprov[ing] of the result in any particular court decision"). Furthermore, in 2000, Congress specifically amended RFRA's definition of "religious exercise" to eliminate its prior reference to the Free Exercise Clause and instead cross-referenced the broader definition from RLUIPA protecting "any exercise of religion." See Ethics & Public Policy *Amicus* Br.6-11. RFRA review, in other words, is not like review in the qualified immunity or federal habeas contexts, which require clearly established federal law controlling the case at hand. The scope of RFRA is answered instead by the statutory text, which covers all persons, including corporations, without regard to their tax status.

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[8] See 366 U.S. at 642 (noting that Justices Brennan and Stewart "are of the opinion that the Massachusetts statute, as applied to the appellees in this case, prohibits the free exercise of religion") (cross-referencing *Braunfeld*, 366 U.S. at 616 (dissenting opinions of Brennan and Stewart, JJ.)); see also *id.* at 631 (incorporating concurrence and dissent in *McGowan* v. *Maryland*, 366 U.S. 420 (1961)); *McGowan*, 366 U.S. at 520 (Frankfurter, J., concurring, joined by Harlan, J.) (noting the "restraint upon the religious exercise of Orthodox Jewish practicants which the [Sunday closing] restriction entails"); *id.* at 577 (Douglas, J., dissenting) (asserting that "[w]hen these laws are applied to Orthodox Jews, as they are in No. 11 [*Gallagher*] and No. 67 [*Braunfeld*] * * * their vice is accentuated," and that, "[i]f the Sunday laws are constitutional, *kosher markets are on a five-day week*")) (emphasis added).

B. Free Exercise Rights, Like Most Constitutional Protections, Extend to For-Profit Corporations and Their Owners.

This Court has long held that corporations enjoy the full panoply of rights protected in the Constitution, except for those that are "purely personal." And the Court has never suggested that free exercise rights are purely personal, or that individuals could not exercise religion when engaged in particular activities (like making money) or when using particular means (like a corporation). The government does not dispute any of this. Instead, it seeks to drive a wedge between the Greens and their businesses, and proposes another distinction—found nowhere in RFRA, the Constitution, or this Court's decisions—between non-profit and for-profit corporations. But the federal tax code does not decide the scope of constitutional rights, and the government's baseless proposal would lead to all manner of absurd results.

1. It is firmly rooted in this Court's jurisprudence that the First Amendment, like most other constitutional provisions, protects corporations and their owners. For over a century, it has been "well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978). Consequently, corporations have long been treated as "persons" under the Equal Protection Clause, the Due Process Clause, and section 1983,[9] and have been recognized as capable of exercising rights under the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments.[10] C12 *Amicus* Br.12-13.

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[9] See *Power Mfg. Co.* v. *Saunders*, 274 U.S. 490, 493 (1927) (Equal Protection Clause) (collecting cases); *Minneapolis & St. Louis Ry. Co.* v. *Beckwith*, 129 U.S. 26, 28 (1889) (Due Process Clause); *Monell*, 436 U.S. at 687-88 (section 1983).

[10] See, *e.g.*, *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Servs. Comm'n*, 447 U.S. 557, 566-68 (1980) (commercial speech); *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906) (unreasonable search), *overruled on other grounds by Murphy* v. *Waterfront Comm'n of New York Harbor*, 378 U.S. 52 (1964); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977) (double jeopardy); *Pa. Coal Co.* v.

The government does not argue that religious exercise is a "purely personal" right that can be exercised only by individuals. *Compare First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 778 n.14 (1978) (Fifth Amendment privilege against compelled self-incrimination is "purely personal"). Nor could it, since "[i]t is beyond question that associations—not just individuals—have Free Exercise rights." Pet.App.34a. This Court has explained that an individual's "freedom to speak, *to worship*, and to petition the government * * * could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added). Indeed, a great many of this Court's free exercise decisions have protected groups, not individuals. See *supra* p. 20 (citing *Hosanna-Tabor; O Centro*; *Lukumi*).

The history of the Free Exercise right confirms that religious activity has been routinely undertaken through corporations. In his *Commentaries on the Law of England*, Blackstone lists "advancement of religion" *first* in the list of purposes that corporations might pursue. 1 *Blackstone Commentaries on the Law of England* ch. 18 ("Of Corporations") 467; see also Christian Booksellers *Amicus* Br. 12-13. Indeed, "religious institutions * * * had long been organized as

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Mahon, 260 U.S. 393, 415 (1922) (takings); *Armour Packing Co.* v. *United States*, 209 U.S. 56, 73, 76-77 (1908) (right to criminal jury); *Ross* v. *Bernhard*, 396 U.S. 531, 532-33 (1970) (right to civil jury); *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433-34 (2001) (protection from excessive fines).

corporations at common law and under the King's charter * * *." *Citizens United* v. *FEC*, 558 U.S. 310, 388 (2010). There is no reason to ignore this history or contort the statutory text to hold otherwise.

Moreover, the government's insistence that one kind of corporation does not "have" religious exercise rights fundamentally misunderstands this Court's approach. In *Bellotti*, the Court explained that "[t]he proper question * * * is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect." 435 U.S. at 776; see also *Citizens United*, 558 U.S. at 342-43 (an activity "does not lose First Amendment protection 'simply because its source is a corporation'") (quoting *Bellotti*, 435 U.S. at 784). Under *Bellotti*, it cannot possibly be right to ask whether for-profit corporations "have" free exercise rights, in contrast to other entities organized in different forms or under separate provisions of the tax code. The question is simply whether the law burdens religious exercise. Here, the government's own actions leave no doubt that the answer is plainly yes: it has exempted churches and other entities for precisely the same religious exercise Respondents raise in this case.

2. The government's proposed distinction between the religious exercise of for-profit and non-profit corporations fails for similar reasons. Most obviously, the distinction appears nowhere in RFRA's text or the Dictionary Act. There is simply no reason to believe Congress intended the unadorned term

"person" in RFRA to include individuals, non-profit corporations, and profit-making enterprises (provided they are organized as something other than a corporation), but to exclude for-profit corporations. And the Dictionary Act does not exclude for-profit corporations from its capacious definition of "person."

Moreover, the government's profit-based approach to religious exercise conflicts with this Court's First Amendment cases, which do not turn on a claimant's tax status. This is true not only for religious exercise (as *Lee* and *Braunfeld* demonstrate), but also for the speech, press, and establishment clauses. See, *e.g.*, *N.Y. Times* v. *Sullivan*, 376 U.S. 254, 265-66 (1964) (holding that "constitutionally protected" statements "do not forfeit that protection because they were published in the form of a paid advertisement"); *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011) ("While the burdened speech results from an economic motive, so too does a great deal of vital expression."); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 117 (1982) (holding, under the Establishment Clause, that the state may not delegate power over liquor licenses to churches).[11]

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[11] This Court's commercial speech cases do not turn on the identity or tax status of the speaker, but on the nature of the speech in question. Thus the New York Times may *sometimes* engage in commercial speech (i.e., when it is selling subscriptions) but engages in noncommercial speech when it is editorializing. Even this Court's Commerce Clause decisions do not turn on corporate form or tax status of the actor, but on the nature of the activity. See *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison, Me.*, 520 U.S. 564, 586 (1997) (rejecting "any categorical distinction between the activities of profit-making

Nor does the government offer any support for the odd notion that the First Amendment singles out religious exercise as the *only* right that may not be exercised while earning a living. Instead, the government offers only the false dichotomy that "[f]or-profit corporations are different from religious non-profits in that they use labor *to make a profit*, rather than to perpetuate a religious values-based mission." Pet.Br.19 (quotation marks omitted).[12] But corporations frequently pursue moral or religious goals alongside profits. See generally Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Money-makers?*, 21 Geo. Mason L. Rev. 59 (2013); Christian Booksellers *Amicus* Br.14-20; Council for Christian Colleges *Amicus* Br.13-19.[13] "States do not generally require for-profit corporations to reject all goals that do not maximize revenues," Twenty States *Amicus* Br.17, and for good reason: that would impermissibly condition basic constitutional freedoms on satisfying the tax code's definition of a non-profit. See *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (government "may not deny a benefit to a person on a

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enterprises and not-for-profit entities" as "wholly illusory" for Commerce Clause purposes).

[12] Nor can the government derive this principle from Justice Brennan's concurrence in *Corporation of Presiding Bishop* v. *Amos* (PetBr.19), which acknowledged that some "for-profit activities could have a religious character." 483 U.S. 327, 345 & n.6 (1987).

[13] See also, Dustin Volz & Sophie Novack, *Why CVS is Ready to Lose Billions and Stop Selling Cigarettes* (Feb. 5, 2014), http://www.nationaljournal.com/health-care/why-cvs-is-ready-to-lose-billions-and-stop-selling-cigarettes-20140205 ("Put simply, the sale of tobacco products is inconsistent with our purpose.").

basis that infringes on his constitutionally protected interests"). Indeed Oklahoma, where Respondents are incorporated, recognizes that general corporations may undertake any "lawful acts," including acts inspired by religious belief. Okla. *Amicus* Br.3-11.

3. Without any foothold in text, context, or history, the government seeks to artificially divide Respondents, suggesting that only the Greens have religious rights but only their businesses suffer the burden of the mandate. Allowing *any* Respondent to sue under RFRA, it says, would wrongly "impute" the Greens' religious beliefs to their businesses and thus "reject the bedrock principle that a corporation is legally distinct from its owners." Pet.Br.25. But neither the law nor the government's own logic recognizes this division between the Greens and their family businesses.

The unremarkable principle that a corporation is "distinct" from its owners for some purposes does not permit the government to divide and conquer Respondents so that their religious rights simply vanish. The government concedes that RFRA and the First Amendment protect "religious non-profit institutions," Pet.Br.18-19, which are often organized in the corporate form. Non-profit corporations are just as "legally distinct" from their individual members as any for-profit corporation. See, *e.g.*, 1A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 25 ("The distinctness of the corporate entity applies equally to all kinds of corporations," and "nonprofit corporations * * *, like other corporations, are legal entities separate from their members"). Yet no one has ever dreamed that a non-profit corporation can be burdened because only its individual members actually exercise religion. In short, whether an entity exercises religion "cannot be about the protections of the corporate form," since "[r]eligious associations can incorporate, gain those protections, and nonetheless retain their Free Exercise rights." Pet.App.38a. Furthermore, RFRA—which protects a "person's exercise of religion," without qualification—does not even hint that it depends on the nuances of corporate structure at all.

The government incorrectly relies on decisions involving federal statutes that—unlike RFRA—expressly turn on corporate structure. See Pet.Br.24-25. Those cases, and the statutes at issue, distinguish themselves. *Cedric Kushner Promotions, Ltd.* v. *King*, involved a RICO provision that "foresees two separate entities, a 'person' and a distinct 'enterprise.'" 533 U.S. 158, 160 (2001); see also 18 U.S.C. § 1962(c) ("unlawful for any person employed by or associated with any enterprise * * * to conduct or participate * * * in the conduct of such enterprise's affairs" by committing certain crimes). The Court simply found sufficient "distinctness" between a corporation and its owner to apply RICO. *Cedric Kushner*, 533 U.S. at 163. Similarly, *Domino's Pizza, Inc.* v. *McDonald* involved 42 U.S.C. § 1981, which specifically protects a person's right to "make and enforce contracts" without regard to race. 546 U.S. 470, 474 (2006). The Court held the corporation's sole shareholder could not sue under the statute because the contractual rights at issue belonged to the corporation only. *Id.* at 477. But this Court did *not* hold that the corporation was unable to enforce its rights, even if it did so at the direction of the sole shareholder. See *id.* at 473 n.1

("[T]he Courts of Appeals to have considered the issue have concluded that corporations may raise § 1981 claims."). And, even farther afield, *United States* v. *Bestfoods*, 524 U.S. 51 (1998), does not involve the distinction between a corporation and its shareholders, but rather "the principle that a parent corporation is distinct from its subsidiaries." Pet.Br.25. More fundamentally, none of these cases relies on the corporate form to strip *both* individual *and* corporation of the relevant statute's rights or liabilities.

4. Nor is the government correct that the Greens *themselves* cannot sue under RFRA simply because they exercise their religion through for-profit corporations. Pet.Br.26-31. This flatly contradicts the statutory text and the actual facts of this case. RFRA broadly protects "any" religious exercise, and does not purport to limit the choice of means by which believers may exercise their faith. *Cf. M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819) ("The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else.").

It is undisputed that the Greens have committed themselves to conducting their business activities according to their religious beliefs. See, *e.g.*, Pet.App.8a. Hobby Lobby and Mardel are closely-held corporations controlled entirely by the Greens. JA129-30, 134; Pet.App.7a-8a. Thus, Hobby Lobby and Mardel act only through the Greens. The record amply demonstrates how the Greens have pursued their religious commitments through their business activities, Pet.App.8a, and there is no dispute about the precise religious exercise at issue here: the Greens cannot in good conscience direct their corporations to provide insurance coverage for the four drugs and devices at issue because doing so would "facilitat[e] harms against human beings." Pet.App.14a.

Thus, forcing Respondents to comply with the mandate would directly burden the Greens' religious exercise. Threats against one's business and livelihood—like threats against one's home, bank account, or unemployment check—can obviously impose unbearable pressure. Here, the devastating consequences for non-compliance will be visited upon the *Greens*' family businesses, and will occur only if the *Greens* continue to exercise their faith by excluding four products from their companies' health plan.[14]

The unavoidable result of the government's argument is that "an individual operating for-profit retains Free Exercise protections but an individual who incorporates * * * does not, even though he engages in the exact same activities as before." Pet.App.38a. That approach would produce absurd results. For example, the government agrees that a Jewish *individual* could exercise religion while operating a kosher butcher shop as a sole proprietor. See Pet.Br.18. Presumably, he could continue to exercise religion if he formed a general partnership with his brother. But the government says the ability of this religiously-observant butcher to exercise his faith abruptly ends—and the government's power to override his faith begins—at the moment of incorporation, "even though he engages in the exact same activities as before." Pet.App.38a. That rule is found nowhere in RFRA, the Dictionary Act, or this Court's decisions.[15]

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[14] The government is also wrong to suggest that Respondents' position would allow "any human resources manager" to seek an exemption under RFRA for the entire company. Pet.Br.30. A human resources manager might seek a Title VII accommodation from his employer if asked to violate his beliefs, but would have no RFRA claim against the government to exempt the entire company he works for.

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Both the Greens and their businesses can sue under RFRA. Indeed, they are indistinguishable for purposes of this case: Hobby Lobby and Mardel will comply with the mandate only if the Greens, and no one else, direct them to do so. But in all events the government cannot possibly be correct that *neither* the Greens *nor* their businesses can sue under RFRA, based on the specious reasoning that only the flesh-and-blood Greens can exercise religion while only the "corporate entity" can suffer the mandate's burdens. That shell game defies both law and logic.

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[15] In passing, the government alludes to the "shareholder standing rule," a prudential rule barring shareholder claims purely derivative of a corporation's claims. Pet.Br.28; see, *e.g.*, *Franchise Tax Bd.* v. *Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990). But the government does not raise the prudential shareholder standing bar in this Court, and it forfeited the argument below. See, *e.g.*, Pet.App.83a (op. of Gorsuch, Kelly, and Tymkovich, JJ.). And in all events, the shareholder standing rule does not apply because the mandate "requires [the Greens] * * * directly and personally * * * to take *affirmative action* contrary to their religious beliefs." *Id.* at 161a (op. of Matheson, J.); see also *id.* at 86a (op. of Gorsuch, Kelly, and Tymkovich, JJ.); *Korte* v. *Sebelius*, 735 F.3d 654, 668-69 (7th Cir. 2013) (same).

It also has dangerous implications. For instance, if the government were correct, then a non-profit religious corporation could be denied a land-use permit, and the government could say the burden falls only on the corporate entity, not on its members. The government could equally say that only the editors of the New York Times can truly exercise free speech rights, and so the First Amendment is unconcerned with defamation liability for the corporate entity. Businesses owned by women and minorities could face discrimination, and neither the owners nor their companies could seek protection. On the flip-side, the government's argument would allow a corporate defendant to deny religious or racial discrimination on the ground that the corporate entity terminated employment and any animus flowed only from the controlling shareholder.

In any of those contexts, the government's argument would be a non-starter. It should fare no better here. A corporation's status as a distinct entity with limited liability does not render its rights or its owners' rights invisible to the First Amendment and federal civil-rights laws.

II. The Mandate Violates Respondents' Rights Under RFRA.

The contraceptive-coverage mandate violates Respondents' RFRA rights. RFRA requires the government to justify actions that "substantially burden" religious exercise by demonstrating that the specific burden is "the least restrictive means of furthering" a "compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The mandate substantially burdens Respondents' religious exercise by coercing them—under threat of multi-million dollar fines—to violate their sincere belief that they cannot provide the four drugs and devices at issue. Indeed, the government itself understands the mandate's profound impact on believers, which is why it exempts certain religious groups, including some that have incorporated, from the mandate. The government's willingness to exempt others—and many for reasons as mundane as administrative convenience—dooms its efforts to meet strict scrutiny. The contraception mandate is the very antithesis of the kind of rigorously uniform requirement which admits no exceptions. And RFRA makes plain that the willingness to make exceptions for secular reasons estops the government from refusing to alleviate substantial burdens on sincere religious beliefs.

A. The Mandate Substantially Burdens Respondents' Exercise of Religion.

The substantial burden inquiry proceeds in two logical steps. The Court first must identify the sincere religious exercise at issue. Then, it must determine whether the government has placed substantial pressure on the plaintiff to abstain from that religious exercise. See, *e.g.*, *Korte* v. *Sebelius*, 735 F.3d 654, 682-85 (7th Cir. 2013); *Gilardi* v. *HHS*, 733 F.3d 1208, 1216-18 (D.C. Cir. 2013); Pet.App.50a-51a; see also *O Centro*, 546 U.S. at 428; *Thomas* v. *Review Bd.*, 450 U.S. 707, 718 (1981); see generally U.S. Conference of Catholic Bishops *Amicus* Br.15-32 (describing substantial burden analysis). Only the second step is at issue here.

1. Respondents' religious beliefs prohibit them from providing coverage for contraceptives that risk

destroying a human embryo. As the government concedes, the mandate coerces Respondents to do just that, by requiring them to cover four types of contraceptives that may prevent uterine implantation of an embryo. See Pet.Br.9 n.4; see also Pet.App.10a n.3 ("no material dispute" on this issue). In Respondents' view, offering these items in their health plan makes them complicit in abortion. See JA127, 139 (Respondents cannot "participat[e] in, provid[e] access to, [or] pay[ ] for * * * abortion-causing drugs and devices," including "deliberately providing insurance coverage for * * * [such] drugs or devices"). Thus, Respondents' objection under RFRA is to the mandate's requirement that they provide these specific drugs in Hobby Lobby's health plan, in violation of their faith. See, *e.g.*, Pet.App.53a ("Hobby Lobby and Mardel have drawn a line at providing coverage for drugs or devices they consider to induce abortions."). And the government concedes that these beliefs are "sincere" and "entitled to respect." Pet.Br.32.

Respondents' unwillingness to facilitate acts they regard as immoral is plainly an "exercise of religion" under RFRA.[16] See 42 U.S.C. § 2000cc-5; 2000bb-2(4) ("exercise of religion" under RFRA "includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief"). This Court has recognized that religious exercise often involves "abstention from * * * physical acts." *Smith*, 494 U.S. at 877; see also *Thomas*, 450 U.S. at 715. And Respondents' belief that their religion draws a moral line at providing insurance coverage is not open to judicial re-examination. The government acknowledges this much, see Pet.Br.32 (citing *Thomas*)), as indeed they must, given that they have recognized the profound impact the mandate has on some believers by offering exemptions to entities with precisely the same objection as Respondents. See, *e.g.*, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011).

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[16] See 38 Protestant Theologians' *Amicus* Br.24-25; 67 Catholic Theologians' *Amicus* Br.2-3; Orthodox Union *Amicus* Br.5-6.

2. Given the draconian penalties for non-compliance, there can be no doubt that the mandate substantially burdens Respondents' exercise of religion. Indeed, the mandate and its multi-million dollar enforcement penalties are the paradigmatic substantial burdens.

A law substantially burdens religious exercise when it pressures a believer to forego a religious practice or violate a religious belief. And this Court has identified "substantial burdens" in far less onerous circumstances than these. In *Sherbert* and *Thomas*, for instance, the Court found such pressure in the unavailability of unemployment benefits. See *Sherbert*, 374 U.S. at 404 (concluding "the pressure upon [a Seventh-day Adventist] to forego [abstaining from Saturday work] is unmistakable"); *Thomas*, 450 U.S. at 717-18 (law's "coercive impact * * * put[ ] substantial pressure on [a Jehovah's Witness] to modify his behavior and to violate his beliefs" by participating in manufacturing tanks). Even though the compulsion was indirect, this Court held that "the infringement upon free exercise [wa]s nonetheless substantial." *Id.* at 718.

But "a fine imposed" for adherence to religious beliefs is as direct and obvious a burden as one could imagine. *Sherbert*, 374 U.S. at 404. Fining someone for an act or omission compelled by faith is the paradigmatic substantial burden against which all other less direct impositions are compared. Thus, *Yoder* found a "severe" and "inescapable" burden where a law "affirmatively compel[led]" Amish parents to send their children to high school, or else be "fined the sum of $5 each." 406 U.S. at 208, 218. Similarly, *Lee* found a law "interfere[d] with * * * free exercise rights" by compelling an Amish carpenter to participate in the social security system against his beliefs or face a $27,000 tax assessment. 455 U.S. at 257; see also, *e.g.*, *Hernandez* v. *Comm'r*, 490 U.S. 680, 699 (1989) (*Lee* involved a "substantial burden").[17]

The penalties imposed by the mandate make *Yoder*'s $5-per-child penalty look quaint. If Respondents continue to offer their current health plan, which comports with their religious beliefs but not the mandate, Respondents face fines of $100 per affected individual per day, which could total "over $1.3 million per day, or close to $475 million per year." Pet.App.51a; 26 U.S.C. § 4980D; JA126 (over 13,000 full-time employees). If Respondents drop insurance altogether, they would face annual penalties of $2,000 per employee, or more than $26 million, 26 U.S.C. § 4980H, and "put themselves 'at a competitive disadvantage in [their] efforts to recruit and retain employees," while undermining their faith-based interest in providing adequate benefits. Pet.App.51a (quoting JA153). Additionally, failure to comply with the mandate would open Respondents to costly private lawsuits and government enforcement under ERISA. See 29 U.S.C. § 1132(a)(1), (2), (5). It is thus impossible "to characterize the pressure as anything but substantial." Pet.App.51a. Since the government "did not question the significance of th[is] financial burden," the court of appeals correctly found a substantial burden "as a matter of law." Pet.App.52a.

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[17] The Tenth Circuit correctly held that government substantially burdens religious exercise if, *inter alia*, it "places substantial pressure on an adherent * * * to engage in conduct contrary to a sincerely held religious belief." Pet.App.45a (citing *Abdulhaseeb* v. *Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010)). Other circuits have adopted similar formulations. See, *e.g.*, *Bethel World Outreach Ministries* v. *Montgomery Cnty. Council*, 706 F.3d 548, 555-56 (4th Cir. 2013). In contrast, the Seventh Circuit has held that a substantial burden "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise * * * effectively impracticable." *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). The Tenth Circuit declined to follow this formulation, Pet.App.56a n.18, as have other circuits. See, *e.g.*, *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).

Finally, the government's insistence that the burden here is insubstantial is difficult to square with its own felt-need to alleviate the same burdens experienced by others. After all, religious objections to the mandate were no surprise. The government knew it was treading on sensitive territory when it imposed a mandate concerning topics as fraught with religious controversy as abortion and contraception. Recognizing the inevitability of religious conflict, the government exempted certain non-profit entities and accommodated others. Having done so, the government is poorly positioned to deny that the mandate imposes a substantial burden on Respondents too.

This is not to say that if the government accommodates some religious exercise it must accommodate all. Conceivably, the government could accommodate some religious objectors in particular circumstances and yet justify refusing to accommodate others with the same beliefs by satisfying strict scrutiny. But logically the government cannot accommodate the religious exercise of some while denying that the law substantially burdens others engaged in the exact same religious exercise.

3. The government offers no coherent response to this straightforward substantial burden analysis. Rather than follow this Court's actual guidance from *Thomas*, *Lee*, and other cases, it proposes a list of newfound "principles" that should "guide[]" the Court—such as whether the relationship between Respondents' injury and the mandate is "too attenuated," and whether their claims involve "actions and rights of independent actors and affected third parties." Pet.Br.32-33. Indeed, the closest the government comes to an actual standard is this masterpiece of obfuscation:

> [A] proffered burden may be deemed not substantial in cases where the nature of applicable legal regimes and societal expectations necessarily impose objective outer limits on when an individual can insist on modification of, or heightened justifications for, governmental programs that may offend his beliefs.

Id. at 33. This tortured standard has no mooring in RFRA's plain text or in this Court's pre-*Smith* cases and is a far cry from *Yoder*'s simplicity, where a mandate and penalty were the quintessential substantial burden even when the fine was a mere $5.

The government's suggested guideposts and factors have no place in the substantial burden analysis. Indeed, to the extent they are relevant at all, they implicate distinct components of a RFRA claim. The government's "attenuation" concern, for example, is at best a backdoor effort to question the sincerity of Respondents' beliefs, which the government has wisely conceded. The major premise of its "attenuation" argument is that the burden is insubstantial because Respondents are merely required to "pay[ ] money into an undifferentiated fund to finance covered benefits" that employees may "independent[ly]" elect to use. *Ibid.* But that premise is incorrect. The mandate does not require the funding of health care accounts for whatever services the employee needs. It unambiguously requires Respondents to cover specifically-named items in their health plan. 42 U.S.C. § 300gg-13(a)(4) (authorizing HRSA to recommend "additional preventive care and screenings"). Indeed, the whole point of the mandate is to require cost-free coverage of *particular* services—a point the government recognizes in its brief. Pet.Br.50 ("Congress's objective [was] to increase access to recommended preventive services by eliminating all associated out-of-pocket costs.").

The balance of the government's "attenuation" argument simply ignores the nature of Respondents' religious-based objection and the government's own concession that the objection is sincere. Respondents object to the government's mandate that they provide religiously-objectionable drugs and devices. It is irrelevant that the ultimate decisions to use the mandated drugs "are made by * * * plan participants and beneficiaries." Pet.Br.33. The government's suggestion otherwise misunderstands the nature of its own mandate and Respondents' religious objection. As the court of appeals correctly explained, "[i]t is not the employees' health care decisions that burden [Respondents'] religious beliefs, but the government's demand that Hobby Lobby and Mardel *enable access* to contraceptives that [they] deem morally problematic." Pet.App.53a (emphasis added). Put differently, Respondents have never filed suit regarding any decisions by their employees. Respondents sued only when the government forced Respondents to provide specific drugs and devices in violation of their faith.

The most fundamental problem, though, with the government's "attenuation" argument is that it invites "an inquiry into the theological merit of the belief in question rather than the *intensity of the coercion* applied by the government to act contrary to those beliefs." Pet.App.44a. At bottom, the government insinuates that Respondents simply misapprehend their own beliefs because their employees' use of the objectionable items cannot be attributed to Respondents "in any meaningful sense." Pet.Br.33. But that is not how Respondents see it: they sincerely believe that *providing* the coverage makes them morally complicit. And that belief is not open to question here. See, *e.g.*, *Smith*, 494 U.S. at 887 ("[r]epeatedly * * * we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim"); *Lee*, 455 U.S. at 256-57 ("[i]t is not within 'the judicial function and judicial competence' * * * to determine whether appellee or the Government has the proper interpretation of the Amish faith"); *Thomas*, 450 U.S. at 715-16 (because Jehovah's Witness "drew a line" against participating in tank manufacturing, "it is not for us to say that the line he drew was an unreasonable one"). It is not for the government to insist that Respondents' faith should have reached a conclusion more convenient for the government's regulatory goals.

The cases the government cites provide no support. *Tilton* v. *Richardson*, 403 U.S. 672 (1971), and *Board of Education* v. *Allen*, 392 U.S. 236 (1968), rejected free exercise challenges to tax dollars flowing to religious entities because, in both cases, the plaintiffs failed to identify any religious practice subject to government coercion. See *Tilton*, 403 U.S. at 689; *Allen*, 392 U.S. at 249.[18] Quite obviously that is not true here. Respondents do not object to their tax dollars being used by the government to subsidize practices with which they disagree. They object to the government forcing *them* to facilitate such services directly or face draconian penalties. Similarly inapposite is the government's citation to *Bowen* v. *Roy*, 476 U.S. 693 (1986), which held that the government did not violate free exercise rights when it assigned a social security number to the plaintiff's child. There was no burden in *Bowen* because the challenged action did not "place[ ] any restriction on what [plaintiff] may believe or what he may do." *Id.* at 699. But *Bowen* was clear that "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion." *Id.* at 700. Here we have the exact opposite of *Bowen*: the *government* seeks to dictate *private* conduct by compelling Respondents to offer religiously-objectionable services, a textbook substantial burden on religious exercise.[19]

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[18] Similarly, *Hernandez*, 490 U.S. at 700, merely suggested there was no burden on religious exercise where plaintiffs did not claim coercion but only that "an incrementally larger tax burden interferes with their religious activities."

The government's invocation of the effect on third-parties also has no place in the substantial burden inquiry. The substantial burden test quite obviously focuses on the burden to the objectors and their religious beliefs. The effect on others of allowing the religious objectors to opt out of a program is properly considered in evaluating whether the government has carried its burden under strict scrutiny, but it does not affect whether there is a substantial burden. Thus, folding concerns about "affected third parties," Pet.Br.33, into the substantial burden inquiry is a category mistake that improperly shifts the government's burden to the believer. Moreover, any relevant adverse impact on third parties must flow from allowing religious objectors to opt out of the otherwise comprehensive program. In a situation like this, where the government program forces one party to provide a benefit to another, the loss of that benefit is not the kind of impact on third parties that should matter. From the perspective of RFRA, a hypothetical government mandate that a person mow his lawn on Sundays should be analyzed no differently from a mandate that the same person mow his neighbor's lawn on Sundays. The fact that the neighbor loses free yard work in one scenario does not alter the substantial burden analysis in the least.

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[19] The government's reliance on *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), is also misplaced. *Zelman* upheld a school voucher program under the Establishment Clause; it says nothing about whether the mandate burdens Respondents' free exercise rights—let alone limits the "moral culpability for the religious believer[s]" to "the government's legal culpability in the Establishment Clause * * * context." Pet.App.55a.

B. The Mandate Fails Strict Scrutiny.

The mandate does not satisfy strict scrutiny. Under RFRA, the government must prove that burdening the claimant's religious exercise is "the least restrictive means of advancing a compelling interest." *O Centro*, 546 U.S. at 423 (citing 42 U.S.C. § 2000bb-1(b)). This is "the most demanding test known to constitutional law," *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997), and the government cannot meet it here.

The government's asserted interests are woefully deficient. The interests identified in the lower courts—public health and gender equality—are overly general, when RFRA requires specificity. And the government's newly-identified interest in ensuring "a comprehensive insurance system," Pet.Br.38, is both forfeited and inapposite. In RFRA, Congress clearly wanted to vindicate religious exercise, even with respect to laws of general applicability. At the same time, the strict scrutiny standard recognizes that not all laws of general applicability are created equal. For a small subset of laws, like social security, the government may be able to show that its need for a truly comprehensive system means it cannot make an exception even for what Congress has deemed the best of reasons. But the mandate with its manifold exemptions is not a law of general applicability, and it is the very antithesis of the kind of truly comprehensive program that can admit only minimal exceptions. When the government allows exceptions for all manner of reasons, including administrative convenience, RFRA makes crystal clear that the government cannot deny exemptions necessary to avoid a substantial burden on religious exercise.

1. The government has not established a compelling interest.

To demonstrate a compelling interest, the government must show that the mandate furthers interests "of the highest order." *Lukumi*, 508 U.S. at 546. This determination "is not to be made in the abstract" but "*in the circumstances of this case*." *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 584 (2000). Further, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664 (1994). RFRA requires specificity: the government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)). Thus, this Court will not find a compelling interest where the government has already granted broad exceptions under the law at issue. See, *e.g.*, *O Centro*, 546 U.S. at 433-34.

1. The government fails to meet this demanding burden. As it did below, the government argues that the mandate is the least restrictive means of advancing compelling interests in "public health and gender equality." Pet.Br.15, 46-51. But it makes no attempt to justify these "broadly formulated interests" with respect to the specific burden on Respondents' religious exercise, as RFRA requires. *O Centro*, 546 U.S. at 431. Nor could it. These compelling interests are at such a high level of generality that they defy meaningful application of strict scrutiny. While public health and gender equality are noble interests, they provide no better guidance in applying strict scrutiny than the equally noble interest in promoting the general welfare. There are countless other ways of promoting public health that would have little or no impact on anyone's religious exercise.

The government's reliance on general findings in the IOM Report does not save its public health argument. See Pet.Br.5. If anything, it undermines this asserted interest. Most fundamentally, the fact that the mandate derives from recommendations of the IOM—a "semi-private" organization—underscores that Congress did not deem a contraception mandate strictly necessary to promote public health, let alone consider the necessity of including the four specific drugs and devices to which Respondents object.[20]

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[20] Indeed, Congress treated the mandate as a lesser-value goal by requiring even grandfathered plans to comply with some ACA requirements (such as the prohibition on lifetime limits and the extension of young adult coverage), but not with the mandate. See 42 U.S.C. § 18011 (requiring grandfathered plans to comply with 42 U.S.C. § 300gg-11, 300gg-12, and 300gg-14, but not 42 U.S.C. § 300gg-13).

Moreover, the IOM Report does not even discuss the necessity of *covering* specific contraceptive methods in employer-provided health plans.[21] HHS never asked the IOM to make recommendations about "coverage decisions," which the Report noted "often consider a host of other issues, such as * * * ethical, legal, and social issues; and availability of alternatives." IOM Report at 6-7; *id.* at 2 (HRSA charge). In fact, HHS ordered the IOM to *exclude* coverage-relevant considerations like "cost effectiveness." *Id.* at 3.

The government's generally-stated interest in gender equality fares no better. Putting to one side the oddity of a claim that mandating contraceptives for women but not men is strictly necessary to promote gender equality, this asserted interest remains hopelessly general. The government relies entirely on boilerplate assertions that "women have different health needs than men," and therefore face higher costs than men, which they "may not be able to afford." Pet.Br.49-51. These broad assertions would justify virtually any forced subsidization of health care costs for women, but they hardly suffice to demonstrate that forcing Respondents to provide four drugs and devices is strictly necessary to promote gender equality. The government has thus failed even to argue, much less demonstrate, that Respondents' practice of covering most contraceptives along with the vast majority of women's preventive care—while merely excluding the four items at issue here—triggers any gender equality interest at all, much less a compelling one.

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[21] The government also fails to articulate a public health justification for two of the products Respondents do not cover, Plan B and Ella. Instead, it merely asserts that "contraceptive methods are not interchangeable," and that certain IUDs are more effective than others—without any evidence that Respondents' inability to cover the four objectionable products actually creates a compelling public health problem in need of remedy. Pet.Br.48.

The government's failures in this regard are fatal. Strict scrutiny requires real evidence of an "actual problem in need of solving." *Brown* v. *Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (quotation omitted). But the government has offered *no* proof that Respondents' exclusion of these four contraceptives threatens public health or gender equality at all. See *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 821 (2000) (noting that, "[w]ithout some sort of field survey, it is impossible to know how widespread the problem in fact is"). Because the government "bears the risk of uncertainty" under strict scrutiny, "ambiguous proof will not suffice." *Brown*, 131 S. Ct. at 2739. The government has not carried its heavy burden.[22]

This is not the first time the federal government has incorrectly relied on such overbroad interests. In *O Centro*, the government opposed a RFRA exemption for a group's religious use of a tea (*hoasca*) containing DMT, a Schedule I narcotic under the Controlled Substances Act ("CSA"). 546 U.S. at 425 (citing 21 U.S.C. § 812(c)). The government argued that the CSA's conclusion that Schedule I narcotics are unsafe and susceptible to abuse was a sufficiently compelling reason to deny individualized exemptions under the statute. *Id.* at 430. But this Court rejected that argument because RFRA requires this Court to "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 430-31. Applying that "more focused" inquiry, this Court held that DMT's placement under Schedule I did not "relieve[ ] the Government of the obligation to shoulder its burden under RFRA." *Id.* at 430-32. First, there was no showing that Congress had "considered the harms posed by the particular use [of DMT] at issue [t]here—the circumscribed, sacramental use of *hoasca*." *Ibid.* Second, the Schedule I listing could not carry "determinative weight," because the CSA authorized individual exemptions from its requirements. *Id.* at 432-33. Third, Congress had already made such an exemption for Native Americans' religious use of peyote, also a Schedule I narcotic. *Id.* at 433-34.

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[22] To the extent the government argues that mandating coverage of these four items somehow *marginally* advances its public health interests, "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown*, 131 S. Ct. at 2741 n.9.

Those same basic problems bedevil the government's reliance on broad interests in public health and gender equality. Even if the mandate promotes those interests, the salient question is whether the religious accommodations RFRA would otherwise compel fatally undermine those interests. In *O Centro*, a single exemption for another Schedule I substance was fatal to the government's effort to invoke the statute's broader goals. Here, the statute is silent on the need for mandatory contraception coverage, the regulations envision exemptions, and numerous exemptions have been granted. If it really were strictly necessary to both public health and gender equality for all employers to pay for these four drugs and devices, it would be well-nigh inexplicable that the government allows so many employers to decline to provide this assertedly indispensable subsidy. "[A] law cannot be regarded as protecting an interest of the highest order * * * when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (quotation omitted). As explained by the Tenth Circuit—and as confirmed by every court to address strict scrutiny—the mandate is subject to a wide variety of exceptions that undermine any claim that the government's interests are compelling. Simply stated, "the contraceptive-coverage requirement presently does not apply to tens of millions of people." Pet.App.58a; Judicial Education Project *Amicus* Br.5 n.2 (collecting cases).

For example, many employers are not required to cover any contraceptives at all, including those offering "grandfathered" plans, 42 U.S.C. § 18011, and those with fewer than fifty employees (who are not required to offer health insurance to begin with), 26 U.S.C. § 4980H(c)(2)(A).[23] In addition, HHS has already granted religious exemptions for other entities (including corporations) pursuant to express regulatory authority to do precisely what it claims this Court cannot do: "establish exemptions * * * with respect to any requirement to cover contraceptive services." 45 C.F.R. § 147.130(a)(iv)(A); 147.131(a).[24]

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[23] The government insists that grandfathering is "transition[al]," Pet.Br.53, but, as the court of appeals pointed out, plans may remain grandfathered "indefinitely," Pet.App.13a. Grandfathered plans may add new beneficiaries, change insurance issuers, and enter into new insurance contracts. 45 C.F.R. § 147.140(a)(1)(i); (b). The co-pay limits for grandfathered plans are indexed to medical inflation. *Id.* § 147.140(g)(iv).

These numerous exceptions belie the government's claim that the mandate is strictly necessary to further compelling interests in public health, gender equality, or anything else. Government programs necessary to furthering compelling interests do not provide express and open-ended regulatory authority to grant exemptions. Nor do they typically provide "grandfather" clauses that permit the supposedly vital subsidy to be phased in over time (or never at all) to accommodate the administrative convenience of both regulators and regulated.

2. The mandate's numerous exemptions also fatally undermine the government's newly-identified interest in ensuring a "comprehensive insurance system." Pet.Br.38-46. The government did not invoke this compelling interest below and the argument is thus forfeited. But the reason the government did not invoke it below is that the asserted interest is a complete misfit. The mandate, honeycombed with religious and secular exemptions,

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[24] The government warns that, if the Court finds these exemptions undermine its compelling interests, this "would *discourage* the government from accommodating religion." Pet.Br.52. But "[t]he Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *O Centro*, 546 U.S. at 436. RFRA requires "case-by-case consideration of religious exemptions to generally applicable rules." *Ibid.* Here, the numerous exemptions already given show the government lacks a compelling interest in denying a religious exemption to Respondents.

is the antithesis of the kind of government program whose demands for true comprehensiveness and uniformity can admit no exceptions. Given the mandate's myriad exemptions, invoking a compelling interest in a "comprehensive insurance system," Pet.Br.38, 46, is like invoking a compelling interest in maintaining an impenetrable barrier to justify a sieve.

The exceptions for the religious exercise of other groups and for grandfathered plans are devastating to the government not just because they undermine the strength of its late-breaking interest. They are devastating because RFRA itself demands that the government consider the feasibility of making exceptions to otherwise general rules in order to accommodate religious exercise. Thus, as this Court emphasized in *O Centro*, RFRA utterly rejects "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." 546 U.S. at 436. To the contrary, "RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rules of general applicability.'" *Ibid.* (quoting 42 U.S.C. § 2000bb-1(a)). Under that demanding test, the government's ability to grant one exception—there, for peyote—without fatally undermining the statutory goals doomed the government's ability to refuse another exception when doing so would remove a substantial burden on religious exercise. Here, not only has the government already granted myriad exemptions covering millions, but its justification for many of those is mere administrative convenience, which is all that supports the grandfather clause. In light of that, the government's authority to decline to alleviate the substantial burden on Respondents is nil.

The mandate's numerous exceptions make the government's reliance on *Lee* profoundly puzzling. *Lee* involved an Amish employer who objected to paying social security taxes for his Amish employees. While this Court found a substantial burden and was unfazed by the commercial context, it nonetheless held that "[t]he design of the [social security] system requires support by mandatory contributions from covered employers *and* employees," and that "mandatory participation is indispensable" to the system's "fiscal vitality." *Lee*, 455 U.S. at 258 (emphasis added). As the government explained to this Court in *Lee*, the "social security system was established when private systems of voluntary support collapsed under the burden of all those who had no other means of survival," and the system "could not exist" with broad exemptions. Gov't Br.*27-28, *United States* v. *Lee*, No. 80-767, 1981 WL 389829 (U.S. June 5, 1981). "Widespread individual voluntary coverage" would be "difficult, if not impossible, to administer." *Lee*, 455 U.S. at 258.

Lee simply recognizes what is implicit in RFRA. Some laws demand virtually uniform and universal participation. In those rare cases, the government might be able to show that opt outs—even for the best of reasons—are incompatible with its objectives. See generally *O Centro*, 546 U.S. at 435 (explaining government can demonstrate compelling interest in uniform application only "by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program") (discussing *Lee* and *Braunfeld*). But the mandate is nothing like social security. The exceptions the government itself has allowed, for religious and non-religious reasons alike, conclusively demonstrate that the mandate is perfectly compatible with the religious exemptions required by RFRA.

The government's related newfound argument that it has created private enforcement rights for third parties under ERISA is likewise both forfeited and deeply flawed. The government claims that granting Respondents a RFRA exemption would "disrupt" its preferred allotment of rights, and would "deprive participants and beneficiaries of statutorily-guaranteed benefits." Pet.Br.43. But this argument does little more than describe why the program substantially burdens Respondents' religious exercise. The fact that the government requires a qualifying health plan to provide these objectionable products and allows employees to use ERISA to enforce the requirement hardly strengthens the government's case. If anything, subjecting Respondents to private enforcement actions on top of government penalties only underscores the substantiality of the burden.

The government's reliance on ERISA fails for two other reasons. First, an exemption for Respondents would not stop the government from using any of the myriad available alternatives to provide access to the products at issue. Second, not receiving coerced coverage from Respondents cannot be a cognizable harm, because nobody is lawfully entitled to a "benefit" from a regulatory scheme that violates RFRA. Religious exemptions to laws forcing nurses to assist with abortions, bookstores to sell Bibles, or convenience stores to sell liquor would all just as surely "deprive" someone of a "statutorily-guaranteed benefit." But that kind of impact on third parties should be irrelevant to the RFRA analysis. Any time a statute takes the form of a mandate that party A must do something for party B, granting a RFRA exemption to party A will make party B worse off. But there is no reason whatsoever to treat exemptions from such Peter-to-Paul mandates as uniquely disfavored under RFRA.[25]

Finally, the government's interest in "ERISA rights" suffers the same fundamental problem as its other failed interests—namely the mandate's exemptions for religious and non-religious employers. Exempted employers may exclude the four items at issue here without fatally undermining ERISA or any other compelling interest. Of course, those plans do not violate ERISA by not offering the mandated coverage, but that is the whole point. The government's ERISA-based argument is nothing more than a description of its own mandate system, which can and does make exceptions for religious and non-religious employers.[26] RFRA simply mandates a further exception for Respondents when, as here, it is necessary to eliminate a substantial burden on sincerely held religious beliefs.[27]

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[25] Contrary to the government's suggestion, Pet.Br.40-41, *Sherbert* and *Yoder* both rejected the argument that a religious exemption was unavailable because it would burden third parties. In *Sherbert*, the state claimed that an exemption from the unemployment system would lead to "spurious claims" that could "dilute the unemployment compensation fund" and burden employer scheduling. 374 U.S. at 407. In *Yoder*, the state claimed an exemption from the compulsory attendance law would burden "the substantive right of the Amish child to a secondary education." 406 U.S. at 229-31. Applying strict scrutiny in both cases, the Court found the state failed to prove those burdens would actually flow from the exemptions and also that the state could not alleviate them through less restrictive means. See, *e.g.*, *Sherbert*, 374 U.S. at 408 (it would "plainly be incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights").

2. The mandate is not the least restrictive means of achieving the government's asserted interests.

Even if it could offer actual evidence that Respondents' religious exercise threatened a compelling government interest, the government has not proven that its refusal to exempt Respondents is the least restrictive means of achieving that interest. Under strict scrutiny, the government must "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert*, 374 U.S. at 407. If a less restrictive alternative would serve its purpose, the government "must use that alternative." *Playboy Entm't Group*, 529 U.S. at 813.

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[26] This uniformity argument is further undermined by the fact that Congress chose not to make ERISA applicable to all plans. For example, as the government explained in *Little Sisters of the Poor et al.* v. *Sebelius*, Congress provided that "'church plan[s]' * * * are exempt entirely from regulation under ERISA," unless they elect otherwise. Gov't Br.15, *Little Sisters*, No. 13A691 (U.S. Jan. 3, 2014); see also Letter from the Church Alliance to HHS 2 (Apr. 8, 2013), http://church-alliance.org/sites/default/files/images/u2/comment-letter-4-8-13.pdf (church plans cover "approximately one million participants" from more than 155,000 churches, synagogues, and affiliated organizations).

[27] Nor is RFRA protection "incompatib[le]" with ERISA. Pet.Br.43. Indeed, in another mandate case, the government conceded that, in third-party lawsuits under ERISA, religious employers "would be free to raise their religious objections as defenses in that litigation, see, *e.g.*, 42 U.S.C. § 2000bb-1(c), and the plan participant would be free to contest those defenses." Gov't Br., *Wheaton Coll.* v. *Sebelius*, No. 12-5273, 2012 WL 5398977, at *16 (D.C. Cir. Nov. 5, 2012). The government also mischaracterizes lower court authority about whether RFRA applies in private lawsuits (Pet.Br.43-44), which in reality strongly supports what it told the D.C. Circuit in *Wheaton*. Judicial Education Project *Amicus* Br.24-25.

The government ignores these familiar standards. The only asserted interests the government has preserved are pitched at such a high level of generality that they defy the least restrictive means analysis. There are literally thousands of ways for the government to advance general interests in promoting public health and gender equality without implicating Respondents' religious exercise. The conflict here arises only because the government has chosen the hardly obvious path of forcing Respondents to pay for religiously-objectionable drugs and devices.

The government's only response is to dilute the least restrictive alternative test with the bald assertion that it "does not require Congress to create or expand federal programs." Pet.Br.57. But the government cites no authority for this statement, which contradicts RFRA's command that *the government* (which surely includes Congress) has the burden of demonstrating that no less restrictive means could achieve its allegedly compelling interest.[28] If Congress had wanted to accommodate religious exercise only where there was no budget-neutral least restrictive alternative or no least restrictive alternative available within the existing corpus of federal programs, presumably it would have said so.

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[28] *Cf. Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (identifying the following less restrictive alternatives

The most obvious less-restrictive alternative is for the government to pay for its favored contraceptive methods itself. See, *e.g.*, 42 C.F.R. § 59.5(a)(1)) (authorizing grants to "[p]rovide a broad range of acceptable and effective medically approved family planning methods * * * and services" through Title X of the Public Health Service Act). And indeed the government has attempted something like that with respect to certain objecting employers. See 78 Fed. Reg. at 39879-80 (outlining accommodation for self-insured religious non-profits). But when the government is disinclined to pay for some favored subsidy and decides to make someone else pay for it—especially when the subsidy touches subjects as religiously sensitive as abortion and contraception—the government cannot be surprised if RFRA poses an obstacle.[29]

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to state's overbroad fundraising disclosure law: (1) creating a new publication program, and (2) expanding the enforcement of existing antifraud laws).

[29] Indeed, employees who want health coverage for the four products at issue here could simply purchase their own policy on the exchanges. See *What if I Have Job-Based Insurance?*, HealthCare.gov, https://www.healthcare.gov/what-if-i-have-job-based-health-insurance/. Employees who decline employer-based insurance are generally not eligible for subsidized premiums, but the government could change that with the stroke of a pen, if it believes its stated interests are compelling enough to do so.

And that is why in the final analysis this is such a straight-forward case under RFRA. The government concedes both that Respondents' beliefs are sincere and that the mandate burdens them. The government's effort to dismiss that burden as insubstantial is belied by the draconian fines for non-compliance and its willingness to accommodate others with the exact same beliefs. That means strict scrutiny applies and under that demanding standard the case is not close. The hard cases under strict scrutiny are those like *Lee* where the mandate at issue is virtually uniform and universal—not a case like this one where the mandate is riddled with exceptions. Indeed, the ultimate question here is not whether there will be an exception to an otherwise uniform mandate, but who will pay for a third-party's religiously-sensitive abortifacients. The government already exempts many employers. And when the government's objectives are perfectly compatible with granting exceptions for reasons both religious and secular, RFRA leaves no room to decline exceptions for others whose sincerely-held religious beliefs are substantially burdened.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY
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In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

No. 13-354

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents have not identified a single case in this Nation's history in which a commercial enterprise has successfully invoked either the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, to secure what respondents seek here: an exemption from a neutral law regulating a for-profit corporation's commercial activities. They point to nothing in our laws and traditions that would support such an exemption. And they all but ignore that the unprecedented step they ask this Court to take would extinguish the statutorily guaranteed rights of the corporations' 13,000 employees (and their covered dependents) to important health benefits that are part of the employees' compensation. So it is remarkable that respondents would open their brief (Br. 1) by saying that this case presents "one of the most straightforward violations of the Religious Freedom Restoration Act this Court is likely to see."

Most strikingly, respondents insist (Br. 55) that the health, dignity, and liberty interests of the corporate-respondents' own 13,000 employees—who may not share respondents' beliefs—"should be irrelevant to the RFRA analysis." To the contrary, when a party seeks a religious exemption from a neutral law, the potential impact on third parties is at the very core of the analysis. In *United States* v. *Lee*, 455 U.S. 252 (1982), for example, the Court's denial of a free-exercise exemption from Social Security taxes to the proprietor of a commercial enterprise rested in significant part on the fact that "[g]ranting an exemption * * * operates to impose the employer's religious faith on the employees" by denying them the statutory protections of the Social Security system. *Id.* at 261; see *Braunfeld* v. *Brown*, 366 U.S. 599, 608-609 (1961) (plurality opinion) (exemption from Sunday closing laws "might well provide" proprietors of commercial enterprises "with an economic advantage over their competitors who must remain closed on that day").

Lee and *Braunfeld* are the very pre-RFRA precedents respondents cite (*e.g.*, Br. 19) as a basis for finding their claims cognizable. Yet respondents miss the essential point of those decisions. The vibrant religious pluralism that the First Amendment (and, by extension, RFRA) protects is a guarantee of freedom of conscience for *all*. *Braunfeld*, 366 U.S. at 606 (plurality opinion) ("[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference."). For that very reason, these provisions cannot be invoked to justify religious exemptions from neutral laws when those exemptions would come at the expense of other members of society who may hold different beliefs and whose own statutory rights and autonomy, and, indeed, free exercise of religion, may be compromised if such exemptions were granted. As Justice Jackson observed, the "limitations which of necessity bound religious freedom * * * begin to operate whenever activities begin to affect or collide with liberties of others or of the public." *Prince* v. *Massachusetts*, 321 U.S. 158, 177 (1944) (opinion of Jackson, J.); see *Lee*, 455 U.S. at 261 (holding that when people "enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity").

Indeed, even before RFRA and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, were enacted, this Court made clear that a statutorily granted religious accommodation may violate the Establishment Clause if the burden of providing the accommodation falls on third parties. *Estate of Thorton* v. *Caldor, Inc.*, 472 U.S. 703, 708-710 (1985) (invalidating statute requiring employers to accommodate employee Sabbath observance without regard to burdens on the employer or other employees). The Court unanimously later rejected an Establishment Clause challenge to RLUIPA (whose standard is substantively identical to RFRA's) because "[p]roperly applying RLUIPA, courts *must* take adequate account of the burdens a requested accommodation may impose on [third parties]." *Cutter* v. *Wilkinson*, 544 U.S. 709, 720 (2005) (emphasis added) (citing *Caldor*). Respondents ignore *Cut-*

ter, doubtless because they cannot reconcile their position with *Cutter*'s unambiguous command.

To achieve the unprecedented result they seek, respondents must stretch every operative provision of RFRA well beyond what Congress could reasonably have intended. They would interpret a "person's exercise of religion" (42 U.S.C. 2000bb-1(a)) to include unprecedented claims by for-profit corporations that would predictably give rise to exemptions that burden employees and other third parties, and would generate intractable problems of administration. They would interpret RFRA's substantial-burden test to be satisfied whenever a corporate or individual plaintiff alleges a sincere religious objection to obeying a law that is enforced through non-trivial sanctions. They would interpret RFRA's compelling-interest standard so that it cannot be satisfied if the law challenged is subject to exceptions. And they would interpret RFRA's least-restrictive-means test to require government to step in and pay for any benefit to which employers assert a religious objection.

It is not difficult to imagine the consequences that would follow from adopting respondents' approach. The free-exercise challenge to the minimum wage law this Court rejected in *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, 471 U.S. 290 (1985) (*Alamo Foundation*), would be transformed into a meritorious RFRA claim even if brought by a for-profit corporation. The free-exercise challenge to employer Social Security taxes this Court rejected in *Lee* would likewise be transformed into a meritorious RFRA claim. A for-profit corporation could invoke RFRA to demand an exemption from the Affordable Care Act's requirement that employer health plans cover rubella vaccinations for children and parents, and there would be no basis for distinguishing that claim from the claims now before the Court. Respondents' approach would even allow a for-profit corporation to discriminate in employment, such as by refusing to hire a devout member of a religion other than that of the corporation owner's. See pp. 20-22, *infra* (setting forth analysis under respondents' approach of actual claims for exemptions).

Needless to say, such outcomes are flatly inconsistent with this Court's admonition that the limits people of faith place on their own conduct "are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261. RFRA should not be read to attribute to Congress an intent to accomplish sub silentio the revolution in free-exercise law that respondents seek. Rather, the reading of RFRA's text that best comports with our laws and traditions is one that does not confer exemptions on for-profit corporations from neutral laws regulating their commercial activities, or recognize claims by owners, managers, and directors of such corporations when the relief sought is an exemption for the corporation.

We acknowledge that the Greens' religious beliefs are sincerely held and that they do not check their beliefs at the door when they operate their businesses. And we recognize that in situations involving small closely held corporations owned, directed, and managed by a tightly knit group of individuals, the claim that the corporations' actions reflect the religious commitments of their owners is not without appeal. But respondents cannot articulate a principled justification for allowing claims to proceed in such circumstances that would not also embroil courts in disputes over corporate governance (such as the rights of minority owners) or the meaning and sincerity of religious commitments (such as those made by proxy vote in public corporations)—and that would not, in violation of *Cutter*, also risk harm to vitally important interests of third parties, who likewise do not check their sincerely held beliefs and values at the door when they enter the workplace or seek medical care.

There is no need in this case, however, to decide whether there might be circumstances in which a for-profit corporation (or the corporation's owners on its behalf) might nonetheless advance a cognizable claim of a Free Exercise Clause or RFRA violation. Here, respondents' claim to an exemption should be rejected because this law applies generally to the furnishing of health coverage by employers such as the corporate-respondents and the government has compelling interests in the public health and in safeguarding the statutory rights of the corporate-respondents' 13,000 employees and their dependents to medically and economically valuable benefits.

A. In Enacting RFRA, Congress Did Not, For The First Time, Confer On For-Profit Corporations, Or Their Owners, Directors, And Managers, The Right To Seek Exemptions From Corporate Regulation

It has long been understood that when for-profit corporations are organized as separate legal entities to participate in the commercial world, they "submit themselves to legislation—such as Title VII, the Fair Labor Standards Act, the Americans with Disabilities Act, and the Affordable Care Act—designed to protect the health, safety, and welfare of employees." *Gilardi* v. *United States Dep't of Health & Human Servs.*, 733

F.3d 1208, 1242-1243 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part), petitions for cert. pending, Nos. 13-567, 13-915 (filed Nov. 5, 2013, and Jan. 30, 2014). Congress has authorized certain exemptions for churches and religious organizations in such statutes, but it has never extended such exemptions to any employer operating in the "commercial, profit-making world." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 337 (1987).

1. Respondents contend (Br. 16-33) that Congress departed from that unbroken history by conferring free-exercise rights on for-profit corporations in RFRA, even though the statute's text and legislative history contain no suggestion that such a step was intended. Respondents argue that, by using "the unadorned term 'person' in RFRA," Congress triggered application of the Dictionary Act and thus conferred a cause of action on *all* "corporations, companies, associations, firms, partnerships, societies, and joint stock companies." *Id.* at 16, 25-26 (quoting 1 U.S.C. 1). Because the operative phrase in RFRA is "person's exercise of religion," 42 U.S.C. 2000bb-1(a), however, a court must "construe the term 'person' together with the phrase 'exercise of religion.'" *Gilardi*, 733 F.3d at 1211; 1 U.S.C. 1(terms in Dictionary Act must be read in "context"). The meaning of the statutory text therefore must be informed by "the full body" of "free-exercise caselaw" that preceded *Employment Division* v. *Smith*, 494 U.S. 872 (1990), *i.e.*, the decisions Congress meant RFRA to embody. *Gilardi*, 733 F.3d at 1212.

Significantly, "during the 200-year span between the adoption of the First Amendment and RFRA's passage," this Court "consistently treated free exercise rights as confined to individuals and non-profit religious organizations." Pet. App. 115a (Briscoe, C.J., dissenting in relevant part); accord *Gilardi*, 733 F.3d at 1211-1215. Congress, in adopting a self-described restorative statute, could not have intended it to embody an understanding of religious exercise that was a quantum leap beyond anything that had ever been recognized. See *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The only counter-examples respondents can muster (Br. 20) involve free-exercise claims raised by churches and related religious organizations. But, unlike those entities, for-profit corporations have never been regarded under the Religion Clauses, or in our societal and legal traditions, as institutions with their own freestanding religious identity. They simply are not equivalent to "an 'ecclesiastical corporation'" (*ibid.* (citation omitted)) and have never been thought to be entitled to the "special solicitude" that is afforded "to the rights of religious organizations" through which individuals collectively worship and exercise their faith. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 706 (2012) (*Hosanna-Tabor*). Thus, this Court should hold that RFRA incorporates the longstanding and common-sense distinction between religious organizations, which sometimes have been accorded accommodations under generally applicable laws in recognition of their accepted religious character, and for-profit corporations organized to do business in the commercial world.[1]

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[1] Respondents state (Br. 20) that in *Gallagher* v. *Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961), "five members of the Court assumed that a commercial corporation

2. Respondents cannot overcome the corporate-respondents' inability to secure an exemption by seeking the very same corporate exemption through a RFRA claim asserted by the Greens as individuals. To the contrary, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Lee*, 455 U.S. at 261.

While the Greens are persons who exercise religion, there is a critical separation between the Greens and the corporation they have elected to create. "One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946) (per curiam). Few norms are more deeply ingrained into the fabric of American law than the principle that "a corporation and its stockholders are deemed separate entities." *New Colonial Ice Co.* v.

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owned by four Orthodox Jewish shareholders could challenge a Sunday closing law under the Free Exercise Clause." A plurality of the Court, however, stated expressly that it "need not decide whether appellees have standing" because *Braunfeld*, *supra*, was fatal to their claim on the merits. *Gallagher*, 366 U.S. at 631. Justices Frankfurter and Harlan likewise rejected the claim on the merits without considering whether a for-profit corporation could assert a free-exercise claim. See *ibid.* (incorporating by reference *McGowan* v. *Maryland*, 366 U.S. 420, 459 (1961) (separate opinion of Frankfurter, J.)). In any event, the corporation was not the only party in *Gallagher*; three of the customers were parties as well. See *id.* at 618.

Helvering, 292 U.S. 435, 442 (1934). In case after case, this Court has interpreted federal statutes in a manner that respects this bedrock legal principle. See Gov't Br. 23-26. Respondents cite no contrary example.

Nor can the Greens state a cognizable RFRA claim by declaring that "Hobby Lobby and Mardel act only through the Greens." Resp. Br. 30. All "[a]rtificial entities such as corporations may act only through their agents," and an agent's action "is not deemed a personal act, but rather an act of the corporation." *Braswell* v. *United States*, 487 U.S. 99, 110 (1988). When the Greens act on behalf of the corporations, they do not do so in their personal capacities.

3. Respondents also fail to come to grips with the implications of their interpretation of RFRA's substantial-burden test in the corporate context. Respondents would confine the analysis to two steps: First, the court "must identify the sincere religious exercise at issue," and, "[t]hen, it must determine whether the government has placed substantial pressure on the plaintiff to abstain from that religious exercise." Resp. Br. 34. In other words, a for-profit corporation would establish a substantial burden (and thus require the government to meet RFRA's compelling-interest test) merely by asserting a sincere religious objection to any tax, employment, civil rights, or other law that is enforced by meaningful sanctions.

Respondents identify nothing indicating that Congress intended to ignore background legal principles or to strip RFRA of established and common-sense limitations (such as principles of proximate cause, attenuation, and intervening third-party actions) traditionally used to determine which injuries are legally cognizable and which are not. *Holmes* v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268-269 (1992); see Gov't Br. 32-37; Gov't Br. at 35-38, *Conestoga Wood Specialties Corp.* v. *Sebelius*, No. 13-356 (oral argument scheduled for Mar. 25, 2014) (Gov't *Conestoga* Br.). These are inherent limitations on free-exercise rights in settings in which other persons with their own freedoms and beliefs also participate.

4. Respondents' reading of RFRA would produce intractable problems of administration.

a. Permitting a for-profit corporation to seek exemptions from laws that bind its competitors based on the corporation's asserted religious beliefs or exercise would pose serious problems for corporate governance and free-market competition. See Gov't *Conestoga* Br. at 29-32.

b. Determining the sincerity of claims to religious exercise by commercial enterprises in their own right would also entangle courts in difficult examinations of a corporation's asserted religion. Respondents' amicus Knights of Columbus candidly acknowledges (Br. 22-24) that sincerity inquiries involving for-profit corporations would "present certain challenges," but suggests that they could be resolved by reference to "[s]hareholder votes" and judicial examination of corporate "mission statement[s]," "employee manuals, handbooks, and contracts," the "manner in which [the corporation] conducts its day-to-day operations," and the religious beliefs of the corporation's "clientele or customers." "It is well established," however, "that courts should refrain from trolling through a person's or institution's religious beliefs," *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality opinion). Congress could not have intended RFRA to be interpreted in a way that would routinely lead to such intrusive inquiries, and respondents offer no workable alternative.

c. Respondents' interpretation of RFRA would also seemingly authorize RFRA challenges by corporate employees with religious objections to duties the law places on their employers. Respondents attempt to disavow (Br. 31 n.14) such a "novel 'management standing' rule," Pet. App. 136a (Briscoe, C.J., dissenting in relevant part) (citing *id.* at 86a (Gorsuch, J., concurring)), but they fail to offer any limiting principle that would preclude it. Under that theory, *any* human resources manager of *any* corporation could sue to exempt the corporation from the contraceptive-coverage provision or any other generally applicable law to which he has a religious objection to implementing. But it was settled before RFRA's enactment that an employee cannot obtain, even from his employer, a religious accommodation in the workplace that comes at the expense of other employees, see Gov't Br. 30-31, much less one that would require an exemption *for the employer* from a generally applicable law to prevent any conflict with the employee's personal religious beliefs.

B. Respondents' Claims Would Fail Even If The Contraceptive-Coverage Provision Were Subject To RFRA's Compelling-Interest Test

Even assuming that respondents satisfy the initial requirements for a claim under RFRA, their claim fails because the religious beliefs of the Greens cannot override statutory provisions protecting the interests of the corporations' 13,000 employees.

1. As the government's opening brief explains (at 38-46), the employees of Hobby Lobby and Mardel have their own statutory rights to preventive-services

coverage, which Congress incorporated into the privately-enforceable Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, and the government has a compelling interest in safeguarding those rights.

Respondents contend (Br. 54-55) that the interests of the employees and their covered dependents are "irrelevant"; that the employees and dependents would suffer no "cognizable harm" from respondents' requested exemption; and that the employees and dependents cannot rightfully complain about being denied the benefits of a "Peter-to-Paul mandate[]."

As discussed above, see pp. 1-4, *supra*, the third-party interests to which respondents give the back of the hand actually doom their RFRA claim under this Court's precedents. *Cutter*, 544 U.S. at 720; see *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 80-81 (1977) (rejecting reading of Title VII's religious-accommodation provision that would require work-place accommodation "at the expense of other[]" employees).

This Court has approved certain accommodations under the Free Exercise Clause or RFRA where it is only the government itself that will be directly affected, and the effect on others in society is indirect and diffuse. See, *e.g.*, *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-437 (2006) (*O Centro*). But respondents cite no case (outside of the special context of autonomy for churches and religious institutions, see *Hosanna-Tabor*, *supra*, and *Amos*, *supra*) in which the Court has upheld, much less *required*, an exemption from a generally applicable law where the cost would be borne directly by a group of identifiable individuals, such as the employees and covered dependents here. To the contrary, in *Lee*, where an employer sought an exemption from a direct government assessment, this Court denied it, emphasizing that an exemption would "operate[] to impose the employer's religious faith on the employees," who would lose their benefits if the employer's religious objection to participation in Social Security excused him from his obligations. *Lee*, 455 U.S. at 261.

There is an established distinction between, on the one hand, accommodations by the government itself that may occasionally be called for to guard the freedom and autonomy of individuals and religious institutions and, on the other hand, exceptions from generally applicable laws that would impose harms on the very individuals those laws are designed to protect. That distinction respects the nature of religious accommodation in a "cosmopolitan nation made up of people of almost every conceivable religious preference." *Lee*, 455 U.S. at 259 (citation omitted). There are circumstances in which that "cosmopolitan nation" as a whole should accept the costs of accommodating an individual's religious exercise in order to respect a sphere of autonomy for that exercise. But employees are not required to share the religious beliefs of their employer's owners, and they should not be required to sacrifice their own federally protected rights to ensure that their employer's owners are afforded the fullest possible effectuation of their beliefs.

Virtually any regulation of the employer-employee relationship could be dismissively characterized (Resp. Br. 55) as a "Peter-to-Paul mandate[]": the obligations to pay a minimum wage, to provide a workplace free of threats to health and safety, to permit family and medical leave, to avoid discrimination in hiring and firing. None of those obligations exist independent of federal law, and, by respondents' logic, all could be minimized as compelled transfers of benefits from employer to employee. In enacting RFRA, which is another federal statute, Congress surely did not render the vital rights of employees under the statutory schemes creating such obligations "irrelevant" (*ibid.*) to an employer's demand for an exemption on religious grounds. To the contrary, a commercial employer's ability to freely exercise his religion in the workplace reaches its limit when it collides with the rights of his employees, who are autonomous individuals with rights and freedoms, including religious freedoms, of their own.

In any event, respondents' disparaging characterization of the benefit at issue here is incorrect. Employees typically pay a portion of the premium for their employer-provided health coverage, see Gov't Br. 2, and premiums are calculated based on the scope of coverage. Nor is the employer's share of the premium a gift to the employee; it is instead "part of an employee's compensation package," *Liberty Univ., Inc.* v. *Lew*, 733 F.3d 72, 91 (4th Cir.) (citation omitted), cert. denied, 134 S. Ct. 683 (2013), and one that is particularly advantageous to employers because it is heavily subsidized by the federal government through favorable tax treatment, see Gov't Br. 2; Pet. 2 n.1. Finally, respondents' discussion of "Peter-to-Paul mandates" (Br. 55) is particularly inapt because the contraceptive-coverage provision does not actually impose economic costs on employers. 78 Fed. Reg. 39,877 (July 2, 2013) ("[T]he costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women's health.").

2. As the government has demonstrated, the link between the contraceptive-coverage provision and women's health is supported by ample empirical evidence demonstrating that providing women access to contraceptives without cost-sharing can have significant health benefits for them and their children, and, conversely, that financial barriers to such access can result in significant health problems. Gov't Br. 46-51; see Gov't *Conestoga* Br. at 42-49. Unlike petitioners in *Conestoga* (see 13-356 Pet. Br. at 54-58), respondents here do not dispute the government's showings that access to medically appropriate contraceptives effectively prevents unintended pregnancies and that reducing costs and logistical barriers to obtaining contraceptive services promotes their use. See Gov't Br. 46-51; see also Gov't *Conestoga* Br. 44-48.

Instead, respondents contend that the government relies on only "'broadly formulated interests'" and "makes no attempt to justify" them "with respect to the specific burden on [r]espondents' religious exercise, as RFRA requires." Resp. Br. 46 (quoting *O Centro*, 546 U.S. at 431). That characterization is baffling. As the government explains at length in its opening brief (at 38-46), application of the contraceptive-coverage provision to corporate-respondents is justified because the exemption they seek would directly and tangibly harm those Hobby Lobby and Mardel employees and covered dependents who would choose to utilize the services the plan is required to offer. Those are real people, whose statutory rights, health, and pocket-book interests—not to mention individual dignity and autonomy—are directly at issue "*in the* *circumstances of this case.*" Resp. Br. 45 (citation omitted). Contrary to respondents' apparent view, those known individuals may not be disregarded as mere "abstract[ions]." *Ibid.* (citation omitted).

Respondents contend (Br. 46) that the contraceptive-coverage provision does not advance a compelling interest because Congress itself did not expressly prescribe it in the Affordable Care Act or statutorily enumerate "specific drugs and devices" to be covered. By that logic, there would be no compelling interest supporting *any* of the services encompassed within the preventive-services coverage provision. Congress did not specify any particular services, but instead set out four general categories that must be covered in accordance with the recommendations of medical experts. Gov't Br. 4; Pet. 4-5. Congress did not, for example, enumerate the particular immunizations that must be covered, instead leaving that question to an advisory committee to the Centers for Disease Control and Prevention. Compare 42 U.S.C. 300gg-13(a)(2) (Supp. V 2011) with 75 Fed. Reg. 41,740, 41,745-41,752 (July 19, 2010). Nor did Congress mandate coverage of colorectal cancer screening or other disease-identification services—those were the recommendations of the United States Preventive Services Task Force. Compare 42 U.S.C. 300gg-13(a)(1) (Supp. V 2011) with 75 Fed. Reg. at 41,741-41,744.

Likewise, Congress did not specifically enumerate coverage for screening and counseling for domestic violence, contraceptives, or any other particular preventive services for women, instead incorporating guidelines issued by the Health Resources and Services Administration, 42 U.S.C. 300gg-13(a)(4) (Supp. V 2011), which in turn looked to the experts at the Institute of Medicine for recommendations. The fact that all of the services encompassed by the preventive-services coverage provision are based on the recommendations of medical experts should make them more, not less, worthy of respect.

Respondents contend (Br. 47 n.21) that the government must make a contraceptive-by-contraceptive showing of "public health justification." Again, respondents misunderstand the nature of covered medical services in general and the contraceptive-coverage provision in particular, which entrusts decisions about which services are appropriate to a patient and her healthcare provider, not to an employer or a court. Just as Congress intended coverage for *all* recommended immunizations, 42 U.S.C. 300gg-13(a)(2) (Supp. V 2011), it intended coverage for *all* recommended "preventive care and screenings" for women, 42 U.S.C. 300gg-13(a)(4) (Supp. V 2011).

In any event, there are obvious and powerful public health justifications for coverage of the particular drugs and devices to which respondents object. The government has explained that the IUD is significantly more effective (and significantly more expensive) than many other contraceptive methods. See Gov't Br. 48; Gov't *Conestoga* Br. 46-47. Moreover, unlike other methods, emergency contraceptives such as Plan B and ella allow "women to prevent pregnancy after rape, unprotected sex or the failure of some other contraceptive." Am. Coll. of Obstetricians & Gynecologists Amicus Br. 25. And RFRA claims indistinguishable from respondents' are now pending that involve employer objections to *all* FDA-approved contraceptives. Gov't Br. 49. So ultimately it cannot matter that respondents object to only some, and not all, contraceptives.[2]

3. Respondents contend (Br. 50) that "exceptions" to the contraceptive-coverage provision "undermine any claim that the government's interests are compelling." As respondents' amicus Eugene Volokh has explained, however, the presence of statutory "exceptions" has never been seen "as casting doubt on the strength of the government's interests" in a free-exercise case. *4B. RFRA Strict Scrutiny: The Argument from Secular Exceptions*, The Volokh Conspiracy (Dec. 5, 2013), http://www.volokh.com/2013/12/05/4b-rfra-strict-scrutiny-argument-secular-exceptions/. "Nearly all important laws * * * have a large set of exceptions. Those laws, even when they serve compelling interests, leave appreciable damage to the interests unprohibited. Yet this can't mean that religious exemptions must be granted from such laws." *Ibid.* (discussing exceptions in laws governing taxes, the draft, statutory rape, contract, and copyright); see Gov't Br. 52, 54-55.

Given the ubiquity of statutory exemptions, respondents' argument, if accepted, would entitle commercial employers with religious objections to opt out of virtually every statute protecting their employees. Here are just a few examples:

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[2] Respondents refer to the drugs and devices to which they object as "abortifacients," *e.g.*, Resp. Br. 15, and their religious view of what constitutes abortion is of course entitled to respect. Nonetheless, as the government has explained, see Br. 10 n.4, these drugs and devices do not cause abortions within the meaning of longstanding federal law. As the Institute of Medicine explained, one benefit of access to all FDA-approved contraceptives is that they *reduce* the incidence of abortion. Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 105 (2011); see 78 Fed. Reg. at 39,872.

- An employer that, "based on an interpretation of the Bible," believes it cannot hire a "single woman working without her father's consent" or "a person whose commitment to a non-Christian religion is strong," *McClure* v. *Sports & Health Club, Inc.*, 370 N.W.2d 844, 847 (Minn. 1985), appeal dismissed, 478 U.S. 1015 (1986), would be entitled to a RFRA-based immunity from federal anti-discrimination laws because those laws include significant exceptions. See 42 U.S.C. 2000e(b) (Title VII exception for employers with fewer than 15 employees)[3]; 42 U.S.C. 2000e-1(a) (exception to Title VII's prohibition on religious discrimination for "religious corporation[s]" and similar entities).[4]

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[3] Nearly 79% of firms that employed others in 2008 had nine or fewer employees, while more than 89% of those firms had 19 or fewer employees. See U.S. Census Bureau, U.S. Dep't of Commerce, *Statistics about Business Size (including Small Business)*, tbl. 2a (2008), https://www.census.gov/econ/smallbus.html.

[4] As *McClure* makes clear, this example is not hypothetical. Indeed, one of respondents' amici expressly urges the Court to use this case to resolve what it describes as the "growing conflict between religion and nondiscrimination principles" in favor of religion. See Liberty, Life, & Law Found. Amicus Br. 13. Similar arguments were recently advanced in favor of an amendment to Arizona's state-level RFRA, Ariz. Rev. Stat. Ann. §§ 41-1493 *et seq.* (2011); see S.B. 1062, 51st Leg., 2d Reg. Sess. (Ariz. 2014), which was vetoed by the Governor. See Letter from Janice K. Brewer, Governor, State of Ariz., to the Hon. Andy Biggs, President of the Ariz. State Senate (Feb. 26, 2014), http://azgovernor.gov/dms/upload/PR_022614_SB1062VetoLtr.pdf. As counsel for respondents' amicus Christian

- RFRA could be invoked to furnish an exemption to an employer with a religious objection to compliance with minimum-wage or overtime laws, see *Alamo Foundation*, 471 U.S. at 303, because those laws do not apply to all employees or employers. See Office of the Assistant Sec'y for Policy, U.S. Dep't of Labor, *Fair Labor Standards Act Advisor: Exemptions*, http://www.dol.gov/elaws/esa/flsa/screen75.asp (last visited Mar. 5, 2014) (listing more than 40 exempt categories).

- An employer with a religious objection to paying Social Security taxes for its employees, see *Lee*, 455 U.S. at 255 & n.3, would also be entitled to a RFRA opt-out because there are numerous statutory exemptions to that obligation. See *id.* at 260 (discussing exemption for "self-employed Amish and others"); 26 U.S.C. 3121(b) (providing 21 exemptions from obligation to pay Social Security taxes, including for state and local governments and churches with religious objections).

Legal Society has explained, the vetoed Arizona bill would have expressly codified as a matter of state law respondents' interpretation of the federal RFRA, *i.e.*, an extension of free-exercise rights to all corporations and recognition of a RFRA defense in litigation between private parties. See David Bernstein, *Guest post from Prof. Doug Laycock: What Arizona SB 1062 actually said*, The Wash. Post (Feb. 27, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/27/guest-post-from-prof-doug-laycock-what-arizona-sb1062-actually-said/; see also Gov't Br. 43-45 (discussing court of appeals decisions holding that RFRA does not apply in litigation between private parties).

- An employer with religious objections to rubella or hepatitis immunizations,[5] would be entitled to a RFRA opt-out from the obligation to cover those recommended immunizations, 42 U.S.C. 300gg-13(a)(2) (Supp. V 2011), because the immunization-coverage provision (like the contraceptive-coverage provision) does not apply to grandfathered plans and because small employers can decline to offer any health coverage without risk of paying a tax.

A reading of RFRA that would produce this regime of virtually automatic exemptions from critical employee-protection legislation cannot be correct.

Even putting aside the overarching problem with respondents' argument, however, their specific contentions regarding what they call the "exceptions" (Br. 50) at issue here lack merit. Respondents contend (*ibid.*) that neither their employees nor the government can have a compelling interest in coverage of any preventive-health services (not only contraceptive coverage but also coverage for immunizations, colorectal cancer screening, domestic abuse counseling, and all other recommended preventive-health services) because grandfathered plans are not required to cover them. But if that is correct, then any time Congress does not compel an immediate switch to a complex new statutory regime, it eliminates the compelling interests underlying the new regime. Respondents cite no support for that remarkable proposition.

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[5] Liberty Counsel, which represented Liberty University in its attempt to challenge the contraceptive-coverage provision, see *Liberty Univ.*, 733 F.3d at 103-105, has raised religious objections to vaccines for varicella, hepatitis A, and rubella. See Liberty Counsel, *Compulsory Vaccinations Threaten Religious Freedom* (2007), http://www.lc.org/media/9980/attachments/memo_vaccination.pdf.

Moreover, respondents admitted below that the Act's grandfathering provision is transitional in effect, see J.A. 39-40, and thus qualitatively different from the permanent exemption respondents seek. Asked by the district court why the Hobby Lobby group health plan did not have grandfathered status, respondents' counsel explained that the "grandfathering requirements mean that you can't make a whole menu of changes to your plan that involve things like the amount of co-pays, the amount of co-insurance, deductibles, that sort of thing." *Ibid.* He emphasized that, "just because of economic realities, our plan has to shift over time. I mean, insurance plans, as everyone knows, shift[] over time." J.A. 40. Respondents' amicus National Religious Broadcasters likewise acknowledges (Br. 28) that, "[g]iven the nature of employers' needs to meet changing economic and staffing circumstances, and to adjust insurance coverage accordingly, the actual benefit of the 'grandfather' exclusion is *de minimis* and transitory at best."

Respondents fare no better by observing (Br. 50-51) that small employers are exempt from the obligation to pay a tax if they do not provide health coverage and that the implementing agencies have exempted churches from the contraceptive-coverage provision. The government explains in its opening brief (at 51-53, 54-57) why neither feature of the Act or its implementation furthers respondents' RFRA claim. It would be unprecedented and counter-intuitive to hold that the existence of small-employer exemptions and accommodations for churches eliminates the government's compelling interests in enforcing a statute against larger employers in the commercial world.

4. Finally, respondents contend (Br. 58) that "the government [should] pay for its favored contraceptive methods itself" as a less-restrictive means of accomplishing its objectives. The implementing agencies explained why use of a government-financed system in place of the employer-based one contemplated by Congress would be ineffective. See Gov't *Conestoga* Br. at 55-56. It would therefore not adequately "further[]" the government's interests. 42 U.S.C. 2000bb-1(b)(2).

There is an even more fundamental flaw in respondents' less-restrictive-means argument. On their theory, commercial employers could secure exemptions from the duty to provide a minimum wage, equal pay, health coverage of vaccines, or any other employee benefit, on the ground that the government could itself step in and directly provide the money or benefit to the employees. That mode of analysis has no support in any free-exercise or RFRA precedent. See Gov't Br. 57-58.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 2014

AMICUS
CURIAE
BRIEF

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In the Supreme Court of the United States

KATHLEEN SEBELIUS, et al.,
Petitioners,

v.

HOBBY LOBBY STORES, INC., et al.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., et al.,
Petitioners,

v.

KATHLEEN SEBELIUS, et al.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF AMERICAN CENTER FOR LAW & JUSTICE AND TWENTY-ONE FAMILY BUSINESS OWNERS AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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INTEREST OF *AMICI*[1]

Amicus, the American Center for Law & Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for amici, *e.g.*, *FCC v. Fox TV*, 132 S. Ct. 2307 (2012); *Hein v. Freedom From Religion Found.*, 551 U.S. 587 (2007).

The federal regulation at issue in these cases requires employers to pay for and provide abortifacient drugs and devices, contraception, sterilization, and related patient education and counseling services in their health insurance plans ("the Mandate"). The ACLJ has been active in litigation concerning that Mandate. In total, the ACLJ currently represents thirty-two individuals and corporations in seven pending actions against the government, including a case with a petition for certiorari currently pending before this Court.[2] The ACLJ has obtained preliminary injunctive relief for its clients in all seven cases.[3]

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[1] No counsel for a party authored this brief in whole or in part. No person or entity aside from *amici curiae*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The government and Conestoga Wood Specialties have filed notices with this Court consenting to the filing of *amicus curiae* briefs, and Hobby Lobby has consented to the filing of this brief.

Amici, Frank O'Brien, Cyril and Jane Korte, Paul and Henry Griesedieck, Francis and Philip Gilardi, Catherine and Milton Hartenbower, William Lindsay, and the Bick Family[4] are all ACLJ clients in challenges to the Mandate. These individuals, in addition to *Amici* Robert and Jacquelyn Gallagher, are owners of family businesses with religious objections to paying for and providing contraceptive services pursuant to the Mandate.

O'Brien is the sole shareholder and manager of O'Brien Industrial Holdings in St. Louis, Missouri. The Kortes, husband and wife, are equal shareholders who together own a controlling interest in Korte &

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[2] *Gilardi v. Sebelius*, No. 13-567 (filed Nov. 5, 2013).

[3] *See O'Brien v. U.S. HHS*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012); *Am. Pulverizer Co. v. U.S. HHS* 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012); *Korte v. Sebelius*, 3:12-cv-01072-MJR-PMF, ECF Doc. 74 (S.D. Ill. Jan. 13, 2014) (granting preliminary injunction pursuant to *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013)); *Lindsay v. U.S. HHS*, No. 1:13-cv-01210, ECF Docs. 20-21 (N.D. Ill. Mar. 20, 2013); *Gilardi v. U.S. HHS*, No. 13-5069 (D.C. Cir. Dec. 11, 2013) (per curiam order staying issuance of mandate and maintaining injunction pending appeal); *Bick Holdings, Inc. v. U.S. HHS*, No. 4:13-cv-462-AGF, ECF Doc. 19 (E.D. Mo. Apr. 1, 2013); *Hartenbower v. U.S. HHS*, No. 1:13-cv-2253, ECF Doc. 21 (N.D. Ill. Jan. 21, 2014).

[4] The Bick Family includes Mary Frances Callahan, Mary Clare Bick, James Patrick Bick, Jr., William Joseph Bick, Mary Patricia Davies, Joseph John Bick, Francis Xavier Bick, Mary Margaret Jonz, and Mary Sarah Alexander.

Luitjohan Contractors, Inc. in Highland, Illinois. The Griesedieck brothers together manage and have a controlling interest in four companies, including American Pulverizer Co. in St. Louis, Missouri. The Hartenbowers, husband and wife, together own and control Hart Electric, LLC and H.I. Cable, LLC in Lostant, Illinois. William Lindsay owns the controlling interest in, and is the managing partner of, the law firm, Lindsay, Rappaport & Postel, LLC in Chicago, Illinois. The nine brothers and sisters of the Bick Family together own Bick Holdings, Inc. and the Bick Group, Inc. in St. Louis, Missouri. The Gallaghers, husband and wife, together have a controlling interest in Good Will Publishers, Inc. in Gastonia, North Carolina.

To date, and except for the Gallaghers, each of these individuals and the closely-held corporations they own and control have filed suit against the government claiming, *inter alia*, that the Mandate violates their rights under the Religious Freedom Restoration Act ("RFRA"). All *Amici* who have filed suit have been awarded preliminary injunctive relief from having to comply with the Mandate.[5] The future ability of these *Amici* to manage their businesses pursuant to their religious beliefs is directly at stake in these cases.

In addition, this brief is filed on behalf of more than 90,000 supporters of the ACLJ who specifically requested that they be included in this brief as an expression of their opposition to the Mandate's encroachment on religious civil liberties as protected by RFRA and the First Amendment.

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[5] *See* n.3, *supra*.

INTRODUCTION

Amici urge this Court, in its adjudication of the issues involved in these cases, to be mindful of the dignity of individual conscience and the right of religious exercise our forefathers held sacred in the founding of this country.

James Madison, the Father of the Constitution, opined that "[c]onscience is the most sacred of all property," and that man "has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them."[6] George Washington, the Father of the Country, noted that "the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle."[7] Thomas Jefferson wrote that "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority."[8]

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[6] *Property* (March 29, 1792), in THE FOUNDERS' CONSTITUTION, Vol. 1, Doc. 23 (P. Kurland & R. Lerner eds. 1987).

[7] Michael Novak and Jane Novak, WASHINGTON'S GOD: RELIGION, LIBERTY, AND THE FATHER OF OUR COUNTRY, p. 111 (2006).

[8] Letter from President Thomas Jefferson to the Society of the Methodist Episcopal Church at New London, Conn. (Feb. 4, 1809). One provision of Jefferson's Bill for Establishing Religious Freedom, originally drafted in 1779, has special relevance to the Mandate challenged in the cases at bar: "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *A Bill for Establishing Religious Freedom*, in THE FOUNDERS' CONSTITUTION, *supra* n.6, at Vol. 5, Doc. 37.

In fact, even before the ratification of the U.S Constitution in 1788, and even before the signing of the Declaration of Independence in 1776, the Continental Congress passed a resolution in 1775 exempting individuals with pacifist religious convictions from military conscription:

> As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.[9]

Thus, even when the country was in dire need of men to take up arms to fight for independence, our forefathers knew that conscience is inviolable and must be honored. They understood that to conscript men into military service against their religious conscience would have undermined the very cause of liberty to which they pledged their lives, fortunes, and sacred honor.

Whether this country will continue to preserve the dignity of conscience and robustly protect religious freedom in the future largely depends on how this Court rules in the cases at bar. If the government is permitted to conscript citizens through their businesses to pay for and provide drugs and services to which they are religiously and steadfastly opposed in violation of their conscience, as the government does through the Mandate, the liberties that our forefathers struggled to secure will be significantly diminished.

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[9] Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harvard L. Rev. 1409, 1469 (1990).

Amici business owners, like the Hahn family in *Conestoga Wood* and the Green family in *Hobby Lobby*, wish to run their businesses in a manner consistent with their religious beliefs. This is not a novel concept. Most, if not all, religious traditions teach that every dimension of one's life, whether personal or public, in the home or in the workplace, should be directed, first and foremost, by one's religious commitments. For such people of faith, religion is not a matter of mere taste, preference, or inclination that can be set aside or ignored when materially advantageous to do so. It is a fundamental and guiding principle that shapes how they think, act, and live their lives in the world.

This is no less true when it comes to business, whether working for a company or owning and controlling one. Judaism, Christianity, and Islam, for example, all place religious and moral obligations on how one conducts oneself in business.[10] They each reject the idea that a business owner is insulated, morally speaking, from the actions of his business. Each of them "prohibit businesses from providing harmful products or services that others would use to engage in harmful conduct."[11]

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[10] *See* Mark L. Rienzi, *God and the Profits*, 21 Geo. Mason L. Rev. 59, 67 (2013).

[11] *Id.*

As the Catholic Church's Pontifical Council for Justice and Peace has stated with respect to living one's faith and engaging in business:

> Dividing the demands of one's faith from one's work in business is a fundamental error which contributes to much of the damage done by businesses in our world today. . . . The divided life is not unified or integrated; it is fundamentally disordered, and thus fails to live up to God's call.[12]

This statement reflects the teaching of Jesus Christ, who, in his Sermon on the Mount uttered words that have echoed throughout history:

> No one can serve two masters, for either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve God and money.

Matthew, 6:24 (ESV).

This admonition makes abundantly and forcefully clear, at least to those who choose to adhere to the teachings of Jesus, that one's obligation to God must take precedence over all other obligations and endeavors, including the pursuit of profit. A Christian business owner, for example, such as any one of the *Amici*, faced with a law requiring management of the company in a way that violates the owner's religious beliefs, must answer with the words of St. Peter and the apostles: "We must obey God rather than men." *Acts*, 5:29 (ESV). Such a stance of conscience is consistent with James Madison's position, who wrote that one's duty to the "Creator . . . is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[13] *Cf. Girouard v. United States*, 328 U.S. 61, 68 (1946) ("The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State.").

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[12] *Vocation of the Business Leader: A Reflection* at p. 6, ¶ 10 (Nov. 2012), http://www.stthomas.edu/cathstudies/cst/VocationBusinessLead/VocationTurksonRemar/VocationBk3rdEdition.pdf.

Thanks in large part to this country's "happy tradition of avoiding unnecessary clashes with the dictates of conscience," *Gillette v. United States*, 401 U.S. 437, 453 (1970), *Amici* have never before had to resolve such a conflict in the management of their businesses. Indeed, until the promulgation of the Mandate at issue here, no federal law or regulation compelled *Amici* to run their businesses in violation of their religious beliefs or commitments. *Amici* were free to practice their respective trades, such as Frank O'Brien in manufacturing industrial materials, William Lindsay in practicing law, and the Gallaghers in publishing Bibles, in a manner consistent with their religious beliefs. Now, however, as a direct result of the Mandate, the Hahns, the Greens, and *Amici* business owners face a stark choice: abandon their beliefs in order to stay in business, or abandon their businesses in order to stay true to their beliefs. That is a choice that the federal government, bound by the Free Exercise Clause and RFRA, "the most important congressional action with respect to religion since the First Congress proposed the First Amendment,"[14] may not lawfully impose upon them.

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[13] *A Memorial and Remonstrance Against Religious Assessments* (1785), in THE SACRED RIGHTS OF CONSCIENCE, p. 309 (D. Dreisbach & M.D. Hall eds. 2009).

In *Conestoga Wood Specialties Corp. v. Secretary of U.S. Dep't Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013), the Third Circuit held that the Hahns themselves had no viable RFRA or Free Exercise claims against the Mandate, and in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), there was no majority decision regarding whether the Green family had RFRA or Free Exercise claims against the Mandate. No matter how this Court rules on whether a closely-held corporation can operate under religious norms, and thus invoke the protection of religious exercise afforded by RFRA and the First Amendment, it should hold that where, as here, a federal regulation compels owners and managers of such a corporation to take actions in violation of their religious beliefs, their religious exercise is substantially burdened by that regulation and, pursuant to RFRA and the Free Exercise Clause, these individuals can challenge it in court.

SUMMARY OF ARGUMENT

According to the government, the owners of a closely-held corporation who oppose implementing the Mandate have no legal claim to challenge it because the Mandate does not injure them, and the corporation itself has no legal claim because a corporation cannot exercise religion.

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[14] Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 243 (1994).

This Court should reject the government's "heads I win; tails you lose" formula for prevailing in these cases.

When family members, like *Amici* business owners, incorporate a business, they do not surrender the right to manage that business according to their religious beliefs. For them, running their business in a manner that reflects their religious values and ideals is part and parcel of their identity as people of faith. Pursuant to their religious beliefs, they measure success in business not only in terms of profit, but in how they serve God and others.

Unlike the multitude of state and federal regulations that *Amici* direct their businesses to comply with, the Mandate crosses the line, and they cannot, in good conscience, implement it without violating their religious beliefs. Contrary to the government's assertion, the Mandate imposes a very real and palpable injury on such owners and managers. A corporation can only act through its agents, and when those agents are also the owners of a closely-held corporation, like Conestoga Wood Specialties, Hobby Lobby, or Mardel, it is plainly wrong to argue they are not harmed or injured by a regulation that, like the Mandate, forces them to manage that corporation in violation of their religious conscience.

Not only does the Mandate injure such owners, it substantially burdens their religious exercise. It imposes on them a Hobson's choice of either (1) complying with the Mandate and violating their religious beliefs, or (2) not complying and likely losing their companies due to ruinous penalties. Even if the Mandate's burden on the owners' religious exercise is characterized as indirect, because the Mandate is directly imposed upon the corporation, it is nonetheless a substantial one.

Finally, this Court should reject any argument that ruling in favor of the religious claimants here will unleash an onslaught of challenges to various government regulations by businesses and their owners. RFRA itself provides two limiting principles to prevent a hypothetical flood of employer challenges to various regulations: (1) most regulations do not even arguably burden anyone's religious exercise, and (2) RFRA provides no exemption when a regulation is the least restrictive means of achieving a compelling governmental interest. In addition, any religious exercise must be *sincere*, *i.e.*, not falsely conjured up for the sole purpose of avoiding the regulation. This Court should not reject the valid RFRA claims asserted here due to any speculative or unfounded fear of future RFRA litigation.

ARGUMENT

I. Individuals Do Not Forfeit Their Free Exercise Rights By Entering the Economic Arena.

In *Braunfeld v. Brown*, 366 U.S. 599 (1961), Justice Stewart wrote:

> Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of Sunday togetherness.

> I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of religion.

Id. at 616 (Stewart, J., dissenting).

Who were the petitioners in *Braunfeld*? A group of Orthodox Jewish merchants engaged in the obviously for-profit business of selling clothes and furniture. And while a majority of the Court in this pre-*Sherbert* and *Yoder* case rejected, on other grounds, the merchants' free exercise challenge to Pennsylvania's Sunday closing law, no member of the Court questioned the right of those for-profit business owners to bring a free exercise challenge to a law that—quite indirectly—had an adverse economic impact on their businesses.

Old Order Amish farmer Lee was also engaged in a for-profit business. *United States v. Lee*, 455 U.S. 252 (1982). And while the Court ultimately held that his free exercise claim had to yield to a compelling state interest in a uniform Social Security tax system, no member of the Court expressed any doubt about the right of this for-profit business owner to bring a free exercise claim. Similarly, the pursuit of economic gain did not foreclose otherwise meritorious free exercise claims in this Court's unemployment benefit cases. *See, e.g., Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

One would think that these cases close the door on the notion that one who engages in commercial activity must abandon the statutory and constitutionally protected right to exercise religion. Yet, the government argues that *Braunfeld*, *Lee*, and similar cases are categorically different from the cases challenging the Mandate, and for one reason: *the corporate form*. The government asserts that when religious persons incorporate a business, they forfeit any right to challenge a law that compels their corporation to act in violation of their own religious beliefs. This, in turn, leads to the government's "heads I win, tails you lose" argument that neither a for-profit corporation nor its owners can challenge a law under RFRA that burdens the religious exercise of the corporation or its owners when the corporation is the object of the regulation. According to the government, the owners cannot bring the claim because they are legally distinct from the corporation and thus are not injured by the regulation, and the corporation itself cannot bring the claim because a corporation is not a person capable of exercising religion.

The practical result of such an argument is as alarming as it is extraordinary: a shop owned by Seventh-day Adventists that does not open on Saturday for religious reasons would have to comply with a law requiring certain businesses to remain open seven days a week. A deli run by a Jewish family that does not sell pork for religious reasons would have to comply with a regulation that requires food establishments to sell pork. A medical practice operated by Catholics who do not conduct abortions for religious reasons would be forced to do so by a law requiring all OB/GYN medical practices to offer abortion services. No court would be able to reach the merits of any religious freedom claim brought by these or similar parties.

This Court should reject the government's attempt to evade review of the merits of such RFRA claims. As argued herein, owners of closely-held corporations have a right under RFRA to pursue a claim against a regulation that compels them to manage that corporation in violation of their religious beliefs. This is seen most clearly in the cases under review, where the Mandate requires business owners to do just that.

II. For Some, Owning and Managing a Business is a Religious Vocation That Not Only Prohibits Them From Undertaking Certain Acts, But Inspires Them to Work For the Good of Others.

Regardless of whether a for-profit or secular corporation is a "person" capable of exercising religion, and thus able to invoke the protections of RFRA or the Free Exercise Clause, there can be no doubt that *individual* owners of closely-held corporations, like the Hahns, the Greens, and *Amici*, are "persons" under both federal law and the First Amendment.[15] There can also be no dispute that such individuals are able to exercise religion and invoke the protections of RFRA and the Free Exercise Clause. Finally, there can be no dispute that, as a factual matter, some employers choose to manage their corporations in a manner that reflects their religious beliefs as a distinct way of fulfilling a religious vocation.

Amicus Frank O'Brien's choice, for example, to commit O'Brien Industrial Holdings ("OIH") "to make our labor a pleasing offering to the Lord while enriching our families and society," in addition to requiring it to act in accordance with the Golden Rule and the Ten Commandments,[16] cannot be described as anything but a religious act, imbuing the company with an ethos and purpose beyond that of simply making a profit.

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[15] To be clear, *Amici* believe that a for-profit or secular corporation can invoke the protections of RFRA and the Free Exercise Clause in their own right. In addition to arguing this very point in the lower courts, *see supra*, n.3, it is the issue on which *Amicus* ACLJ has filed a petition for a writ of certiorari. *See Gilardi v. Sebelius*, No. 13-567 (filed Nov. 5, 2013).

O'Brien's mission statement for OIH is hardly an abstract platitude. Following the exhortation of St. Paul to "[w]ork hard and willingly but do it for the Lord and not for the sake of men," O'Brien has made it a goal of OIH "for all of our people to have the ability to own their own home," through a salary and an annual profit sharing bonus.[17] It is a goal of the company "for all of our people to have the ability to send their children to college," through a scholarship program. It is a further goal of OIH "for all of our people to have the opportunity to retire with dignity," through a retirement plan. It was Frank O'Brien's religious beliefs that motivated and inspired him to establish these goals for OIH.

Furthermore, Frank O'Brien's religiously inspired charitable work goes beyond the four walls of his business. In his desire for OIH to play a role in enriching society, O'Brien initiated the St. Nicholas Fund in 2008, named after the fourth century bishop of

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[16] O'Brien Industrial Holdings, LLC, *Mission & Values*, http://www.christyco.com/mission_and_values.html.

[17] O'Brien Industrial Holdings, LLC, *Explanation of Mission & Values*, http://www.christyco.com/mission_and_values_details.html.

Myra.[18] This fund, supported in part by tithing based on earnings of the company, offers monetary support to those in need, and OIH employees are encouraged to "keep their eyes open" to identify where such support might be necessary.

Thus, for a business owner like Frank O'Brien, managing the business is not just a way of putting food on the table for himself, his employees, and their families. It is a *vocation*; an answer to a call to use his talents, resources, and abilities to serve God and others through his company. Asking someone like Frank O'Brien to set aside his religious beliefs in how he manages his own corporation would be tantamount to asking him to stop running his company entirely.

Frank O'Brien is not alone in this regard. *Amicus* the Bick Family has chosen to adopt and incorporate a specifically religious standard with respect to its business practices:

> We believe in the Christian principles that form the societal mores the founders of our country believed necessary for our Democracy to work. In our dealings with customers, employees, owners, and all members of the community, we must above all strive to act in a manner which adheres to the Judeo-Christian principles of ethical behavior.[19]

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[18] *Id.*

[19] Bick Group, *Bick Group Values*, http://www.bickgroup.com/bick-group-values.asp.

For owners of closely-held corporations like the Bicks, it would be unfathomable to run a business in a manner that is inconsistent with the Golden Rule or the Judeo-Christian idea that all persons are created in the image of God and thus deserving of respect. For this reason, a government regulation compelling the Bicks to direct their company to undertake actions in violation of their understanding of Christian morality would undermine the very ethics upon which their corporation was founded.

For employers like *Amici* Frank and Phil Gilardi, owners of Freshway Foods and Freshway Logistics, it is their religious beliefs that inspire them to direct their companies to undertake any number of charitable activities within their community, such as making food and monetary donations to the YMCA, Holy Angel's Soup Kitchen, United Way, Habitat for Humanity, American Legion, Bill McMillian's Needy Children, Elizabeth's New Life Center, and local schools.[20] Examples of such charitable deeds further demonstrate a key principle of religious practice: it not only *proscribes* certain actions, it *prescribes* works of goodness, kindness, and generosity.

In fact, at the direction of the Gilardis, and as motivated by their religious beliefs, the Freshway companies provide their Muslim employees with space to pray during breaks and lunches, and adjust break periods during Ramadan to allow their Muslim employees to eat after sundown pursuant to their religion.[21] Whether state or federal law requires such an accommodation of religious exercise in the workplace is irrelevant to the Gilardis; they do so because, in light of their religious beliefs, it is the right thing to do.

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[20] Pet. at 6, *Gilardi v. Sebelius* (No. 13-567).

Amici Robert and Jacquelyn Gallagher are owners of Good Will Publishers, Inc., which publishes Bibles and works of Catholic spirituality and instruction through its St. Benedict Press. While the business could always earn extra profits by publishing any number of books, the Gallaghers have limited the company, and thus its profits, to publishing only books the Gallaghers believe are consistent with the Catholic faith.[22] To print or publish anything else, even if it meant a substantial increase in profits, would undercut a purpose and mission of the company that cannot be reduced to dollars and cents. Thus, for the Gallaghers, Good Will Publishers and St. Benedict Press are not only profit-making endeavors, they are a religious undertaking.

Just as George Washington famously opined that "religion and morality are indispensable supports" for "political prosperity,"[23] business owners like *Amici* view morality and religion as indispensable supports for their commercial prosperity. While, most certainly, a business can earn profits without a view to religion and morality—perhaps more easily so—*Amici* believe that wealth obtained at the expense of these commitments is not true or authentic prosperity at all, but a spiritual poverty for which no amount of profit-making can substitute. These employers adhere to the words of Jesus, who asked, "For what does it profit a man to gain the whole world and forfeit his soul?" ***Mark***, 8:36 (ESV).

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[21] *Id.*

[22] Saint Benedict Press & TAN Publisher's Letter, June 29, 2012, https://books.benedictpress.com/index.php/page/shop:publisherletter712/.

[23] *Farewell Address* (Sept. 19, 1796), in THE FOUNDERS' CONSTITUTION, *supra* n.6, at Vol. 1, Doc. 29.

For these reasons, *Amici* are justly alarmed at statements suggesting that for-profit businesses, no matter their motivating religious mission or purpose or commitment to ethical principles, should be devoted to making money and nothing else. *See, e.g.*, *Conestoga Wood Specialties Corp. v. Sebelius*, 2013 U.S. App. LEXIS 2706, at *15 (3d Cir. Feb. 7, 2013) (Garth, J., concurring) ("[T]he purpose—and only purpose—of the plaintiff Conestoga is to make money!"). A mentality like this is what undoubtedly gave rise to Ambrose Bierce's definition of "*Corporation*": "An ingenious device for obtaining individual profit without individual responsibility."[24]

While some for-profit corporations may be "different from religious non-profits in that they use labor to make a profit, rather than to perpetuate a religious values-based mission," some for-profit corporations, like those owned by *Amici*, are owned and operated with a view toward more than just earning a profit. *Gilardi v. United States Dep't of Health & Human Servs.*, 733 F.3d 1208, 1242 (D.C. Cir. 2013) (Edwards,

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[24] THE UNABRIDGED DEVIL'S DICTIONARY, p. 43 (D. Schultz & A.J. Joshi eds. 2000).

J., concurring in part and dissenting in part). For many employers, it is an important part of how they carry out and fulfill their personal and religious vocations and of how they serve God and others.

III. The Mandate Injures the Religious Exercise of Religious Business Owners Who Oppose the Mandate.

While the government may not question the sincerity of the religious beliefs of business owners like *Amici*, it directly questions—in fact, seeks to eradicate—their ability to run their businesses according to these beliefs, specifically, on an issue of what they believe to be of supreme importance: the dignity and sanctity of human life, in its creation and transmission.

Each of the *Amici* not only have religious beliefs with respect to the mission of their businesses, and the manner in which they conduct those businesses, they have deeply held religious beliefs regarding the drugs and services that they are required to pay for and provide by the Mandate challenged in these cases. Some business owners, like the Hahns and the Greens, religiously oppose only drugs or services that have an abortifacient mechanism of action; others, such as most *Amici*, oppose contraceptives and sterilization as well. For these employers, the fundamental issue is not just the use of such abortifacient and/or contraceptive methods, it is the requirement that they arrange for their company to pay for and provide such methods in the first place.

It is important to note that the same religious faith that compels employers like *Amici* to care for the needs of their employees, to provide charitable goods and services to their local communities, and to conduct their business dealings according to the Golden Rule, also compels them not to manage their companies in a way dictated by the Mandate. *Amici* employers cannot in good conscience pick and choose which religious beliefs to adhere to and which to ignore or violate. They form a seamless garment. And though employers like *Amici* direct and manage their companies to comply with any number of laws, rules, and regulations, they cannot do so with respect to the Mandate.

Nonetheless, the government maintains that none of these business owners are injured, let alone their religious exercise substantially burdened, by the Mandate. It argues that because the Mandate only applies to the group health plan a corporation sponsors, the owners of that corporation are not required to do *anything*, let alone anything that violates their religious beliefs or conscience. As the Third Circuit held in its decision below, ". . . the Mandate does not actually require *the Hahns* to do anything. All responsibility for complying with the Mandate falls on *Conestoga*." 724 F.3d at 388 (emphasis in original). Similarly, the Sixth Circuit held that "[t]he decision to comply with the mandate falls on Autocam [the company], not the Kennedys [its owners]." *Autocam Corp. v. Sebelius*, 730 F.3d 618, 622 (6th Cir. 2013), *petition for cert. pending*, No. 13-482 (filed Oct. 15, 2013).

Although it is true that a closely-held corporation is legally distinct from its owners and controllers, the government critically ignores the reality that a corporation cannot comply with a regulation, or take any steps toward compliance, unless its owners and controllers choose to have it comply. *See Robinson v. Cheney*, 876 F.2d 152, 159 (D.C. Cir. 1989) ("[A] corporation cannot act except through the human beings who may act for it."); *see also Reich v. Sea Sprite Boat Co.*, 50 F.3d 413, 417 (7th Cir. 1995) ("[I]ncorporeal abstractions act through agents."). Indeed, because a corporation is not a self-willing, self-thinking automaton that can operate independently of human agency, *a corporation cannot do anything* in the absence of those who control it. The corporation cannot define itself or its mission on its own (religious or not), or establish or implement policies on its own (religious or not). Any regulation that compels a corporation to do X, Y, or Z, concomitantly and necessarily requires the human agents of that corporation to implement X, Y, or Z, either under the explicit or implicit authority of those who own the corporation.

Normally, of course, there is no need to state the obvious reality that "a corporation acts only through its directors, officers, and agents." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165 (2001). Owners and managers of corporations routinely ensure that their corporations comply with any number of local, state, and federal regulations. But where, as here, those owners must violate their own religious beliefs in the course of ensuring that their corporation complies with a regulation, it is absurd to suggest that, because of the corporate form, they are not harmed in the exercise of their religion.[25]

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[25] As Judge Randolph noted, in the case of subchapter S corporations (as are many of the businesses of *Amici*) the corporate form is disregarded for purposes of corporate taxation. *Gilardi v.*

The Seventh Circuit described the Mandate's impact on the religious exercise of owners of closely-held corporations this way:

> Complying with the mandate requires them to purchase the required contraception coverage (or self-insure for these services), albeit as agents of their companies and using corporate funds. But this conflicts with their religious commitments; as they understand the requirements of their faith, they must refrain from putting this coverage in place because doing so would make them complicit in the morally wrongful act of another.

Korte v. Sebelius, 735 F.3d 654, 668 (7th Cir. 2013).

And this is how the D.C. Circuit described what the government incorrectly thinks does not amount to any injury: "The contraceptive mandate demands that owners like the Gilardis meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans, over whatever objections they may have. Such an endorsement—procured exclusively by regulatory ukase—is a 'compel[led] affirmation of a repugnant belief.'" *Gilardi*,

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United States Dep't of Health & Human Servs., 733 F.3d 1208, 1225 (D.C. Cir. 2013) (Randolph, J., concurring). Why, Judge Randolph asked, would Congress have "disregarded the corporate form for subchapter S corporations but then wanted it imposed to prevent their owners from asserting free-exercise rights under RFRA. There is no good answer, or at least we have received none. It would be incongruous to emphasize the corporate veil in rigid form for RFRA purposes while disregarding it for tax purposes under subchapter S." *Id.*

733 F.3d at 1217-18 (quoting *Sherbert v. Verner*, 374 U.S. 398, 402 (1963)).

It is therefore incorrect to say that the Mandate's injury to the owners of a corporation is *purely* derivative of the injury to the corporation, as though the owners are mere uninvolved shareholders with only a monetary interest in its financial success. Although the failure to comply with the Mandate would have financially ruinous results for the owners, the harm that they assert is not merely financial. The harm, rather, is *the coercion to violate their own consciences* as the individuals who make the corporation act. In other words, the specter of financial ruin is a source of substantial pressure placed upon the Hahns, Greens, and *Amici* business owners personally to take actions that are prohibited by their faith.

For these reasons, and contrary to the Sixth Circuit's decision in *Autocam*, 730 F.3d at 623, the shareholder standing rule does not and cannot preclude owners like the Hahn and Green families from challenging the Mandate. A well-established exception to this rule allows "a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated." *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990). As the Seventh Circuit held in *Korte*, the owners "fall comfortably within [this] exception; they have a direct and personal interest in vindicating their individual religious-liberty rights, even though the rights of their closely held corporations are also at stake." 735 F.3d at 669; *see also Gilardi*, 733 F.3d at 1216 ("[T]he Gilardis' injury . . . is 'separate and distinct,' providing us with an exception to the shareholder-standing rule."). In fact, as Judge Gorsuch noted, because the Mandate requires the Greens to "direct the corporations to comply with the mandate and do so in defiance of their faith," they have "a quintessentially 'direct' and 'personal' interest protected *even under the shareholder standing rule*." *Hobby Lobby*, 723 F.3d at 1156 (Gorsuch, J. concurring) (quoting *Franchise Tax Bd.* 493 U.S. at 336 (1990) (emphasis supplied)).

Religious owners and controllers of closely-held corporations, like *Amici*, sincerely believe that they are religiously and morally responsible for how they manage the assets and resources of their businesses. In addition to the *legal* obligations imposed upon all owners and managers by corporate law, these individuals are subject to *religious and moral* obligations as they own and manage their companies. For these individuals, the intricacies of corporate law do not absolve them of the moral culpability they would bear by managing their corporations to comply with the Mandate against their religious beliefs—and it is wrong for the government to suggest otherwise.[26]

Indeed, *Amici* business owners cannot assuage their consciences by operating under the fiction that what they do in their capacities as owners and managers of the corporation, such as complying with the Mandate, is legally distinct from what they do in their individual capacities as religious believers. *Amici* strive to act consistently with their religious beliefs not only in their personal or individual capacities, but in *all* dimensions of their lives, including as owners, officers, directors, or managers of the corporation. As the Fourth Circuit noted in a different context, "Free religious exercise would mean little if restricted to places of worship or days of observance, only to disappear the next morning at work." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 319 (4th Cir. 2008).

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[26] The government knows that the corporate form cannot shield corporate malefactors like Kenneth Lay of Enron from *criminal* responsibility, and yet it contends that the same corporate form somehow shields owners and managers from *religious and moral* responsibility. Even aside from the constitutional incompetence of the government and the courts to make religious judgments, this profound inconsistency of reasoning exposes the inadequacy of the government's "logic".

No one disputes that "[t]he corporate form offers several advantages 'not the least of which was limitation of liability,' but [that] in return, the shareholder must give up some prerogatives." *Conestoga Wood*, 724 F.3d at 388 (citation omitted). But this Court has never held that one prerogative that must be surrendered is the ability to own and operate one's corporation consistent with one's religious beliefs. In fact, as this Court reiterated last term, in the context of unconstitutional conditions, "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983)); *see also Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 592–593 (1926) (invalidating regulation that required the petitioner to give up a constitutional right "as a condition precedent to the enjoyment of a privilege"); *Southern Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892) (invalidating statute "requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution").

Stated more directly: citizens do not sign away their religious freedoms when they sign and submit articles of incorporation to a secretary of state. The Mandate imposes a distinct and palpable injury on owners of closely-held corporations who oppose implementing the Mandate and, as discussed in the next section, that injury is substantial.

IV. The Mandate Substantially Burdens the Religious Exercise of Religious Business Owners Like the Hahns, the Greens, and *Amici*.

In an attempt to avoid strict scrutiny in these cases, the government not only tries to keep corporations and their owners from asserting any religious freedom claims at all, it tries to convince this Court that the Mandate does not substantially burden their religious exercise. Regardless of whether a for-profit corporation can engage in religious exercise, it is clear that the Mandate substantially burdens the religious exercise of owners like the Hahns, the Greens, and *Amici* family business owners.

The Mandate requires non-exempt group health plans to cover a range of abortifacient, contraceptive, and sterilizing drugs, devices, and services. Employers like *Amici* business owners object on religious grounds to paying for such services in their health plans, which must be included *whether or not any employee avails herself of them*. The religious claimants' objection is not based or dependent upon the extent to which employees may use these services, it is triggered by the requirement that they pay for and provide these services in the first place. Any argument, therefore, that the religious burden is somehow "attenuated" by choices of third parties is actually an attempt to rewrite the specific religious objection and burden asserted in these cases.

The government failed to persuade the D.C. Circuit on this score:

> The burden on religious exercise does not occur at the point of contraceptive purchase; instead, it occurs when a company's owners fill the basket of goods and services that constitute a healthcare plan. In other words, the Gilardis are burdened when they are pressured to choose between violating their religious beliefs in managing their selected plan or paying onerous penalties.

Gilardi, 733 F.3d at 1217.

The Seventh Circuit similarly rejected the government's attenuation argument:

> "The religious-liberty violation at issue here inheres in the coerced coverage of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services."

Korte, 735 F.3d at 685 (quoting *Korte v. Sebelius*, 528 Fed. Appx. 583, 587 (7th Cir. 2012) (granting injunction pending appeal)) (emphasis in original).

If the government through a rule or regulation requires one to do X or pay a fine or penalty, but one cannot do X without violating one's religious beliefs, a substantial burden on religious exercise is readily apparent—it puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 717-18. The manner in which the Mandate substantially burdens religious exercise is just as obvious. It requires that employers manage their companies to comply with the Mandate or expose their companies to financial ruin, but these employers cannot do so without violating their religious beliefs. The Mandate thus "affirmatively compels them . . . to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972).

Quite simply, "[t]he contraception mandate forces [the objecting business owners] to do what their religion tells them they must not do." *Korte*, 735 F.3d at 685. It forces them to choose between following the precepts of their religion and incurring huge penalties on the one hand, or abandoning a precept of their religion on the other hand. *See Sherbert*, 374 U.S. at 404. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against *Amici* for objecting to personally participating in, or facilitating, abortion or contraception. *Id.*

As the D.C. Circuit explained, the Mandate imposes a substantial burden on *Amici*, the Gilardis,

> because the government commands compliance by giving the Gilardis a Hobson's choice. They can either abide by the sacred tenets of their

> faith, pay a penalty of over $14 million, and cripple the companies they have spent a lifetime building, or they become complicit in a grave moral wrong. If that is not "substantial pressure on an adherent to modify his behavior and to violate his beliefs," we fail to see how the standard could be met.

Gilardi, 733 F.3d at 1218 (quoting *Thomas*, 450 U.S. at 718).

In fact, even if one were to characterize the Mandate's burden on the religious exercise of owners and managers as "indirect," because the Mandate is *technically* imposed on the corporation, and not its owners or managers, that is of no moment. Under the substantial burden test enunciated by this Court, courts are to examine the substantiality of "the coercive impact" on the claimants' religious exercise, *Thomas*, 450 U.S. at 717, *not* how direct or indirect that coercive impact is. *Id*. at 718 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial"); *see also Braunfeld*, 366 U.S. at 607 (a rule may be "constitutionally invalid even though the burden may be characterized as being only *indirect*") (emphasis added).

Indeed, the religious claimants in *Sherbert* and *Thomas* were not forced by law to work on the Sabbath and produce armaments, and yet this Court found that their religious exercise was nonetheless substantially burdened through the denial of unemployment benefits, which indirectly pressured them to violate their religious beliefs. Here, however, the burden imposed by the Mandate is even more direct than in *Sherbert* or *Thomas*; it affirmatively compels *Amici* business owners to undertake actions in direct violation of their religious beliefs. As far as these owners are concerned, the Mandate operates like a law requiring Adell Sherbert to work on her Sabbath, or Eddie Thomas to help manufacture arms, backed by the sanction of ruinous penalties for non-compliance.

In short, the Mandate imposes a substantial burden on the religious exercise of objecting business owners like *Amici*, the Hahns, and the Greens.

V. Recognizing that the Mandate Violates the Free Exercise Rights of Individuals and their Businesses Would Not Prompt a Flood of RFRA Litigation.

Any argument that respecting the rights of owners to act consistently with their religious beliefs in how they manage their company would somehow allow them to escape the reach of various federal laws governing the workplace is simply untenable. Under RFRA, where a law substantially burdens a sincere religious exercise, that is only the beginning of the analysis, not its conclusion. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) (a "*prima facie case* under RFRA" exists where a law "(1) substantially burden[s] (2) a sincere (3) religious exercise") (emphasis supplied). The government can justify the burden by demonstrating that the law serves a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b).

This limiting principle built into the framework of RFRA itself is enough to ensure, for example, that owners of closely-held corporations will not be able to invoke the statute to avoid paying social security taxes, *see, e.g.*, *United States v. Lee*, or to force employees to violate their own religious beliefs, *see, e.g.*, *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

In point of fact, and consistent with state and federal laws, none of *Amici* discriminate in employment based on religion, nor have any desire to do so. *Amicus*, Frank O'Brien, a Catholic, has stated as a key value for his family of companies: "We will not discriminate based on anyone's personal belief system."[27] And, as previously described, the Gilardi brothers see to it that the religious beliefs of their employees are generously accommodated, even beyond what state and federal laws require.

With respect to the services required by the Mandate, while each *Amicus* business owner strenuously opposes the Mandate and the manner in which it requires them to violate their religious beliefs, none of these employers prohibit or otherwise limit their employees from accessing or paying for any contraceptive services with the salaries they have earned. Just as the employers in these cases seek to have their freedom of conscience respected in how they allocate their companies' resources, they respect their employees' freedom of conscience to spend their salaries how they choose.

If a page of history is worth a volume of logic, history is most persuasive here in showing that religious owners of corporations are not using their religious freedoms in some oppressive or irresponsible way. RFRA was passed just over twenty years ago, and yet there is a veritable dearth of case law involving employers invoking RFRA to circumvent or seek exemptions from laws pertaining to health, safety, or discrimination in the workplace.

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[27] *Mission & Values*, *supra*, n. 16.

In addition, it has been the law in the Ninth Circuit for twenty-five years, per its decision in *Townley*, that corporations can, at times, assert the religious rights of their owners. *See id.* at 619-20. And yet, here too, there is no widespread evidence of employers within the states of the Ninth Circuit invoking this doctrine to unleash an onslaught of challenges to government regulations.

The point of the matter is that employers, like *Amici*, the Hahns, and the Greens, are content to manage their corporations in a way that complies with thousands of state, local, and federal laws and regulations that, unlike the Mandate, do not require them to violate their religiously-formed consciences. And in light of the fact that it is the religious beliefs of many such employers that motivates them to provide their employees with a decent wage, an accommodating workplace, and a health plan to begin with, it is unsurprising that employees of such corporations rarely object to their employers' incorporation of religious tenets in the management of their businesses.

Should this Court adopt the government's position that owners of closely-held corporations have no cognizable right to manage their businesses according to their religious beliefs, this will not only harm the employers themselves, it stands to harm their employees, their dependents, and society in general. A business owner, for example, who cannot in good conscience allow his company to comply with the Mandate will face financial penalties so steep that he will be forced to shut down the company completely.[28] Such a result would negatively impact every person with something at stake in the viability of the company—*even the government*, which has an obvious interest in sustaining businesses and encouraging job growth.

Directly at stake in the cases at bar is the right of citizens, like *Amici* family business owners, to manage their businesses consistent with the dictates of their religious beliefs. If, as the government argues, neither a family-owned corporation nor the family members themselves can challenge a regulation like the Mandate on RFRA or Free Exercise grounds, then such individuals will have no legal recourse or remedy when forced by the government to act against their religious conscience. They must necessarily kowtow, now and in the future, to any government edict that compels them to run their family business in violation of their religious beliefs.

No constitutional principle permits this. Our country's longstanding respect for freedom of religion and conscience prohibits it. This Court cannot allow it.

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[28] In the case of *Amici* Frank and Phil Gilardi, for example, those penalties would total $14 million per year. *See Gilardi*, 733 F.3d at 1218.

CONCLUSION

For the foregoing reasons, *Amici* respectfully ask this Court to hold that the Mandate imposes a distinct legal injury on the Hahns and the Greens, and that it substantially burdens their religious exercise.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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No. 13-354

IN THE
Supreme Court of the United States

Kathleen Sebelius, Secretary of Health
and Human Services, et al.,
Petitioners,

v.

Hobby Lobby Stores, Inc., Mardel, Inc.,
David Green, Barbara Green, Steve Green,
Mart Green, and Darsee Lett,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

***Amicus Curiae* Brief of the American Civil Rights Union In Support of Respondents**

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to protect the rights of all Americans to religious liberty, regardless of political correctness.

STATEMENT OF THE CASE

Respondents David and Barbara Green, and their children Steve Green, Mart Green, and Darsee Lett, operate as family businesses Hobby Lobby Stores, an arts-and-crafts chain, and Mardel, a chain of Christian bookstores. App. 64a.

David Green founded Hobby Lobby in 1970, starting as a single arts and crafts store in Oklahoma City. Today, Hobby Lobby operates a nationwide chain of over 500 stores employing over 13,000 full-time workers. Mart Green founded Mardel in 1981 as a chain of Christian bookstores affiliated with Hobby Lobby. Today, Mardel operates 35 stores employing about 400 workers full time. Both Hobby Lobby and Mardel have always operated as closely held family business, organized as general corporations under Oklahoma law, and exclusively controlled by the Green family respondents. App. 7a-8a, Verified Compl. ("VC"), ¶¶ 23, 24, 32-38.

The Greens have always operated their businesses based on religious principles. App. 8a. The Greens adopted as their official statement of purpose for Hobby Lobby their commitment to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." *Id.*

Mardel primarily sells Christian books and related materials as "a faithbased company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support." *Id.* The Greens each sign a Statement of Faith and a Trustee Commitment obligating them to conduct their businesses according to their religious beliefs and to "use the Green family assets to create, support, and leverage the efforts of Christian ministries." JA 21a.

The Greens consequently rely on their faith to guide business decisions for their companies. App. 8a. The Greens close all their stores on Sundays, to allow all their employees a day of rest, in accordance with biblical teachings, even though that costs them millions of dollars a year. At Christmas and Easter each year, Hobby Lobby buys hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior." The Greens play Christian songs for their store music. They grant their employees cost-free access to chaplains, spiritual counseling, and religiously themed financial courses. They donate millions from Company profits provide every year to ministries. App. 8a; VC ¶¶ 39-43, 45, 47, 51.

The Greens also steer their businesses clear from activities that transgress their religious beliefs. For example, Hobby Lobby does not sell shot glasses to avoid promoting alcohol consumption. The Greens also declined an offer from a liquor store to take over one of their building leases, which cost them hundreds of thousands of dollars a year. The Greens also do not allow their trucks to "back-haul" beer, losing substantial profits by refusing offers from distributors. App. 8a; VC ¶44.

The Greens faith similarly affects the insurance they provide through the self-funded health plan that Hobby Lobby offers to its employees. Based on their religious faith, the Greens believe that human life begins at conception. Hobby Lobby's health plan, therefore, does not provide coverage for drugs that risk killing an embryo, which would make the Greens complicit in abortion. App. 50a-51a. That means that Hobby Lobby's employee health plan does not cover drugs such as RU-486, which can terminate a pregnancy by chemical poisoning of the baby in the womb. The health plan also excludes coverage for Plan B, Ella, and two types of intrauterine devices that can prevent an embryo from implanting in the womb, resulting in death of the embryo.

But the Patient Protection and Affordable Care Act ("ACA") requires employers to provide health insurance for their employees that covers preventive services without cost-sharing, which includes preventive care and screenings" for women. 42 U.S.C. § 300gg-13(a)(1)-(4); Pet. 3-8. That includes well-woman visits, gestational diabetes screening, testing and counseling for certain sexually-transmitted diseases, and breastfeeding support, supplies, and counseling. *See* Health Resources and Services Administration, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines/ (last visited Jan. 24, 2014) ("HRSA Guidelines"). That same regulation also requires Hobby Lobby's health plan to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." HRSA Guidelines; *see also* 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011). The Petitioner calls this "the contraceptive coverage requirement." Pet. 8.

That contraceptive coverage requirement includes precisely Plan B, Ella, and two intrauterine devices which the Petitioner conceded below may prevent a human embryo from implanting in the womb, resulting in death for the embryo. Pet 10 n.5 (the FDA *Birth Control Guide* explains that these drugs and devices may prevent "attachment" or "implantation" of an embryo "in the womb"); App. 10a.

The court of appeals below, therefore, based on the Petitioner's concession and the FDA's guidance, found "no material dispute" over how these drugs and devices function, App. 10a n.3, and given their beliefs, the Respondent Greens cannot cover them through their companies' health insurance plan without facilitating what they believe to be an abortion. App. 50a-51a. The Respondent Greens do not object to covering any of the sixteen other forms of FDA-approved contraceptives,[2] but they cannot cover these four methods without violating their faith. App. 14a-15a.

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[2] Those sixteen methods include male and female condoms, diaphragms, sponges, cervical caps, spermicides, the pill, the mini-pill, the continuous-use pill, patches, vaginal rings, progestin shots, implantable rods, sterilization surgery for men and women, and sterilization implants for women. *See* FDA *Birth Control Guide* (May 2013), http://www.fda.gov/ForConsumers/ByAudience/ForWomen/FreePublications/ucm313215.htm.

But if the Respondent Greens do not comply with this contraceptive coverage requirement of the ACA, they will be subject to regulatory enforcement actions, severe fines, and lawsuits. 26 U.S.C. §§ 4980D, 4980H; 29 U.S.C. § 1185d, 1132; *see also* Pet. 3 n.3 (noting enforcement mechanisms). If Hobby Lobby continued to provide health insurance that did not cover the four abortion inducing drugs or devices that violate the religious faith of the Greens, the fine imposed on the family owned company would be $100 per day for each "individual to whom such failure relates." 26 U.S.C. §4980D. With 13,000 Hobby Lobby employees, the total fine would be "at least $1.3 million per day, or almost $475 million per year." App. 15a.

Hobby Lobby could alternatively drop its employee health insurance altogether. In that case, it would be subject to penalties totaling $26 million per year. *Id.*; VC ¶ 144; 26 U.S.C. § 4980H. Plus it would be subject to the additional cost of otherwise compensating its employees sufficiently, without the health insurance they formerly received.

As a result of various exemptions, health insurance for tens of millions of Americans, about half of all workers covered by employer provided health insurance, is not subject to the contraceptive coverage requirement of the ACA. App. 58a; Appellees' Br. at 40 n.11; *see also, e.g., Beckwith Elec. Co.* v. *Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *17 (M.D. Fla. June 25, 2013).

These exemptions include "small employers" with fewer than 50 employees, who collectively employ over

34 million people, who the ACA does not require to offer health insurance at all. 26 U.S.C. §4980H(c)(2); WhiteHouse.Gov, *The Affordable Care Act Increases Choice and Saving Money for Small Business* 1 ("*ACA Small Business*"), http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf (last visited Jan. 24, 2014).

Secondly, "grandfathered" plans may indefinitely avoid the contraceptive-coverage requirement by not making certain changes after the ACA's effective date. *See* 42 U.S.C. § 18011 (a)(2) ("Preservation of right to maintain existing coverage"); App. 12a-13a. HHS has estimated that 34% of small employer and 55% of large employer plans would retain grandfathered status in 2013. *See id.* at 34552 Tbl. 3.

Thirdly, the ACA grants HHS authority to establish exemptions for health insurance plans "established or maintained by religious employers... with respect to any requirement to cover contraceptive services." 45 C.F.R. § 147.130(a)(iv)(A); App. 11a. HHS used this authority to exempt "churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order." App. 11a-12a. Other religious groups who object to insurance on principle and members of "health care sharing ministries" are exempt from the ACA by the statute, and therefore not subject to the contraceptive-coverage requirement. 26 U.S.C. § 5000A (d)(2)(A), (B), (ii).

Fourthly, HHS recently issued an "accommodation" for certain non-exempt religious organizations allowing them to make contraceptive payments through their insurer or plan administrator. Pet. 8 (citing 45 C.F.R. § 147.131(b);78 Fed. Reg. 39870); App. 12a. This accommodation, however, "does not extend to for profit organizations." *Id.* at 39875.

Even though the Respondent Greens have long demonstrated by their conduct their sincere religious objections to financing and facilitating the provision of abortifacients, they do not qualify for any of these exemptions. Hobby Lobby employs far more workers than the 50 employee maximum to qualify for the small business exemption. The Hobby Lobby health plan lost its grandfather exemption because of changes made before the contraceptive, abortifacient, coverage requirement was specified by regulation after adoption of the ACA. VC ¶59; App. 14a. As a for-profit business, Hobby Lobby does not qualify for the religious employer exemption or the accommodation. App. 13a-14a. None of the exemptions apply to the Greens in their ownership and operation of the Christian bookstore company Mardel for the same reasons.

Consequently, the Greens must either violate their faith by financing and facilitating coverage for the mandated abortifacients, or pay crippling fines that threaten their livelihood.

The Respondent Greens consequently sued under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 20000bb *et seq.*, which provides that the government "shall not substantially burden a person's religious exercise" unless that burden satisfies the legal standards of strict scrutiny, *id.* § 2000bb-1(a), (b). They also sued under the guarantee of religious freedom under the First Amendment, and under the procedural requirements of the Administrative Procedures Act. App. 15a-16a.

After Respondents were denied a preliminary injunction and emergency appellate relief, they were granted initial en banc review before an 8 judge panel of the Tenth Circuit. App. 15a-16a. On June 27, the Tenth Circuit en banc reversed the district court, and ruled for the Respondent Greens. *Id.* 5a-7a.

The Tenth Circuit en banc panel held unanimously ruled that Hobby Lobby and Mardel have Article III standing, and that their claims are not barred by the Anti-Injunction Act, 26 U.S.C. § 7421. App. 17a-18a, 18a-21a. The federal government Petitioner conceded both points. Pet. 12.

On the merits, a five-judge majority concluded that Hobby Lobby and Mardel had demonstrated a likelihood of success on their RFRA claims. Based on the Dictionary Act, which provides that "unless the context indicates otherwise," the word "person" in federal law "includes corporations...as well as individuals," 1 U.S.C. § 1; App. 24a, the majority ruled that "the plain language of the text [of RFRA] encompasses 'corporations,' including ones like Hobby Lobby and Mardel." App. 24a. The Tenth Circuit majority added that coverage for Hobby Lobby and Mardel under RFRA was especially appropriate because the companies publicly "express themselves for religious purposes," are "closely held family businesses with an explicit Christian mission as defined in their governing principles," "ma[k]e business decisions according to [religious] standards," and (in Mardel's case) "directly serve a religious community." *Id.* 37a, 39a, 42a.

The Tenth Circuit En Banc majority easily found that the contraceptive abortifacient mandate did substantially burden Respondent's free exercise of religion under RFRA. *Thomas* v. *Review Bd.*, 450 U.S. 707 (1981); *United States* v. *Lee*, 455 U.S. 252, 257 (1982). In particular, because "[t]he government [Petitioner] d[id] not dispute the corporations' sincerity," the court saw "no reason to question it either." *Id.* 50a-51a.

Finally, imposing this substantial burden on the Respondent Greens could not serve a compelling state interest, because the exemptions already granted to the contraceptive mandate were so broad, encompassing tens of millions of people. App. 58a; *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

Moreover, the court found that the contraceptive coverage mandate fails the least restrictive means test in serving any state interest, because Respondents "ask only to be excused from covering four contraceptive methods out of twenty," and the government "does not articulate why accommodating such a limited request fundamentally frustrates its goals." App. 59a-60a.

SUMMARY OF ARGUMENT

The contraceptive coverage mandate violates the rights to Freedom of Religion of the Respondent Greens under RFRA.

This Court has long held that individuals have Free Exercise rights with respect to their for-profit businesses. And RFRA does not say that "when individuals incorporate" a for-profit business, their "Free Exercise rights somehow disappear." App. 36a. In the court below, the government identified "no principled reason why an individual who uses the corporate form in a business must thereby sacrifice the right to the free exercise of religion." *Id.* 68a.

It cannot be disputed that the contraceptive coverage mandate substantially burdens the free exercise of religion by the Respondent Greens, as recognized by the Tenth Circuit below. The religious exercise at issue is Respondents' "object[ion] to 'participating in, providing access to, paying for, training others to engage in, or otherwise supporting'" the mandated contraceptives. App. 50a-51a. The court also found that the sincerity of Respondents' beliefs was undisputed. App. 51a.

The burden is indisputably substantial because the Respondent Greens are faced with the stark, coercive choice either to "compromise their religious beliefs," or pay nearly "$475 million more" in annual taxes, or drop employee health benefits and "pay roughly $26 million more in annual taxes," plus the cost of compensating their employees for the loss of health benefits formerly part of their employee compensation.

But as the Tenth Circuit found, the government Petitioner has not demonstrated any compelling interest in imposing this substantial burden on the religious freedom of the Respondent Greens. The government Petitioner has made no showing how any compelling interest would be "adversely affected" by granting the limited four drug exemption out of 20 to the contraceptive coverage mandate for the Respondent Greens that would remove the substantial burden on their religious liberty demonstrated in this case.

The contraceptive coverage mandate also fails strict scrutiny because the government Petitioner failed to show that the mandate is the least restrictive means of furthering any compelling interest.

The religious freedom of the companies Hobby Lobby and Mardel is also protected by RFRA. Congress enacted RFRA after more than a century of jurisprudence recognizing that corporations exercise a broad range of constitutional rights. That is why corporations have long been treated as "persons" under the Equal Protection Clause, the Due Process Clause and section 1983.

Similarly, corporations have long been recognized as capable of exercising rights under the First, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments.

The religious liberty of these corporations is substantially burdened just as the religious liberty of the Respondent Greens discussed above. And the government Petitioner again has not met the strict scrutiny standards to justify this substantial burden on religious liberty.

The government Petitioner has failed to offer any compelling interest that would justify the particular substantial burden on religious liberty in this case. There is no showing of how allowing these two corporations exemptions from four of the 20 contraceptive drugs and devices required by the contraceptive coverage mandate would adversely affect any compelling interest. Nor is there any showing that the contraceptive coverage mandate is the least restrictive means of serving any such compelling interest.

ARGUMENT

I. THE CONTRACEPTIVE COVERAGE MANDATE VIOLATES THE RIGHTS TO FREEDOM OF RELIGION OF THE RESPONDENT GREENS UNDER RFRA.

This Court has long held that "*individuals* have Free Exercise rights with respect to their *for-profit businesses*." App. 35a-36a (citing *Lee*, 455 U.S. 252); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961)) (emphasis in original); *see also* App. 68a (Hartz, J., concurring) (noting that "the Supreme Court has already recognized that profit-seekers have a right to the free exercise of religion").

It would be illogical and self-contradictory to hold that "an individual operating for-profit retains Free Exercise protections but an individual who incorporates...does not, even though he engages in the exact same activities as before." App. 38a. This Court long ago expressly rejected the contention that those who engage in commercial enterprise thereby nullify their constitutional rights. *See, e.g., New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265-66 (1964) (holding that "constitutionally protected" statements "do not forfeit that protection because they were published in the form of a paid advertisement").

RFRA does not say that "when individuals incorporate" a for-profit business, their "Free Exercise rights somehow disappear." App. 36a. In the court below, the government identified "no principled reason why an individual who uses the corporate form in a business must thereby sacrifice the right to the free exercise of religion." *Id.* 68a. (Hartz, J., concurring). Nor can it be said that an individual loses his right to exercise freedom of religion in his business enterprise when that enterprise earns a profit. That proposition "is not 'rooted in the text of the First Amendment,' and therefore could not have informed Congress's intent when enacting RFRA." App. 36a.

It cannot be disputed that the contraceptive coverage mandate substantially burdens the free exercise of religion by the Respondent Greens, as recognized by the Tenth Circuit below. The religious exercise at issue is Respondents' "object[ion] to 'participating in, providing access to, paying for, training others to engage in, or otherwise supporting'" the mandated contraceptives. App. 50a-51a. The court also found that the sincerity of Respondents' beliefs was undisputed. App. 51a.

Finally, the burden is indisputably substantial because the Respondent Greens are faced with the stark, coercive choice either to "compromise their religious beliefs," or pay nearly "$475 million more" in annual taxes, or drop employee health benefits and "pay roughly $26 million more in annual taxes," plus the cost of compensating their employees for the loss of health benefits formerly part of their employee compensation. App. 51a-52a. Since Hobby Lobby and the Mardel Christian bookstore chain are family owned and operated, it is the Respondent Greens who would bear these costs.

As the Tenth Circuit majority noted, the government Petitioner "did not [even] question the significance of [this] financial burden" below. App. 52a. Indeed, the government effectively conceded as much by exempting certain religious organizations from this very mandate. In finding the burden substantial, the Tenth Circuit below noted "the *intensity of the coercion* applied by the government to act contrary to [Respondents' religious] beliefs." App. 44a, 46a-50a (emphasis in original). *Thomas*, 450 U.S. at 717-18; *Lee*, 455 U.S. at 256-57.

Under RFRA, that finding of a substantial burden on religious free exercise imposes the legal burden on the government to meet the requirements of strict scrutiny. *O Centro*, 546 U.S. at 429 (explaining that "the burden [of strict scrutiny] is placed squarely on the [g]overnment by RFRA...including at the preliminary injunction stage," citing 42 U.S.C. § 2000bb-1(b), 2000bb-2(3)). The Tenth Circuit majority below found that the government did not meet this burden.

In particular, the Tenth Circuit found that the government Petitioner did not demonstrate any compelling interest in imposing the substantial burden on the religious freedom of the Respondent Greens. The Tenth Circuit found that the government articulated only "broadly formulated interests" in public health and gender equality, but "offer[ed] almost no justification for not 'granting specific exemptions to particular religious claimants.'" App. 57a-58a (quoting *O Centro*, 546 U.S. at 431). What is the compelling interest that justifies the government imposing the substantial burden on the religious liberty of the Respondent Greens? The government Petitioner has still not told us, at this late stage of this litigation.

As this Court ruled in *O Centro*, 546 U.S. at 430-31, RFRA requires the government to "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the *particular claimant* whose sincere exercise of religion is being substantially burdened") (quoting 42 U.S.C. §2000bb-1(b)) (emphasis added). The government Petitioner has made no showing how any compelling interest would be "adversely affected" by granting the limited four drug exemption out of 20 to the contraceptive coverage mandate for the Respondent Greens that would remove the substantial burden on their religious liberty demonstrated in this case. That is yet another reason why the decision of the Tenth

Circuit below in favor of Respondents should be affirmed.

The denial of any such limited exemption for the Respondent Greens is even more unjustifiable due to the extensive exemptions from the contraceptive coverage mandate discussed above already granted to thousands of employers covering tens of millions of employees. Petitioner before this Court for the first time raises a new compelling interest in "ensuring a 'comprehensive insurance system with a variety of benefits available to all participants.'" Pet. 29 (quoting *Lee*, 455 U.S. at 258). But *Lee* involved a request by the Amish for an exemption from Social Security, in which "mandatory participation [was] indispensable to [the system's] fiscal vitality" and to its ability to function, as today's payroll taxes are used to finance today's promised retirement benefits. The contraceptive coverage mandate cannot possibly require such "mandatory participation" because it already expressly includes widespread exemptions.

The contraceptive coverage mandate also fails strict scrutiny because the government Petitioner failed to show that the mandate is the least restrictive means of furthering any compelling interest. In the court below, the government failed to explain why it could not increase contraceptive access and use by other possible means, such as through Title X of the Public Health Service Act, where the government spends hundreds of millions each year to "[p]rovide a broad range of acceptable and effective medically approved family planning methods * * * and services." 42 C.F.R. § 59.5(a)(1); RTI International, *Title X Family Planning Annual Report: 2011 National*

Summary 1 (2013), http://www.hhs.gov/opa/pdfs/fpar-2011-national-summary.pdf ("In fiscal year 2011, the [Title X] program received approximately $299.4 million in funding."). *See also* 42 C.F.R. § 59.5(a)(7) (providing family-planning services for "persons from a low-income family").

The court in *Newland* v. *Sebelius*, 881 F. Supp. 2d 1287, 1299 (D. Colo. 2012) noted such "analogous programs" and lack of proof that providing contraceptives through these pre-existing programs would "entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventive health care coverage to women," particularly to women who could not otherwise afford them), *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013). That alternative would not restrict the religious liberty of anybody.

II. THE CONTRACEPTIVE COVERAGE MANDATE VIOLATES THE RIGHTS TO FREEDOM OF RELIGION OF HOBBY LOBBY AND MARDEL UNDER RFRA.

The religious freedom of the companies Hobby Lobby and Mardel is also protected by RFRA. RFRA's plain text protects "a *person's* exercise of religion." 42 U.S.C. § 2000bb-1(a). The Dictionary Act provides that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise... the word[ ] 'person'...include[s] *corporations*, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (emphasis added). The Tenth Circuit below correctly noted that "we could end the matter here since the plain language of the text encompasses 'corporations,' including ones like Hobby Lobby and Mardel." App. 24a.

Moreover, Congress enacted RFRA after more than a century of jurisprudence recognizing that corporations exercise a broad range of constitutional rights. This Court said in *Monell* v. *Department of Social Services*, 436 U.S. 658, 687 (1978) "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." That is why corporations have long been treated as "persons" under the Equal Protection Clause, the Due Process Clause and section 1983. *Power Mfg. Co.* v. *Saunders*, 274 U.S. 490, 493 (1927); *Minneapolis & St. Louis Ry. Co.* v. *Beckwith*, 129 U.S. 26, 28 (1889); *Monell*, 436 U.S. at 687-88.

Similarly, corporations have long been recognized as capable of exercising rights under the First, Fourth, Fifth, Sixth, Seventh, and Eighth Amendments. *E.g.*, *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Utils. Comm'n*, 447 U.S. 557, 566-68 (1980); *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977); *Pa. Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922); *Armour Packing Co.* v. *United States*, 209 U.S. 56, 76-77 (1908); *Ross* v. *Bernhard*, 396 U.S. 531, 532-33 (1970); *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001).

In *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978), the Court explained that "[t]he proper question...is not whether corporations 'have'

First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect." *See also Citizens United* v. *FEC*, 558 U.S. 310, 342-43 (2010) (explaining that "political speech does not lose First Amendment protection 'simply because its source is a corporation'")(quoting *Bellotti*, 435 U.S. at 784).

Just as whether "corporations have speech rights" is not the right question in freedom of speech cases, whether "corporations exercise religion" is not the right question in freedom of religion cases. The right question, as *Belloti* indicates, is whether the law at issue transgresses religious liberty that RFRA and the First Amendment protect. We agree with Respondents that in this case, the answer is clearly yes.

Indeed, "[i]t is beyond question that associations—not just individuals—have Free Exercise rights." App. 34a (citing *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984)). And, "[a]s should be obvious," the right of religious exercise extends to all manner of religious associations—"including those that incorporate." App. 35a (citing *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 525 (1993); *Terrett* v. *Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815) (Story, J.).

The religious liberty of these corporations is substantially burdened just as the religious liberty of the Respondent Greens discussed above. These corporations must either violate the religious beliefs of their owners and operators, or pay nearly "$475 million more" in annual taxes, or drop employee health benefits and "pay roughly $26 million more in annual taxes," plus the cost of compensating their employees for the loss of health benefits formerly part of their employee compensation. App. 51a-52a.

And the government Petitioner again has not met the strict scrutiny standards to justify this substantial burden on religious liberty. The government Petitioner has failed to offer any compelling interest that would justify the particular substantial burden on religious liberty in this case. There is no showing of how allowing these two corporations exemptions from four of the 20 contraceptive drugs and devices required by the contraceptive coverage mandate would adversely affect any compelling interest. Nor is there any showing that the contraceptive coverage mandate is the least restrictive means of serving any such compelling interest.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should affirm the ruling of the court below.

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IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES, *ET AL.*,

Petitioners,

v.

HOBBY LOBBY STORES, INC., *ET AL.*,

Respondents.

(Additional Caption on the Reverse)

On Writs of Certiorari to the United States Court of Appeals for the Tenth and Third Circuits

BRIEF OF *AMICI CURIAE* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PHYSICIANS FOR REPRODUCTIVE HEALTH, AMERICAN ACADEMY OF PEDIATRICS, AMERICAN NURSES ASSOCIATION, *ET AL.* IN SUPPORT OF THE GOVERNMENT

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INTEREST OF AMICI CURIAE[1]

Amici curiae are organizations of physicians, registered nurses and other health care professionals that share the common goal of ensuring access to high quality medical care for women and families that is comprehensive and evidence-based. Such medical care should include reproductive health care and services. Amici believe that increased access to the full range of FDA-approved prescription contraceptives is an essential component of effective health care for women and their families.

The American College of Obstetricians and Gynecologists (ACOG) is a non-profit educational and professional organization founded in 1951. With more than 57,000 members, ACOG is the leading professional association of physicians who specialize in the health care of women. ACOG's members represent approximately 90% of all board-certified obstetricians and gynecologists practicing in the United States.

Physicians for Reproductive Health (PRH) is a doctor-led national not-for-profit organization that relies upon evidence-based medicine to promote sound reproductive health care policies.

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part and no person other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters of consent to this filing have been filed with the Clerk of the Court.

Comprised of physicians, PRH brings medical expertise to discussions of public policy on issues affecting reproductive health care and advocates for the provision of comprehensive reproductive health services as part of mainstream medical care.

The American Academy of Pediatrics (AAP) was founded in 1930 and is a national, not-for-profit organization dedicated to furthering the interests of child and adolescent health. Since AAP's inception, its membership has grown from 60 pediatricians to over 60,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists. Over the past 84 years, AAP has become a powerful voice for child and adolescent health through education, research, advocacy, and the provision of expert advice. AAP has worked with the federal and state governments, health care providers, and parents on behalf of America's children and adolescents to ensure the availability of safe and effective childhood vaccines and contraceptives.

The American Nurses Association (ANA) represents the interests of the nation's 3.1 million registered nurses. Founded over a century ago and with members in every state across the nation, ANA is comprised of state nurses associations and individual nurses. Collectively, ANA and its organizational affiliates represent more than 300,000 nurses who practice across the continuum of care and in all health care settings.

American College of Nurse-Midwives (ACNM) is the professional organization for certified nurse-midwives and certified midwives. ACNM leads the profession through education, clinical practice, research and advocacy. ACNM advocates on behalf of women and families, its members, and the midwifery profession to eliminate health disparities and increase access to evidence-based, quality care.

The American College of Osteopathic Obstetricians and Gynecologists (ACOOG), which traces its origins to 1934, is passionately committed to excellence in women's health. ACOOG educates and supports osteopathic health care professionals to improve the quality of life for women.

The American Medical Student Association (AMSA) is the oldest and largest independent association of physicians-in-training in the United States. Founded in 1950, AMSA is a student-governed, non-profit organization committed to representing the concerns of physicians-in-training.

The American Medical Women's Association (AMWA) is a multispecialty organization comprised of physicians, residents, medical students, and health care professionals. AMWA functions at the local, national, and international level by providing and developing leadership, advocacy, education, expertise, mentoring, and strategic alliances to advance women in medicine and improve women's health.

The American Society for Emergency Contraception (ASEC) is a national organization which holds as its primary mission the promotion of access to and education about emergency contraception. ASEC supports collaboration among and represents a diverse group of stakeholders in the reproductive health community whose work includes a focus on emergency contraception.

The American Society for Reproductive Medicine (ASRM) is a non-profit, multidisciplinary organization with members in all 50 states and more than 100 countries worldwide. Founded in 1944, ASRM is dedicated to the advancement of the art, science, and practice of reproductive medicine.

The Association of Reproductive Health Professionals (ARHP) is a non-profit membership organization that was founded by Alan Guttmacher in 1963 as the education arm of Planned Parenthood. ARHP translates good science into practice by producing accredited, evidence-based programs for health care professionals across a broad range of sexual and reproductive health topics.

The California Medical Association (CMA) is a non-profit, incorporated professional association for physicians with approximately 39,000 members throughout the state of California. For more than 150 years, CMA has promoted the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession. CMA's physician members practice medicine in all specialties and settings, including providing reproductive health services.

International Association of Forensic Nurses (IAFN) is a non-profit membership organization comprised of forensic nurses working around the world and other professionals who support and complement the work of forensic nursing. IAFN is dedicated to the use of evidence-based forensic nursing practices and advocates for the availability of emergency contraception to victims of sexual assault who choose to use it as a means of preventing pregnancy.

Jacobs Institute for Women's Health (JIWH) is an organization that works to improve health care for women across their lifespan and in all populations. The mission of JIWH is to identify and study issues involving the interaction of medical and social systems, facilitate informed dialogue and foster awareness among consumers and providers, and promote problem resolution, interdisciplinary coordination and information dissemination.

The Maine Medical Association (MMA), founded in 1853, is a non-profit membership organization headquartered in Manchester, Maine representing the interests of over 4000 physicians, medical students and residents in training. MMA's mission is to support Maine physicians, advance the quality of medicine in Maine and promote the health of all Maine citizens.

The Massachusetts Medical Society (MMS) was founded in 1781 as a statewide professional association committed to advancing medical knowledge, developing and maintaining the highest professional and ethical standards of medical practice and health care, and promoting medical institutions. MMS is the oldest continuously operating medical society in the United States; its nearly 25,000 members include physicians practicing in all areas of medicine throughout the Commonwealth.

The National Association of Nurse Practitioners in Women's Health (NPWH) is a non-profit educational and professional organization that was established over 30 years ago and is the leading professional association of nurse practitioners who specialize in the health care of women. The mission of NPWH is to ensure the provision of quality health care to women of all ages by nurse practitioners and to protect and promote women's rights to make their own health care choices.

The National Physicians Alliance (NPA) creates research and education programs that promote health and foster active engagement of health care providers with their communities to achieve high quality, affordable health care for all. NPA offers a professional home to physicians who share a commitment to professional integrity and health justice.

The Society for Adolescent Health and Medicine was founded in 1968 and is a multidisciplinary organization committed to improving the physical and psychosocial health and well-being of all adolescents through advocacy, clinical care, health promotion, health service delivery, professional development and research.

The Society of Family Planning (SFP) is an academic society of researchers, clinicians and educators dedicated to improving sexual and reproductive health. Among its other activities, SFP promotes scientifically sound research by funding studies on family planning and fosters the advancement of clinical care through the development of evidence-based clinical guidelines. SFP also advances the creation of family planning knowledge to inform public policy.

The Society for Maternal-Fetal Medicine was established in 1977 and is the membership organization for obstetricians/ gynecologists who have additional formal education and training in maternal-fetal medicine. With approximately 2,000 members the Society works to improve maternal and child health through clinical guideline development, scientific research, continuing medical education, health policy leadership, and advocacy.

The Washington State Medical Association (WSMA) represents physicians and physician assistants throughout Washington state. The WSMA delivers strong advocacy that is patient focused and physician driven, working to help physicians deliver complete care patients can trust and to make Washington the best place to practice medicine and to receive care.

SUMMARY OF ARGUMENT

One of the major goals of the Affordable Care Act (ACA) is to provide access to certain forms of preventive care without additional cost to the patient, among them, contraceptives for women. Widespread access to contraception is an essential component of health care for women of childbearing age. Contraception helps to prevent unintended pregnancy and protects the health and well-being of women and their children. Cost is often an impediment to widespread use of appropriate contraceptives. The Government has a compelling interest in addressing the medical and social consequences of unintended pregnancy and ensuring the availability of medically appropriate contraception for all women, regardless of their financial status and ability to pay.

Recognizing an exemption to the contraception mandate for for-profit corporate employers based on their owners' personal religious beliefs would deny the ACA's promise of better preventive care coverage to female plan beneficiaries.[2] Employers' refusal to provide insurance coverage for contraceptives would increase the cost of health care to women. Some women, particularly lower income women, would be unable to access the most medically appropriate method because of the additional expense. As a result, a private, medical decision that should be made by a woman in consultation with her health care provider would be unduly influenced by the employer. Employers should not be allowed to interfere in the provider-patient relationship in this way. Contraceptive access is critical to the health of women and women should not be denied coverage to which they are otherwise entitled by law based on the religious beliefs of their employer-corporation's owners.

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[2] In both cases before the Court, the religious exemptions sought under RFRA and/or the Free Exercise

Moreover, allowing an employer a religious exemption to the ACA's mandated coverage requirements would have consequences that extend far beyond contraception. Employers who object to any medical treatment, device, or procedure on personal religious grounds could similarly exclude such services from the coverage they provide—with potentially disastrous results. Employers could, for example, seek to exclude vaccinations that they

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Clause of the First Amendment are asserted on behalf of the individual owners of the corporate employers as well as the corporations themselves. Amici do not agree that corporations can have religious beliefs or that the personal beliefs of the owners are attributable to the corporations. References herein to the employer's beliefs are intended solely to enhance the readability of the brief and are not an acknowledgment that the corporate employer has religious beliefs.

deem offensive to their religious beliefs, forcing individuals to pay for objected-to vaccinations out-of-pocket or worse, forgo the medically-recommended vaccinations entirely. The public health implications of allowing a for-profit corporation to assert a religious exemption to the ACA's mandated coverages are self-evident.

In short, health care decisions should be made by patients in consultation with their health care providers based on the best interests of the patient. This is possible only when health care providers have the full range of options available to recommend or prescribe in accordance with the individual circumstances of each patient. To allow the personal view of a remote party—the employer of a patient (or the patient's spouse or guardian)—to play a role in a patient's medical treatment would undermine the very nature of the patient-provider relationship and would cause wide ranging harms to public health.

ARGUMENT

POINT I.

EMPLOYERS SHOULD NOT BE ALLOWED TO INTERFERE IN THE PROVIDER-PATIENT RELATIONSHIP BY OPTING OUT OF PROVIDING INSURANCE COVERAGE FOR CONTRACEPTION

Decisions regarding contraception have a profound impact on a woman's health as well as on the health of her children. These important, private, medical decisions should be made by a patient in consultation with her health care provider. There is no role for a woman's employer in these decisions. Yet, if the requested religious exemption were to be recognized, corporate employers could deny access to prescription drugs and devices recommended by a woman's health care provider and thus inappropriately interfere in the provider-patient relationship.

A. Contraception Is an Essential Component of Women's Health Care

Access to contraception is a medical necessity for women during approximately thirty years of their life—from adolescence to menopause. *See* Guttmacher Inst., *Next Steps for America's Family Planning Program: Leveraging the Potential of Medicaid and Title X in an Evolving Health Care System* (2009), http://www.guttmacher.org/pubs/NextSteps.pdf; *see also* Gladys Martinez et al., *Use of Family Planning and Related Medical Services Among Women Aged 15-44 in the United States: National Survey of Family Growth, 2006-2010*, National Health Statistics Reports (Sept. 5, 2013) http://www.cdc.gov/nchs/data/nhsr/nhsr068.pdf. Without the ability to control her fertility during her childbearing years, a woman risks becoming pregnant approximately twelve times. Guttmacher Inst., *Sharing Responsibility: Women, Society and Abortion Worldwide,* 18 (1999), https://www.guttmacher.org/pubs/sharing. pdf.

Contraception helps women plan their pregnancies and determine the timing and spacing of them, which improves their own health and the well-being of their children. Women with unintended pregnancies are less likely to breastfeed, and more likely to receive delayed prenatal care, to be anxious or depressed, and experience domestic violence during pregnancy. Jessica D. Gipson, Michael A. Koenig, Michelle J. Hindin, *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature*, 39 STUD. IN FAM. PLANNING 18, 18-38 (2008). The fact that a woman did not intend to become pregnant may have a lasting effect on her child's health; low birth weight and preterm birth, which have long term sequela, are associated with unintended pregnancies. Prakesh S. Shah et al., *Intention to Become Pregnant and Low Birth Weight and Preterm Birth: A Systematic Review*, 15 MATERNAL & CHILD HEALTH J. 205, 205-206 (2011).

Unintended pregnancy remains a significant public health concern in the United States. Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 CONTRACEPTION 478, 478-485 (2011). Approximately 50% of all pregnancies in the United States are unintended. *Increasing Use of Contraceptive Implants and Intrauterine Devices to Reduce Unintended Pregnancy,* ACOG Comm. Op. 450, 114 OBSTET. & GYNECOL. 1434, 1434-1438 (2009); *see also* Lawrence B. Finer & Mia R. Zolna, *Shifts in Intended and Unintended Pregnancies in* *the United States, 2001-2008*, 104 AM. J. PUB. HEALTH S43, S43-S48 (2014). Many unintended pregnancies end in abortion. *See* Guttmacher Inst., *Unintended Pregnancy in the United States* (Dec. 2013), http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html ("In 2008, 40% of unintended pregnancies (excluding miscarriages) ended in abortion").

Pregnancies that are too frequent and too closely spaced, which are more likely when those pregnancies are unintended, put women at significantly greater risk for permanent physical health damage. Such damage can include: uterine prolapse (downward displacement of the uterus), rectocele (hernial protrusion of the rectum into the vagina), cystocele (hernial protrusion of the urinary bladder through the vaginal wall), and pelvic floor disorders. Additionally, women with short interpregnancy intervals are at greater risk for third trimester bleeding, premature rupture of membranes, puerperal endometritis, anemia, and maternal death. Augustin Conde-Agudelo & Jose M. Belizan, *Maternal Morbidity and Mortality Associated with Interpregnancy Interval: Cross Sectional Study*, 321 BRITISH MED. J. 1255, 1257 (2000). It is generally not possible to predict, in advance, which women will suffer these complications in pregnancy.

Inadequate spacing between pregnancies can increase the risk of low birth weight, preterm birth, and small size for gestational age. Augustin Conde-Agudelo, Anyeli Rosas-Bermúdez and Anna Cecilia

Kafury-Goeta, *Birthspacing and Risk of Adverse Perinatal Outcomes: a Meta-Analysis*, 295 J. AM. MED. ASS'N 1809, 1809-1823 (2006); Bao Ping Zhu, *Effect of Interpregnancy Interval on Birth Outcomes: Findings From Three Recent U.S. Studies*, 89 INT'L J. GYNECOL. & OBSTET. S25, S25–S33 (2005); AM. ACAD. OF PEDIATRICS & AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, GUIDELINES FOR PERINATAL CARE 202 (7th ed., 2013). Infants conceived 18 to 23 months after a previous live birth had the lowest risks of these adverse perinatal outcomes. Bao Ping Zhu et al., *Effect of the Interval Between Pregnancies on Perinatal Outcomes*, 340 NEW ENG. J. MED. 589, 590 (1999).

Because of these recognized benefits of contraceptives, the Centers for Disease Control and Prevention identified family planning as one of the greatest public health achievements of the twentieth century, finding that smaller families and longer birth intervals contribute to the better health of infants, children, and women, as well as improving the social and economic roles of women. Ctrs. for Disease Control & Prevention, *Achievements in Public Health, 1900-1999*, (Dec. 3, 1999), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4847a1.htm.

Contraception also helps to protect the health of those women for whom pregnancy can be hazardous, or even life-threatening. Ctrs. for Disease Control & Prevention, *U.S. Medical Eligibility Criteria for Contraceptive Use, 2010*

(June 18, 2010), http://www.cdc.gov/mmwr/pdf/rr/rr5904.pdf. Women with certain chronic conditions such as heart disease, diabetes mellitus, hypertension and renal disease, are at risk for complications during pregnancy. Other chronic conditions complicated by pregnancy include sickle-cell disease, cancer, epilepsy, lupus, rheumatoid arthritis, hypertension, asthma, pneumonia and HIV. *See generally*, F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS 958-1338 (23d ed. 2010); AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, GUIDELINES FOR WOMEN'S HEALTH CARE 187 (3rd ed. 2007) ("ACOG GUIDELINES FOR WOMEN'S HEALTH"); *see also Harris v. McRae*, 448 U.S. 297, 339 (1980) (Marshall, J., dissenting) ("Numerous conditions—such as cancer, rheumatic fever, diabetes, malnutrition, phlebitis, sickle cell anemia, and heart disease—substantially increase the risks associated with pregnancy or are themselves aggravated by pregnancy.").

Contraception has other scientifically recognized health benefits for many women. Hormonal birth control, in addition to preventing unintended pregnancies, helps address several menstrual disorders, helps prevent menstrual migraines, treats pelvic pain from endometriosis, and treats bleeding from uterine fibroids. Ronald Burkman et al., *Safety Concerns and Health Benefits Associated With Oral Contraception*, 190 AM. J. OF OBSTET. & GYNECOL. S5, S5-S22 (2004). Oral contraceptives have been shown to have long-term benefits in reducing a woman's risk of developing endometrial and ovarian cancer, protecting against pelvic inflammatory disease and certain benign breast disease and short-term benefits in protecting against colorectal cancer. *Id. See also* Inst. of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 107 (2011) ("IOM Report"), http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx.

Virtually all American women who are or have been sexually active have used contraceptives at some point during their lifetimes, irrespective of their religious affiliation. Rachel K. Jones & Joerg Dreweke, *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use*, Guttmacher Inst., (April 2011), http://www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf. At any given time, approximately two-thirds of American women of reproductive age wish to avoid or postpone pregnancy. ACOG GUIDELINES FOR WOMEN'S HEALTH at 182. Access to contraception is a medical necessity for all women, regardless of their economic means.

B. Allowing the Exemption Sought Would Impose Financial Barriers to Medically Appropriate Contraception for Many Women

If employers are permitted to exclude contraceptive methods from the insurance coverage they provide to their employees, contraception will become cost prohibitive for many women. As a result, many will use no contraception or will use an imperfect form of contraception inconsistently or improperly, with a concomitant increase in unintended pregnancies with all their consequences. Numerous studies have demonstrated that the cost of treatment or prescriptions generally, and the out-of-pocket costs associated with contraceptives in particular, creates a barrier for many women to obtain and consistently use the particular contraceptive best suited for their needs.

1. Insurance Coverage Promotes Contraception Use

Insurance coverage has been shown to be a "major factor" for a woman when choosing a contraceptive method and determines whether she will continue using that method. Kelly R. Culwell & Joe Feinglass, *Changes in Prescription Contraceptive Use, 1995-2002*, 110 OBSTET. & GYNECOL. 1371, 1378 (2007). *See also* Guttmacher Inst., *Testimony of Guttmacher Institute Submitted to the Committee on Preventive Services for Women*, 8 (Jan. 12, 2011), http://www.guttmacher.org/pubs/CPSW-testimony.pdf ("Guttmacher Testimony") ("Several studies indicate that costs play a key role in the contraceptive behavior of substantial numbers of U.S. women."); Gina M. Secura et al., *The Contraceptive CHOICE Project: Reducing Barriers to Long-Acting Reversible Contraception*, 203 AM. J. OBSTET. &. GYNECOL. 115, 115 (2010) (when 10,000 study participants were offered the choice of any contraceptive method at no cost, two-thirds of participants chose long-acting methods, such as the IUD or implant); Debbie Postlethwaite et al., *A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change*, 76 CONTRACEPTION 360, 360 (2007) (elimination of cost-sharing for contraceptives at Kaiser Permanente Northern California resulted in significant increases in the use of the most effective forms of contraceptives); Kelly R. Culwell & Joe Feinglass, *The Association of Health Insurance with Use of Prescription Contraceptives,* 39 PERSPS. ON SEXUAL & REPROD. HEALTH 226, 226 (2007) (study reveals that uninsured women were 30% less likely to use prescription contraceptives than women with some form of health insurance).

A 1998 poll commissioned by the Kaiser Family Foundation reported that 75% of adult women identified insurance coverage as having an impact on their choice of a method of contraception. Adam Sonfield & Rachel Benson Gold, *New Study Documents Major Strides in Drive for Contraceptive Coverage*, 7 GUTTMACHER REP. ON PUB. POL'Y 4, 5 (2004) ("Sonfield & Gold"). Lack of insurance coverage deters many women from choosing a high-cost contraceptive, even if that method is best for her health and lifestyle, and may result in her resorting to a method that places her more at risk for medical complications or improper or inconsistent use. The intrauterine device ("IUD"), for example, a long-acting reversible contraceptive ("LARC") that does not require regular action by the user, is among the most effective forms of contraception, but it has up-front costs of between

$500 and $1000.[3] IOM Report at 108; *see also* Megan L. Kavanaugh et al., *Perceived and Insurance-Related Barriers to the Provision of Contraceptive Services in U.S. Abortion Care Settings*, 21-3S WOMEN'S HEALTH ISSUES S26, S26 (2011) (finding that cost can be a barrier to the selection and use of LARCs and other effective forms of contraceptives, such as the patch, pills, and the ring). The out-of-pocket cost for a woman to initiate LARC methods was 10 times higher than a 1-month supply of generic oral contraceptives. Stacie B. Dusetzina et al., *Cost of Contraceptive Methods to Privately Insured Women in the United States*, 23 WOMEN'S HEALTH ISSUES e69, e69-e71 (2013). Women and couples are more likely to use contraception successfully when they are given their contraceptive method of choice, be it a birth control pill, a vaginal ring, or an IUD. Jennifer J. Frost & Jacqueline E. Darroch, *Factors Associated with Contraceptive Choice and Inconsistent Method Use, United States, 2004*, 40 PERSPS. ON SEXUAL & REPROD. HEALTH 94, 94 (2008). A national survey conducted in 2004 found that one-third of women using contraception would switch methods if cost was not a factor. *Id.*

Even seemingly insubstantial additional cost requirements can dramatically reduce the use of health care services. Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 GUTTMACHER POL'Y REV. 7, 10 (2011). *See also* Sonfield & Gold at 14 ("coverage, in and of itself, may not be enough for many women. Insurance plans typically require co-payments that may effectively render service use unaffordable"); *Access to Emergency Contraception*, ACOG Comm. Op. 542, 120 OBSTET. & GYNECOL. 1250, 1251 (2012) ("ACOG Opinion 542") (citing Jodi Nearns, *Health Insurance Coverage and Prescription Contraceptive Use Among Young Women at Risk for Unintended Pregnancy*, 79 CONTRACEPTION 105, 105-110 (2009)) (financial barriers, including lack of insurance, or substantial co-payments or deductibles, may deprive women of access to contraception).

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[3] The IUD, as well as sterilization and the implant have failure rates of 1% or less. Failure rates for injectable or oral contraceptives are 7% and 9% respectively, due to some women skipping or delaying an injection or pill. Guttmacher Testimony at 2.

The Department of Health and Human Services recognized that mandated preventive services had been underutilized, and anticipated that eliminating cost sharing would result in greater utilization. This, in turn, would improve health for individuals by *inter alia*, preventing and reducing transmission of disease and enabling earlier treatment of disease, and would result in savings due to lower health care costs. 75 C.F.R. at 41731, 41733 (July 19, 2010); IOM Report at 1-2.[4]

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[4] Public Health Service Act Section 2713 as added by the ACA requires non-grandfathered group health plans to cover certain preventive-health services without cost sharing. These include services with Grade A and B recommendations made by the United States Preventive Services Task Force,

Similarly, in studying the issue of contraceptive coverage under the ACA, the Institute of Medicine ("IOM") found that imposing additional costs like deductibles and co-payments can pose barriers and result in reduced use of services. IOM Report at 109. The IOM concluded that the elimination of cost-sharing for contraceptive care could greatly increase contraceptive use, including use of LARCs, especially for low-income women at greater risk of unintended pregnancy. IOM Report at 109. Many women are so cost-sensitive that even small increments in cost-sharing have been shown to reduce the use of beneficial preventive services. IOM Report at 109.

2. The Requested Exemption Would Deny Women Access to Medically Appropriate Contraception

The consequences of lack of coverage for contraceptives fall more heavily on women and families with the fewest resources. IOM Report at 109. Specifically, unintended pregnancy is more likely amongst unmarried women aged 18-24, women who are low-income, who are not high school graduates, and who are members of certain

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preventive care and screenings for children provided for in guidelines supported by the Health Resources and Services Administration (HRSA), vaccinations specified by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention, and preventive services for women as recommended by the HRSA and the Institute of Medicine. *See* 42 U.S.C. 300gg-13; 75 C.F.R. at 41731 (July 19, 2010).

racial or ethnic minority groups. IOM Report at 2. Moreover, approximately 750,000 adolescents get pregnant each year, and 80% of those pregnancies are unintended. *US Teenage Pregnancies, Births and Abortions: National and State Trends and Trends By Race and Ethnicity* (2010), http://www.guttmacher.org/pubs/USTPtrends.pdf; Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006,* 84 CONTRACEPTION 478, 478-85 (2011). Among adolescents, oral contraceptives have been found to be less effective due to faulty compliance (*e.g.*, not taking the pill every day or at the right time of day), and therefore more passive contraceptive methods like IUDs and other LARCS are often preferable, but they have greater up-front costs. Am. Acad. of Pediatrics, *Policy Statement: Contraception and Adolescents*, 120 PEDIATRICS 1135, 1135-1148 (2007). A recent study of over 9,000 adolescents and women desiring reversible contraception, for which all participants received their choice of contraceptive at no cost, resulted in a significant reduction in abortion rates and teenage birth rates. The study concluded that "unintended pregnancies may be reduced by providing no-cost contraception and promoting the most effective contraceptive methods." Jeffrey Peipert et al. *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 OBSTET. & GYNECOL. 1291, 1291 (2012). Excluding contraception from insurance coverage, and thereby creating barriers to access to suitable contraceptives for adolescents, could increase rates of unintended teenage pregnancies.

The ACA mandate represents the Government's determination that ensuring a woman's access to the full range of FDA-approved contraceptives is sufficiently essential to warrant mandatory coverage without cost-sharing. IOM Report at 109-10. Allowing employers to exclude all or certain contraception methods from their employees' insurance coverage would make appropriate contraceptives cost-prohibitive to many women. Because expense is such a high barrier for many women, the availability of contraceptives without cost sharing makes a crucial difference in women's access to this essential element of their health care.

C. Decisions About Contraception Should be Made in the Context of the Provider-Patient Relationship, Without Interference by the Employer

The provider-patient relationship is essential to all health care. The health care professional and the patient share responsibility for the patient's health, and the well-being of the patient depends upon their collaborative efforts. Am. Med. Ass'n, *Opinon 10.01*, http://www.ama-assn.org//ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion1001.page. *See also, Elective Surgery and Patient Choice,* ACOG Comm. Op. 578, 122 OBSTET. & GYNECOL. 1134, 1135 (2013) ("The goal should be decisions reached in partnership between patient and physician."). Within the provider-patient relationship, the provider's respect for the patient's autonomy is fundamental. Am. Coll. Of Obstetricians & Gynecologists, *Code of Professional Ethics,* http://www.acog.org/About_ACOG/~/media/Departments/National%20Officer%20Nominations%20Process/ACOGcode.pdf. "In medical practice, the principle of respect for autonomy implies personal rule of the self that is free . . . from controlling interferences by others." *Ethical Decision Making in Obstetrics and Gynecology,* ACOG Comm. Op. 390, 110 OBSTET. & GYNECOL. 1479, 1481 (2007).

Deciding on the best form of contraceptive for any specific patient should take place within the shared responsibility of the provider-patient relationship. Like other decisions, the welfare of the patient should receive the highest priority in the consideration of appropriate contraceptive use. Not all contraceptives are clinically appropriate for every woman. Rachel A. Bonnema, Megan C. McNamara, Abby L. Spencer, *Contraception Choices in Women with Underlying Medical Conditions,* 82 AM. FAM. PHYSICIAN 612, 612-628 (2010). A variety of individualized factors must be considered, including, for example, a patient's current health and medical conditions, potential drug interactions, medical history, stage of life, and religious and personal preferences.

More particularly, LARCS, such as implants and IUDs, may be preferable for women who require highly effective methods, who wish to postpone pregnancy for an extended length of time, and who desire or need a method that is effective without the user taking regular action once it is initiated. Emergency contraception pills or devices are used by women to prevent pregnancy after rape, unprotected sex or the failure of some other contraceptive. ACOG Opinion 542 at 1250.[5]

Hormonal birth control pills or a hormonal IUD may not be suitable for women with certain medical conditions such as heart or liver disease, women who have certain blood-clotting disorders, or who have had or are at a higher risk of certain types of cancer. Ctrs. for Disease Control & Prevention, *U.S. Medical Eligibility Criteria for Contraceptive Use, 2010*, (June 18, 2010), http://www.cdc.gov/mmwr/pdf/rr/rr5904.pdf. Oral contraceptives may be inappropriate for women who smoke. *Id.* Similarly, use of a copper IUD may be inappropriate for women with uterine abnormalities, pelvic infections, or women with disorders resulting in accumulation of copper in their organs, such as Wilson's disease. *Id.* Use of certain contraceptives may be contraindicated based on adverse interactions with other medications a woman is taking, or based on certain lifestyle factors that could make certain forms of contraception inadvisable. *Id.* All of these factors concerning a woman's medical and personal circumstances, and the patient's *own* personal beliefs, should be weighed by health care providers when advising her about her contraception choices.

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[5] None of the FDA-approved emergency contraceptives or IUDs cause abortion; rather, they prevent unintended pregnancy from occurring and thereby prevent situations in which a woman may consider abortion. *See* Brief of Amici Curiae Physicians for Reproductive Health et al. in Support of the Government's Petition for a Writ of Certiorari in *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354.

To best serve the particular medical needs of their patients, physicians must have available to them an array of contraceptive options from which to recommend in order to ensure that the particular method prescribed optimally meets the particular medical and personal circumstances of the patient. *See* Adam Sonfield et al., *U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates, 2002*, 36 PERSPS. ON SEXUAL & REPROD. HEALTH 72, 78 (2004) ("By covering a wide range of contraceptive methods, plans may enable women to choose the method that is best suited to their needs; by doing so, plans may help them to use contraceptives correctly and more consistently; and hence reduce unintended pregnancy.").

This Court has also repeatedly recognized the importance of safeguarding the relationship between individual and health care provider, as well as the independence of medical judgment. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 197 (1973) (recognizing a "woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it"); *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 67 (1976) (avoiding "confin[ing] the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession"). As noted in *Colautti v. Franklin*, *Doe v. Bolton* "underscored the importance of affording the physician adequate discretion in the exercise of his medical judgment." 439 U.S. 379, 387 (1979). *See Doe v. Bolton*, 410 U.S. at 192 (recognizing that "medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient").

An employer's personal religious beliefs should not intrude into private medical decisions made between a health care provider and patient by controlling the available medical options, and should not be permitted to compel a woman to accept lesser preventive health care services or to pay for services to which she is entitled to at no additional cost under the ACA. *Cf. Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) ("The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.") (*quoting Otten v. Baltimore & Ohio R. Co*, 205 F.2d 58, 61 (2d Cir. 1953).[6]

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[6] Although it is the employer that selects and purchases the health insurance plan available for employees, employees themselves are frequently expected to contribute to the cost of the premium and pay significant deductibles and co-payments which are increasingly significant features of health plan design. In 2013, on average, covered workers

POINT II.

ALLOWING EMPLOYERS TO VETO MANDATED COVERAGE BASED ON THEIR OWNERS' RELIGIOUS BELIEFS HAS PUBLIC HEALTH RAMIFICATIONS FAR BROADER THAN CONTRACEPTIVES

The issues presented in these cases can have far-reaching effects. Recognizing a for-profit employer's right to a religious belief exemption to mandated insurance coverage can have dangerous health implications that extend beyond the ACA and far beyond contraceptive use. The ability of medical professionals to provide comprehensive health care to their patients could be significantly impaired if corporate employers (or their owners) are permitted to veto objected-to medications, treatments, or other mandated health services from their employees' health plans.

Our diverse society holds a wide variety of religious beliefs. And, the Constitution's protection of religious beliefs "is not limited to beliefs which

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contributed 18% of the cost of single coverage, and 29% of the cost of family coverage. Kaiser Fam. Found., *Employer Health Benefits 2013 Annual Survey* 67 ("Kaiser Survey"). Among small firms (fewer than 200 employees), 31% of workers paid more than half of the cost of premiums. *Id.* at 68. Notwithstanding the employees' contribution to the cost of their insurance, the religious exemption sought would allow the employer to deprive the company's employees of mandated coverage to which they are entitled in exchange for the premium to which the employee contributed.

are shared by all of the members of a religious sect." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection," *id.* at 714; all that is required is that the individual have an "honest conviction" that the act in question violates his religious beliefs. *Id.* at 716. Consequently, employers' religious objections to providing insurance coverage can be as broad and wide-ranging as the diverse beliefs of the American population.[7]

Sincerely held religious beliefs prompt some adherents to object to a variety of medical services that are an essential part of mainstream health care, such as, for example, vaccines and mental health services. Giving corporate employers a religious exemption to mandated insurance coverage for these health services creates significant barriers to access to health care that pose a serious risk to patients' health.

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[7] The diversity of employers' personal religious beliefs is evident in these cases alone. Respondents in *Hobby Lobby* object to covering IUDs and emergency contraception, but not to contraceptives generally. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1125 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013). Petitioners in *Conestoga Wood* object to various contraceptives that "prevent implantation." *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 381-82 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013). Plaintiffs in other cases awaiting this Court's decision object to covering all contraceptives. *See, e.g. Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1210 (D.C. Cir. 2013), *pet. for cert. pending*, No. 13-567 (filed Nov. 5, 2013) (plaintiffs oppose contraception); *Korte v. Sebelius*, 735 F.3d 654, 663-664 (7th Cir. 2013) (same); *Autocam Corp. v. Sebelius*, 730 F.3d 618, 621 (6th Cir. 2013), *pet. for cert. pending*, No. 13-482 (filed Oct. 15, 2013) (plaintiffs "accept their church's teaching that artificial contraception [is] immoral").

A. Allowing Religious Objections to Coverage of Vaccinations Would Pose a Threat to the Provision of Comprehensive Health Care

Vaccines have been hailed as the single greatest improvement in the history of medicine and have long been recognized as a public health imperative, particularly for children. According to the National Center for Immunization and Respiratory Diseases "vaccination with 7 of the 12 routinely recommended childhood vaccines prevents an estimated 33,000 deaths and 14 million cases of disease in every birth cohort." Sandra W. Roush & Trudy V. Murphy, *Historical Comparisons of Morbidity and Mortality for Vaccine-Preventable Diseases in the United States*, 298 J. AM. MED. ASS'N 2155, 2160 (2007). They also found that "the number of cases of most vaccine-preventable diseases is at an all-time low; hospitalizations and deaths have also shown striking decreases . . . due to reaching and maintaining high vaccine coverage levels from infancy throughout childhood." *Id.* All 50 states require certain vaccinations for children entering public schools and most mandate insurance coverage for certain vaccinations.[8] Recognizing the vital role vaccinations play in preventive care, the ACA also mandates coverage, without cost sharing, of numerous immunization services for both children and adults. *See* 42 U.S.C. 300gg-13(a)(2); 75 Fed. Reg. 41728 (July 19, 2010). At the same time, vaccines are often the object of religious objections, across various religious groups and for differing reasons.[9]

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[8] Most states allow religious exemptions to mandatory vaccinations. These exemptions allow an individual to refuse vaccination for himself (or his child) based on his own religious beliefs. These types of exceptions, and the mandates to which they apply, are entirely different from those at issue in this case and would be unaffected by a denial of the exemptions sought here. Unlike state mandates which require individuals to be vaccinated prior to school entry, the mandate in this case does not require individuals to undergo a medical intervention—rather it requires that insurance coverage for that intervention be part of a package of employee benefits. Moreover, the exemptions to state vaccine mandates are given to individuals based on their own beliefs; in contrast, the exemption sought here would impose one individual's religious beliefs onto others.

[9] Religious objections to vaccinations are very real. By way of example only, in 1994, significant measles outbreaks occurred in two religious communities originating from an unvaccinated teenager who lived in Illinois and attended boarding school in Missouri. *Outbreak of Measles Among Christian Science Students—Missouri and Illinois, 1994* (July 1, 1994), http://www.cdc.gov/mmwr/preview/mmwrhtml/00031788.htm. In 2005, a measles outbreak occurred in Indiana among a religious community that opposed vaccinations when an unvaccinated teenager passed the disease to others at a church gathering. Amy A. Parker et al., *Implications of a 2005 Measles Outbreak in Indiana for*

Certain religious adherents object to vaccines derived from fetal tissue, including vaccinations for chicken pox, Hepatitis A and B, MMR (Measles, Mumps, and Rubella), and Polio. Richard K. Zimmerman, *Ethical Analyses of Vaccines Grown in Human Cell Strains Derived From Abortion: Arguments and Internet Search*, 22 VACCINE 4238, 4238-4244 (2004). Others object to vaccines containing bovine or porcine extracts, or blood fragments, and some object to vaccines more generally as defiling the body by introducing foreign or virulent substances.[10] Tara M. Hoesli et al., *Effects of Religious and Personal Beliefs on Medication Regimen Design*, 34 ORTHOPEDICS 292, 292-295 (2011).

Vaccinations against the Human Papillomavirus (HPV) prevent serious health conditions such as cancer and genital warts.[11] The vaccine offers the best protection to individuals who receive all three

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Sustained Elimination of Measles in the United States, 355 NEW ENG. J. MED. 447-455 (2006). And in 2010, an outbreak of whooping cough was similarly linked to vaccination refusals. Jessica E. Altwell et al., *Nonmedical Vaccine Exemptions and Pertussis in California*, 132 PEDIATRICS 624, 624-630 (2010).

[10] Certain vaccines contain a low dose of the live virus against which the vaccine inoculates.

[11] HPV causes most forms of cervical cancers, with which approximately 12,000 women are diagnosed annually and from which 4,000 women die each year. Ctrs. for Disease Control & Prevention, *HPV and HPV Vaccine*, http://www.cdc.gov/std/hpv/stdfact-hpv-vaccine-hcp.htm.

doses of the vaccine before beginning sexual activity, thus giving their bodies time to develop an immune response to the vaccine before possible exposure to the virus. Therefore, the HPV vaccine is recommended for preteens at 11 or 12 years of age. Ctrs. for Disease Control & Prevention, *Human Papillomavirus (HPV)*, http://www.cdc.gov/vaccines/vpd-vac/hpv/downloads/dis-HPV-color-office.pdf. However, there are religious objections to the HPV vaccine in that these diseases can and should best be reduced by abstinence outside of marriage. Surveys have shown a definite correlation between those who have rejected the HPV vaccine and attendance at religious services. Rachel Shelton et al., *HPV Vaccine Decision-Making and Acceptance: Does Religion Play a Role?*, 52 J. RELIGIOUS HEALTH 1120, 1120-30 (2013); Debra Bernat et al., *Characteristics Associated with Initiation of the Human Papillomavirus Vaccine Among a National Sample of Male and Female Young Adults*, 53 J. ADOLESCENT HEALTH 630, 630-636 (2013).

By logical extension, if a religious exemption to providing mandated coverage were recognized, corporate employers holding any of these views could similarly decline to cover any or all of the vaccines deemed to violate the corporation owners' religious beliefs.

B. Recognizing a Religious Exemption to Providing Mandated Health Insurance Coverage Would Deprive Patients of Access to Other Essential Health Services

Certain religious adherents object to other specific health services, or to medical interventions at all. Corporate owners whose religion renounces medical treatment on the belief that disease is prevented or cured by prayer may assert a religious objection to the provision of health insurance in its entirety as being contrary to their religious beliefs. *See* Park Ridge Ctr. for the Study of Health, Faith, and Ethics, *The Christian Science Tradition: Religious Beliefs and Healthcare Decisions*, http:// www.che.org/members/ethics/ docs/1276/Christian% 20Science.pdf (noting religious belief that illness and disease results from an underlying condition of spiritual distance from God; healing is sought primarily from prayer, rather than medical intervention). Similarly, certain religious interpretations hold that insurance generally is forbidden as a form of gambling. Mubbsher M. Khan & Hassan M. Alam, *Comparative Analysis of Islamic and Prevailing Insurance Practices*, 2 INT'L J. BUS. & SCIENCE 282, 283 (2011). Thus, owners of a corporation adhering to this belief could assert a religious objection to providing any health insurance to its employees. Followers of a religion which eschews mainstream mental health care in favor of that religion's own mental health therapies, may assert a religious objection to coverage of mandated depression screening, treatment, and psychiatric pharmaceuticals. *See* Steven A. Kent & Terra A. Manca, *A War Over Mental Health Professionalism: Scientology Versus Psychiatry,* MENTAL HEALTH, RELIGION & CULTURE 1, 1 (2012).

Moreover, the ACA further requires coverage of essential benefits that have been mandated by the respective states. *See* 42 U.S.C. 300gg-13. Certain medical treatments required to be covered under the ACA through state mandates may also be vulnerable to religious objections. Coverage for fertility treatments, including in-vitro fertilization, embryo transfer and artificial insemination, is presently mandated by some states. *See* National Conference of State Legislatures, *State Laws Related to Insurance Coverage for Infertility Treatment* (Mar. 2012), http://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx.[12] Religious objections to in-vitro fertilization and other fertility treatments are well documented. For example, in 1987, the Vatican's Congregation for the Doctrine of the Faith expressed the Vatican's opposition to certain fertility treatments, including in vitro fertilization and artificial insemination by donor. *Instruction* Donum Vitae *on Respect for Human Life at its Origins and for the Dignity of Procreation* (1988), http://www.vatican.va/roman_curia/ congregations/

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[12] Although some states allow religious exemptions to coverage, as does the contraception mandate under the ACA, these exemptions do not apply to for-profit corporate employers.

cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html. In 2008, the Vatican reaffirmed its objection to in vitro fertilization. *Instruction* Dignitas Personae *on Certain Bioethical Questions* (2008), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html. If a religious exemption is permitted, a corporate employer in an in-vitro mandated state may nevertheless object to covering such treatment if its owners have a religious objection to such treatment.

Hospice care is similarly mandated by the ACA through mandates in at least 11 states. *See* National Conference of State Legislatures, *Cancer Insurance Mandates and Exceptions,* (Aug. 2009), http://www.ncsl.org/portals/1/documents/health/CancerMandatesExcept09.pdf. Palliative care, which may incorporate features such as Do Not Resuscitate orders or large dosage narcotics, is objected to by some as hastening the patient's death in violation of religious prohibitions. *See, e.g.*, Nigel Sykes & Andrew Thorns, *Sedative Use in the Last Week of Life and the Implications for End-of-Life Decision Making*, 163 ARCH. INTERN. MED. 341, 341 (2003) (noting that "[t]he use of sedation at the end of life has aroused ethical controversy, attracting accusations of hastening death by gradually increasing sedative doses.").

Though framed as issues of religious exercise under the First Amendment and RFRA, these cases also raise the concern that owners of a for-profit corporate employer, based upon their personal religious beliefs, can deny a plan beneficiary insurance coverage for the treatment that she, in consultation with her health care provider and taking into account *her own* religious beliefs, believes to be appropriate and that has been determined to have a public health interest. *Amici* respectfully urge the Court to recognize the impact its decision will have, not only on the specific challenges to coverage of contraception, but also on employees' rights to other evidence-based essential health care services and the impact that denial of those rights will have on public health.

CONCLUSION

For the foregoing reasons, as well as those in the Government's brief, the judgment of the Court of Appeals for the Third Circuit should be *affirmed* and the judgment of the Tenth Circuit should be *reversed.*

Dated: New York, New York
January 28, 2014

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LIST OF ADDITIONAL *AMICI*

American College of Nurse-Midwives
American College of Osteopathic Obstetricians and Gynecologists
American Medical Student Association
American Medical Women's Association
American Society for Emergency Contraception
American Society for Reproductive Medicine
Association of Reproductive Health Professionals
California Medical Association
International Association of Forensic Nurses
Jacobs Institute for Women's Health
Maine Medical Association
Massachusetts Medical Society
National Association of Nurse Practitioners in Women's Health
National Physicians Alliance
Society for Adolescent Health and Medicine
Society of Family Planning
Society for Maternal-Fetal Medicine
Washington State Medical Association

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
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Nos. 13-354, 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS, *et al.*,
Petitioners,
v.
HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,
v.
KATHLEEN SEBELIUS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF AMERICAN FREEDOM LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, *ET AL.*

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QUESTIONS PRESENTED

The question presented in *Sebelius v. Hobby Lobby Stores, Inc.*, was framed by the government as follows:

> The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. [§§] 2000bb *et seq.*, provides that the government "shall not substantially burden a person's exercise of religion" unless the burden is the least restrictive means to further a compelling governmental interest. 42 U.S.C. [§§] 2000bb-1(a) and (b). The question presented is whether RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners.

In *Conestoga Wood Specialties Corp. v. Sebelius*, the petitioners framed the question presented as follows:

> Whether the religious owners of a family business, or their closely-held business corporation, have free exercise rights that are violated by the application of the contraceptive coverage Mandate of the Patient Protection and Affordable Care Act of 2010 ("ACA").

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae* American Freedom Law Center (hereinafter referred to as "AFLC") respectfully submits this brief in support of the respondents in *Hobby Lobby Stores, Inc.* and the petitioners in *Conestoga Wood Specialties Corp.*, urging the Court to protect the fundamental right to religious exercise that is violated by the contraceptive services mandate of the Patient Protection and Affordable Care Act of 2010 (hereinafter "Affordable Care Act" or "Act").[1]

AFLC is a national, public interest law firm that advances and defends America's Judeo-Christian heritage and moral values, including religious freedom and the sanctity of human life. AFLC accomplishes its mission through litigation, education, and public policy initiatives.

To further its public interest mission of safeguarding religious freedom, AFLC is lead counsel for two legal challenges to the contraceptive services mandate. The first legal challenge was filed on behalf of Johnson Welded Products, Inc., an Ohio-based company, and its owner, Ms. Lilli Johnson, a devout

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

AFLC further states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than AFLC, its members, or its counsel made a monetary contribution to its preparation or submission.

Catholic who wants to operate her family business according to the precepts of her faith. This case, in which the government consented to a preliminary injunction, is currently pending in the U.S. District Court for the District of Columbia. *See Johnson Welded Products, Inc. v. Sebelius*, No. 1:13-cv-00609-ESH, Minute Order, (D.D.C. May 24, 2013) (granting unopposed motion for preliminary injunction).

The second legal challenge was filed on behalf of Priests for Life, a nonprofit Catholic organization; Father Frank Pavone, the National Director of Priests for Life; Dr. Alveda King, the niece of civil rights leader Martin Luther King, Jr. and the Pastoral Associate and Director of African-American Outreach for Priests for Life; and Janet Morana, the Executive Director of Priests for Life. This case is currently pending in the U.S. Court of Appeals for the District of Columbia Circuit. On December 31, 2013, the court of appeals granted Priests for Life's emergency motion for an injunction, enjoining the enforcement of the contraceptive services mandate pending appeal. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, 2013 U.S. Dist. LEXIS 177951 (D.D.C. Dec. 19, 2013), *injunction granted*, No. 13-5368, Order at 2, (D.C. Cir. Dec. 31, 2013), *petition for cert. filed*, (Jan. 23, 2014).

In both cases and similar to the situation confronted by the challengers here, private citizens seek to operate their company or organization in accord with the tenets of their faith. Permitting the government to impose this unconscionable mandate on businesses and nonprofit organizations will effectively exclude faith-conscious owners and directors from participating in business affairs and public life — a result squarely at odds with the First Amendment and RFRA.

INTRODUCTION

> Sir Thomas More: "And when we stand before God, and you are sent to Paradise for doing according to your conscience, and I am damned for not doing according to mine, will you come with me, for fellowship?"

Robert Bolt, *A Man for All Seasons* 132 (1960)

For people of faith, matters of morality and conscience are not *insubstantial* — they are serious concerns that directly and materially affect a person's soul and thus eternal salvation, which is far more important than a person's physical health and thus exponentially more important than increasing the use of contraceptive services — services the government promotes under the guise of healthcare. And one's religious beliefs are not simply personal beliefs that are checked in and out at the cathedral door. Rather, for the faithful, their religious beliefs transcend all that they do. Indeed, for Catholics such as Ms. Johnson and Father Pavone, their faith is their guide for how they conduct their lives, both private and public. *See, e.g., Gilardi v. U.S. Dep't of Health & Human Servs.,* 733 F.3d 1208, 1217 (D.C. Cir. 2013) ("Equally uncontroverted is the nature of the Gilardis' religious exercise: they operate their corporate enterprises in accordance with the tenets of their Catholic faith."). And their religious beliefs and practices are beyond the reach of government compulsion and thus beyond the government's purview of what is or is not a burden upon those beliefs and practices. Otherwise, the First

Amendment loses its meaning and force as a *restriction* on the power of government. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993) ("The principle that government may not enact laws that suppress religious belief or practice is . . . well understood.").

Through its defense of the challenged mandate, the government urges this Court to accept what it, the government, believes is an acceptable burden upon religious beliefs and practices. Indeed, the government urges the Court to accept the position that "a proffered burden" upon one's religious beliefs is "not substantial in cases where the nature of applicable legal regimes and societal expectations necessarily impose objective outer limits on when an individual can insist on modification of, or heightened justification for, governmental programs that may offend his beliefs." Pet'r Sebelius Br. in *Hobby Lobby* at 33. But by whose measure, then, are we to determine what is an "objective outer limit": the measure of the government agency that is empowered to enforce the program or the man whose conscience is burdened in the process? The answer to that fundamental question rests, as it should, with the latter. *See Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs."). Indeed, moral teachings that guide the consciences of the faithful do not change with — nor can they be changed by — "legal regimes" or "societal expectations," and that is certainly the case with the Church's universal and consistent moral teaching on contraception — a teaching that has been in place for over 2,000 years.

And despite the best efforts of man and the federal government, this teaching will not, because it cannot, change. As Pope Paul VI made clear in *Humanae Vitae*, which confirmed the Church's universal teaching regarding the immorality of contraceptive practices:

> It is to be anticipated that perhaps not everyone will easily accept this particular teaching. There is too much clamorous outcry against the voice of the Church, and this is intensified by modern means of communication. But it comes as no surprise to the Church that she, no less than her divine Founder, is destined to be a "sign of contradiction." She does not, because of this, evade the duty imposed on her of proclaiming humbly but firmly the entire moral law, both natural and evangelical.
>
> Since the Church did not make either of these laws, she cannot be their arbiter — only their guardian and interpreter. *It could never be right for her to declare lawful what is in fact unlawful, since that, by its very nature, is always opposed to the true good of man.*
>
> In preserving intact the whole moral law of marriage, the Church is convinced that she is contributing to the creation of a truly human civilization. She urges man not to betray his personal responsibilities by putting all his faith in technical expedients. In this way she defends the dignity of husband and wife. This course of action shows that the Church, loyal to the example and teaching of the divine Savior, is sincere and unselfish in her regard for men whom she strives to help even now during this

> earthly pilgrimage "to share God's life as sons of the living God, the Father of all men."

Humanae Vitae ¶18 (1968) (emphasis added). Similarly, it could never be right for civil authorities — whether the federal government or this Court — to declare moral what is in fact immoral for a person of faith, "since that, by its very nature, is always opposed to the true good of man."

In the final analysis, religious beliefs and rights of conscience that flow from those beliefs are not subject to popular vote, majoritarian preferences, "societal expectations," "legal regimes," the predilections of the Executive Branch, or the predilections of this Court. The Bill of Rights ensures us of that outcome. Consequently, it should ensure us that this Court will uphold this fundamental freedom against the government's unconscionable and unlawful mandate — an outcome similarly compelled by RFRA.

SUMMARY OF THE ARGUMENT

The ultimate question for this Court is not whether compliance with the contraceptive services mandate can be reconciled with the religious beliefs of the challengers. That's a question of religious conscience that no civil authority, including this Court, can decide. Indeed, it cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs. Here, the challengers have concluded that their legal obligations under the mandate and their religious obligations compelled by their consciences are incompatible. Thus, by presenting challengers with a Hobson's choice of either violating their religious beliefs or suffering crippling financial penalties, the mandate imposes a substantial burden on religious exercise, properly understood, in direct violation of RFRA.

ARGUMENT

I. The Church's Universal and Consistent Moral Teaching on the Immorality of Contraceptive Services Is Binding on the Consciences of the Faithful.

The Church "teaches that each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life." *Humanae Vitae* ¶11. "This particular doctrine, often expounded by the magisterium of the Church, is based on the inseparable connection, established by God, which man on his own initiative may not break, between the unitive significance and the procreative significance which are both inherent to the marriage act." *Humanae Vitae* ¶12. Thus, "an act of mutual love which impairs the capacity to transmit life which God the Creator, through specific laws, has built into it, frustrates His design which constitutes the norm of marriage, and contradicts the will of the Author of life. Hence to use this divine gift while depriving it, even if only partially, of its meaning and purpose, is equally repugnant to the nature of man and of woman, and is consequently in opposition to the plan of God and His holy will." *Humanae Vitae* ¶13. Therefore, based "on the first principles of a human and Christian doctrine of marriage," the Church is "obliged once more to declare that the direct interruption of the generative process already begun and, above all, all direct abortion, even for therapeutic reasons, are to be absolutely excluded as lawful means of regulating the number of children.

Equally to be condemned, as the magisterium of the Church has affirmed on many occasions, is direct sterilization, whether of the man or of the woman, whether permanent or temporary. Similarly excluded is any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation — whether as an end or as a means." *Humanae Vitae* ¶ 14.

As Pope Paul VI prophetically observed in *Humanae Vitae:*

> Responsible men can become more deeply convinced of the truth of the doctrine laid down by the Church on this issue if they reflect on the consequences of methods and plans for artificial birth control. Let them first consider how easily this course of action could open wide the way for marital infidelity and a general lowering of moral standards. Not much experience is needed to be fully aware of human weakness and to understand that human beings — and especially the young, who are so exposed to temptation — need incentives to keep the moral law, *and it is an evil thing to make it easy for them to break that law*. Another effect that gives cause for alarm is that a man who grows accustomed to the use of contraceptive methods may forget the reverence due to a woman, and, disregarding her physical and emotional equilibrium, reduce her to being a mere instrument for the satisfaction of his own desires, no longer considering her as his partner

> whom he should surround with care and affection.

Humanae Vitae ¶ 17 (emphasis added).

Thus, it has come to pass that the widespread use of contraceptives has indeed harmed women physically, emotionally, morally, and spiritually — and has, in many respects, reduced her to the "mere instrument for the satisfaction of [man's] own desires." Consequently, the promotion of contraceptive services — the very goal of the challenged mandate — harms not only women, but it harms society in general by "open[ing] wide the way for marital infidelity and a general lowering of moral standards." Responsible men and women cannot deny this truth.

In sum, for adherents to Church teaching, contraceptive services are not properly understood to constitute medicine, healthcare, or a means of providing for the well-being of persons. Rather, these procedures involve gravely immoral practices, and compelling people of faith to promote or facilitate their use imposes a substantial burden on the exercise of religion, properly understood.

II. The Government's "Substantial Burden" Argument Invites the Court to Determine the Validity of the Challengers' Religious Objection to the Mandate.

It is well established that "[c]ourts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716. And while the government gives a nod to this longstanding principle of free exercise jurisprudence, *see* Pet'r Sebelius Br. in *Hobby Lobby* at 32, it nonetheless invites this Court to assume that role. The

Court should reject this invitation, which will essentially subject religious beliefs (and religious objections to government programs based on those beliefs) to those to which the government deems valid. *See Hernandez v. Comm'r of Internal Revenue Serv.*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of a particular litigant's interpretation of those creeds."); *United States v. Seeger*, 380 U.S. 163, 185 (1965) (acknowledging that the court's limited competence in this area extends to determining "whether the beliefs professed by [the challengers] are sincerely held and whether they are, in [their] own scheme of things, religious"); *see also Patrick v. Lefevre*, 745 F.2d 153, 157 (2d Cir. 1984) ("It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs."); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 482 (2d Cir. 1985) (noting that courts must be vigilant to "avoid any test that might turn on the factfinder's own idea of what a religion should resemble") (internal quotations and citation omitted); *Sample v. Lappin*, 424 F. Supp. 2d 187 (D.D.C. 2006) ("The Court's inquiry is limited to 'whether a claimant sincerely holds a particular belief and whether the belief is religious in nature.'") (quoting *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) (upholding the granting of a preliminary injunction under RFRA in a case in which the plaintiff refused to submit to a PPD test, claiming that accepting artificial substances into the body is a sin under the tenets of Rastafarianism)).

III. *Thomas* Compels a Finding that the Contraceptive Services Mandate Imposes a Substantial Burden on Religious Exercise in Violation of RFRA.

In defense of its claim that the challenged mandate and the onerous penalties associated with failing to comply with it do not substantially burden religious exercise, the government attempts to distinguish *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981). *See* Pet'r Sebelius Br. in *Hobby Lobby* at 35-37 (characterizing the argument as follows: "Respondents rely on *Thomas* for the proposition that the Court must accept not only their definition of their sincerely held religious belief but also their position that their religious exercise would be substantially burdened by the provision they challenge"). However, that attempt is unavailing.

In *Thomas*, this Court held that the State's denial of unemployment compensation benefits because the employee *voluntarily* terminated his employment with a factory that produced armaments, claiming that the production of items that could be used for war was contrary to his religious beliefs, placed a substantial burden on the employee's right to the free exercise of religion. *See Thomas*, 450 U.S. at 717-18 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."). Indeed, Thomas specifically stated that he did not object to the physical work required of him. *Id.* at 711 ("When asked at the hearing to explain what kind of work his religious convictions would permit, Thomas said that he would have no difficulty doing the type of work that he had done at the roll foundry. He testified that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms — for example, as an employee of a raw material supplier or of a roll foundry.").

In fact, Thomas made it clear that it was not the physical act of the work that violated his religious beliefs, but the purposes and effects of what someone else would do with the result of his "work" at some later point in time (*i.e.*, use the tanks he worked on for war). *See id.* at 714 (quoting Thomas at his hearing). So it is that Thomas did object to doing the exact same unobjectionable work when that work resulted in a thing (*i.e.*, a tank) that would be used subsequently by a third-party (*i.e.,* the military) to do that which was objectionable: to wage war. That is, not only is waging war objectionable to Thomas, but any act, the purpose and effect of which is to facilitate the waging of war by a third party at some later time, was proscribed by Thomas' religious beliefs and thus a substantial burden was found. Consequently, *Thomas* provides an *a fortiori* argument for a RFRA violation here. Thomas stated expressly that he had no religious objection to working in a roll foundry, the product of which might be used later to build a tank. But doing that same work in a factory that more directly violated his religious objection to war was too direct pursuant to his religious beliefs. In other words, this Court credited Thomas' religious beliefs for determining how direct or indirect an enabler or facilitator Thomas could be before he violated his religious beliefs (and thus a substantial burden found). Neither a federal court nor a government agency may decide how direct an enabler or facilitator Thomas could be for war waging. *Id.* at 715 ("Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."). And the same is true here with regard to the contraceptive services mandate. Indeed, the burden here is more substantial in that the Hobson's choice presented by the challenged mandate is not simply between violating one's religious beliefs or forfeiting benefits, as in *Thomas*. Rather, the challengers must choose between violating their religious beliefs or being subject to substantial penalties that will financially ruin them and their family-run business that they spent a lifetime building.

The Seventh Circuit in *Korte v. Sebelius,* 735 F.3d 654 (7th Cir. 2013), reaffirmed this principle in a case challenging the contraceptive services mandate by expressly rejecting the argument the government presents here:

> The government's "attenuation" argument posits that the mandate is too loosely connected to the use of contraception to be a substantial burden on religious exercise. Because several independent decisions separate the employer's act of providing the mandated coverage from an employee's eventual use of contraception, any complicity problem is insignificant or nonexistent. This argument purports to resolve the religious question underlying these cases: Does providing this coverage impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the Catholic Church? No civil authority can decide that question.
>
> To repeat, the judicial duty to decide substantial-burden questions under RFRA does

> not permit the court to resolve religious questions or decide whether the claimant's understanding of his faith is mistaken. . . The question for us is not whether compliance with the contraception mandate can be reconciled with the teachings of the Catholic Church. That's a question of religious conscience for the Kortes and the Grotes to decide. They have concluded that their legal and religious obligations are incompatible: The contraception mandate forces them to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood.

Id. at 685.

The D.C. Circuit similarly rejected the government's argument in *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013), stating, in relevant part:

> The contraceptive mandate demands that owners like the [challengers] meaningfully approve and endorse the inclusion of contraceptive coverage in their companies' employer-provided plans, over whatever objections they may have. Such an endorsement — procured exclusively by regulatory ukase — is a "compel[led] affirmation of a repugnant belief." *See id.* That, standing alone, is a cognizable burden on free exercise. And the burden becomes substantial because the government commands compliance by giving the [challengers] a Hobson's choice. They can either abide by the sacred tenets of their faith, pay a

> penalty of over $14 million, and cripple the companies they have spent a lifetime building, or they become complicit in a grave moral wrong. If that is not "substantial pressure on an adherent to modify his behavior and to violate his beliefs," we fail to see how the standard could be met. *See Thomas*, 450 U.S. at 718.

Gilardi, 733 F.3d at 1218

In the final analysis, the ultimate question for this Court is not whether compliance with the challenged mandate can be reconciled with the religious beliefs of the challengers. That's a question of religious conscience that no civil authority can decide. The challengers have concluded that their legal obligations under the mandate and their religious obligations are incompatible. Thus, by presenting challengers with a Hobson's choice, the mandate imposes a substantial burden on religious exercise, properly understood, in direct violation of RFRA.

CONCLUSION

The Court should hold that the contraceptive services mandate of the Affordable Care Act substantially burdens the challengers' exercise of religion in violation of RFRA.

Respectfully submitted,

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Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH
& HUMAN SERVICES, *et al.*,
Petitioners,
v.
HOBBY LOBBY STORES, INC., *et al.*,
Respondents,

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,
v.
KATHLEEN SEBELIUS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuit

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BRIEF *AMICUS CURIAE* OF AMERICAN JEWISH COMMITTEE AND JEWISH COUNCIL FOR PUBLIC AFFAIRS IN SUPPORT OF THE GOVERNMENT

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INTEREST OF *AMICI* [1]

The American Jewish Committee ("AJC") is a national organization with more than 125,000 members and supporters and 22 regional offices nationwide. It was founded in 1906 to protect the civil and religious rights of American Jews. AJC views both religious liberty and the equal rights of women as basic American values essential to its core mission. In those rare instances where these interests may clash, as in this case, AJC believes rigorous scrutiny under the compelling interest standard is appropriate to uphold the equality and dignity of women while preserving and safeguarding sincerely held principles of faith.

AJC has a long-standing commitment to religious freedom. AJC was one of the original supporters of the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA"), restoring the compelling interest test in response to *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). As AJC explained at the time, the absence of strong protections for freedom of religion in the wake of *Smith* invited governments to "run roughshod over religious conviction." *See* Religious Freedom Restoration Act of 1993: Hearing on S. 2969 Before the H. Comm. on the Judiciary, 103d Cong. 1 (1993) (statement of Rev. Oliver S. Thomas, appearing on behalf of the Baptist Joint Committee on Public Affairs and the American Jewish Committee). AJC views the protections afforded by RFRA as no less important today than at the time of its enactment.

---

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

AJC's commitment to equality for women is likewise integral to its history and mission. AJC regularly files *amicus* briefs before this Court and others in opposition to unequal treatment of women and other forms of gender bias. *See, e.g., Dept. of Human Resources v. Hibbs*, No. 01-1368, 2002 WL 31444460 (Oct. 25, 2002), Brief of The American Jewish Committee, *et al.* in Support of Respondents. Additionally, through its Jacob Blaustein Institute for the Advancement of Human Rights, AJC has been a leading voice calling attention to human rights issues of core importance to the Jewish community, including the promotion of equality for women in the United States and around the globe.

The Jewish Council for Public Affairs ("JCPA"), the coordinating body of 16 national and 125 local Jewish community relations organizations, was founded in 1944 by the Jewish Federation system to safeguard the rights of Jews throughout the world and to protect, preserve, and promote a pluralistic society. JCPA believes that reproductive health decisions are best made by individuals in consultation with their families and health care professionals and based on personal religious beliefs. JCPA also believes that restrictions on the right to choose and lack of access to services threaten this constitutionally protected individual right.

Thus, AJC and JCPA stand at the intersection of the competing interests in this case—religious freedom and equality and reproductive freedom for women—and are equally committed to both interests. AJC and JCPA submit this brief to aid the Court in the difficult task of balancing the government's interest in promoting equality for women and public health against the religious liberty of those who oppose, on religious grounds, mandatory coverage for certain types of contraceptive care mandated under the Health Resources and Services Administration ("HRSA") Guidelines, 77 Fed. Reg. 8725 (Feb. 15, 2012) (the "Mandate"), pursuant to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (March 23, 2010) ("ACA").

AJC and JCPA take no position on whether (i) a for-profit corporation has Free Exercise rights under the First Amendment or RFRA, or (ii) the Mandate imposes a substantial burden on religious practices. Rather, the question of concern to AJC and JCPA is, assuming the Mandate could be found to impinge upon the religious practices of those subject to its requirements, does it do so in furtherance of a compelling governmental interest and is it the least restrictive means of furthering that compelling governmental interest? AJC and JCPA respectfully submits that the Mandate furthers the government's compelling interests in promoting women's equality and public health in the least restrictive means available. Accordingly, AJC and JCPA support the government's position and oppose granting for-profit corporations an exception to the Mandate under RFRA.[2]

---

[2] AJC previously filed an *amicus curiae* brief pertaining to the parties' respective petitions for writ of *certiorari*, arguing that although the petitions meet the criteria for review, it would be better to defer review until the records could be more fully developed. Nonetheless, the Court having granted *certiorari*, AJC submits that the present records satisfy the government's burden under RFRA.

SUMMARY OF ARGUMENT

This appeal presents the rare situation in which the government's important interests in promoting gender equality and public health are alleged to be in conflict with the religious liberty of corporations asserting religious objections to the government's policies. The claimants in these consolidated cases, Hobby Lobby Stores, Inc. ("Hobby Lobby"), Mardel, Inc. ("Mardel"), Conestoga Wood Specialties Corp. ("Conestoga"), and their owners (collectively, "Claimants"), seek an exemption under RFRA from the Mandate's requirement that Claimants offer health insurance benefits providing full coverage for all Food and Drug Administration ("FDA") approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity. *See* 77 Fed. Reg. 8725 (Feb. 15, 2012); 78 Fed. Reg. 39870 (July 2, 2013).

Claimants object to the Mandate on religious grounds, stating that it forces them to violate their sincerely held religious beliefs against drugs and devices that they believe to be abortifacients. Different corporations opposing the Mandate under RFRA have asserted different combinations of objections, ranging from those who oppose specific drugs or devices to those opposing all contraception in any form. Hobby Lobby and Mardel, for example, oppose two types of intrauterine devices and the emergency contraceptives commonly known as Plan B and Ella, while Conestoga opposes only Plan B and Ella. *See Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1123 (10th Cir. 2013); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 382 (3d Cir. 2013).

Assuming (without advocating for or against the view) that corporations have Free Exercise rights under the First Amendment, and that the Mandate imposes a substantial burden on their religious practices, RFRA requires evaluation of the parties' important competing interests under the compelling interest standard. This requires a showing by the government that the Mandate (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. §§ 2000bb-1(a), (b). That stringent burden has been met in this case.

The Mandate furthers two compelling governmental interests as applied to Claimants and their employees. First, it promotes gender equality by closing the wide disparity in out-of-pocket medical costs incurred by women in funding their own reproductive health needs, which, improves the social and economic standing of women. Second, it meaningfully enhances public health by reducing the negative health costs of unintended pregnancy, improving birth spacing, and reducing the number of women seeking invasive abortions. Contraceptive coverage also provides significant cost savings.

These are not abstract interests; they are particularized to Claimants and their employees. The Mandate reduces gender-based cost disparities and provides public health benefits to each employee who gains coverage for contraceptive care. All employees deprived of this coverage, whether in whole or in part depending on the scope of the particular religious objection asserted, will thus suffer a direct detriment. The availability of certain other statutory and regulatory exemptions to the ACA and the Mandate does not diminish the government's compelling interests; those exemptions involve separate interests, and do not detract from the Mandate's promotion of equality and public health.

The Mandate is, moreover, the least restrictive means available to further the government's interests. The Mandate cannot function as intended unless it is applied evenly to all statutorily eligible employers and employees; each *ad hoc* exemption based on religious objections excludes employees from the coverage they would otherwise receive, deprives them of the economic and medical benefits of coverage, and undermines the Mandate as a comprehensive system designed to provide uniform benefits to covered employees. Claimaints' proposed alternatives impose an unworkable patchwork quilt of insurmountable administrative burdens upon the government, would be substantially and materially less effective than the Mandate, and may well fail even to address Claimants' own religious objections. For these reasons, Claimants are not entitled to an exemption from the Mandate under RFRA.

ARGUMENT

I. Laws Substantially Burdening Religious Liberty Are Properly Subject to RFRA's Particularized Compelling Interest Review

Congress passed RFRA in 1993 in reaction to *Smith*, which declared that the Free Exercise Clause of the First Amendment does not prohibit governments from burdening religious practices through generally applicable laws. 494 U.S. at 890. *Smith* held that the First Amendment does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Id.* RFRA responded by adopting "a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v.*

O Centro Espirita Beneficente Uniao Do Vegtal, 546 U.S. 418, 424 (2006).

RFRA prohibits the federal government from substantially burdening a person's exercise of religion, "even if the burden results from a rule of general applicability," unless it can "demonstrate that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000bb-1(a), (b). This is the same "compelling interest" test previously set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), prior to the Court's ruling in *Smith*. *See* 42 U.S.C. § 2000bb(b)(1).

The compelling interest test contemplates a "focused" rather than a "categorical" approach. *O Centro*, 546 U.S. at 430. The government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31 (*quoting* 42 U.S.C. § 2000bb-1(b)). The Court therefore looks "beyond broadly formulated interests justifying the general applicability of government mandates" and scrutinizes "the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. Put simply, "context matters." *Id.* at 431-32 (*quoting Grutter v. Bollinger*, 539 U.S. 306, 327 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995)).

This brief takes no position on whether a corporation has Free Exercise rights under the First Amendment or RFRA, nor on whether the Mandate imposes a substantial burden on the Free Exercise rights alleged. Rather, assuming the Mandate could be found to substantially burden the religious practices of those subject to its requirements, this brief undertakes a focused, context-specific analysis of the Mandate's application to Claimants to assess whether it is the least restrictive means of furthering the compelling interests advanced by the government, which it is.

II. The Mandate as Applied to Claimants Significantly Furthers the Government's Compelling Interests in Promoting Gender Equality and Advancing Women's Health

The Mandate furthers compelling government interests with respect to all employees (and covered family members of employees) who come within its scope, including Claimants' employees. Hobby Lobby has approximately 13,000 full-time employees in over 500 stores, Mardel has just under 400 employees, and Conestoga has approximately 950 employees. *See Hobby Lobby*, 723 at 1122; *Conestoga*, 724 F.3d at 381. These more than 14,000 individuals and their covered family members experience direct and material benefits from the Mandate, furthering the government's interests in promoting gender equality and public health. These are interests "of the highest order," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993), and "paramount interests," *Thomas v. Collins*, 323 U.S. 516, 530 (1945), not in the abstract, but specifically as applied to Claimants and their employees. Granting Claimants their requested RFRA exemptions would thus weaken the government's particularized interest in promoting equality and public health for these employees.

A. Application of the Mandate to Claimants Furthers the Government's Compelling Interest in Promoting Gender Equality

The Mandate is a powerful tool for promoting and extending the reach of gender equality. The United States has a compelling interest in "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984). This interest extends to "[a]ssuring women equal access to . . . goods, privileges, and advantages" enjoyed by men. *Id.* Providing full contraceptive coverage to Claimants' employees specifically advances the ACA's larger goal of providing women with equal access to the privileges and advantages of full health coverage.

The ACA "acknowledges that both existing health coverage and existing preventive services recommendations often did not adequately serve the unique health needs of women." 78 Fed. Reg. at 39873. A disparity prevailed in health coverage, which "placed women in the workforce at a disadvantage compared to their male coworkers." *Id.* "Even with employer-based coverage, women have higher out-of-pocket medical costs than men. Overall, women of reproductive age spend 68 percent more out of pocket than men on health care, in part because their reproductive health care needs require more frequent health care visits and are not always adequately covered by their insurance. Among women insured by employer-based plans, oral contraceptives alone account for one-third of their total out-of-pocket health care spending." *Korte v. Sebelius*, 735 F.3d 654, 724 (7th Cir. 2013) (Rovner, J., dissenting) (*quoting* J. Arons & L.

Rosenthal, Center for American Progress, *Facts About the Health Insurance Compensation Gap* (June 2012)). The Mandate closes this gap.

Full contraceptive coverage is an inseparable part of the ACA's cost-equalizing goal. Multiple studies show access to contraception "improves the social and economic status of women." 78 Fed. Reg. at 39873 (*citing* C. Goldin & L. Katz, *Career and Marriage in the Age of the Pill*, 90(2) Am. Econ. Rev. 461-65 (2000); C. Goldin & L.F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110(4) J. of Pol. Econ. 730-70 (2002); M.J. Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply*, 121(1) Q. J. Econ. 289-320 (2006)). By reducing unplanned pregnancy and the accompanying financial strain, expense, and potential loss of employment, access to contraception has "highly significant impacts" on the economic well-being of women. *Korte*, 735 F.3d at 725 (Rovner, J. dissenting) (*citing* Inst. of Medicine, Committee on Preventive Services for Women, *Clinical Preventive Services for Women: Closing the Gaps*, p. 103 (2011)). As this Court has observed, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood v. Casey*, 505 U.S. 833, 835 (1992)). *See also Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1972).[3]

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[3] The availability of oral contraception, for example, "played an important role in increasing the presence of women in the workforce, bringing them into more direct economic competition with men, and eventually improving women's wages." *Legatus v. Sebelius*, 901 F.Supp.2d 980, 992-93 (E.D. Mich. 2012) (citing

This is not an abstract interest; it is particularized in its application to Claimants and their employees. Lack of coverage for any preventive service, including contraception, generates "significant out-of-pocket expenses for women," and full coverage "is particularly critical to addressing the gender disparity of concern here." 78 Fed. Reg. at 39873 (*citing Clinical Preventive Services for Women*, at p. 19). The Mandate reduces the economic disparity of contraceptive costs for each woman who, by virtue of the Mandate's requirements, gains access to contraception she otherwise might not be able to afford, or could only afford at much greater out-of-pocket expense. At the same time, if deprived of the full coverage otherwise available under the Mandate, it is "unproven and unclear" how employees could "alternatively acquire, without cost-sharing, the full range of FDA-approved contraceptive methods in the absence of the [Mandate]." *Legatus v. Sebelius*, 901 F.Supp.2d 980, 995 (E.D. Mich. 2012).

If Claimants are granted an exemption to the Mandate under RFRA, therefore, more than 14,000 employees (or their covered family members) will be deprived in whole or in part of contraceptive coverage, imposing upon them and their covered family members the continuing burden of the out-of-pocket health cost disparity and the resulting consequences of gender inequality that the Mandate seeks to address. This is not a speculative social harm; the

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M.J. Bailey, *et al.*, *The Opt–In Revolution? Contraception and the Gender Gap in Wages*, 4 Am. Econ. J.: Applied Econ. 225 (2012); Goldin & Katz, *The Power of the Pill*). Though not all parties seeking a RFRA exemption oppose oral contraception, it provides one example of how restricting coverage to any FDA-approved method of contraception exposes women to adverse economic consequences.

consequences are specific to each woman deprived of full coverage for contraceptive methods she would otherwise obtain.

B. Application of the Mandate to Claimants Furthers the Government's Compelling Interest in Promoting Public Health

The government also has "a compelling interest in safeguarding the public health by regulating the health care and insurance markets." *Mead v. Holder*, 766 F. Supp.2d 16, 43 (D.D.C. 2011). *See also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978); *Kleindienst v. Mandel*, 408 U.S. 753, 783-84 (1972). That interest is particularly meaningful here, where the Mandate is directed to providing women with full coverage for contraceptive methods shown to enhance public health.

The role of full contraceptive coverage in promoting public health begins with the ACA's larger goal of expanding access to all preventive health care. The ACA reflects a determination by Congress that coverage of recommended preventive services "is necessary to achieve access to basic health care for more Americans." 78 Fed. Reg. at 39872. Individuals "are more likely to use preventive services if they do not have to satisfy cost-sharing requirements (such as a copayment, coinsurance, or a deductible)." *Id*. These services "result[] in a healthier population and reduce[] health care costs by helping individuals avoid preventable conditions and receive treatment earlier." *Id*. (*citing Clinical Preventive Services for Women*, at p. 16). Full coverage of preventive services thus helps "either prevent illness altogether or facilitate detection at an earlier stage when it is more amenable to treatment, thereby reducing the direct and indirect costs of illness otherwise borne by the insured, his family, his employer, his insurer, medical providers, and the government." *Korte*, 735 F.3d at 724 (Rovner, J., dissenting).

With respect to contraceptive coverage, the Mandate results from the Women's Health Amendment to the ACA, introduced by Senator Barbara Mikulski, to expand the range of required preventive care "to include a separate set of preventive services for women." *Id.* The amendment recognized "that many women forego preventive screenings for the conditions that statistically are most likely to result in their death—breast, cervical, colorectal, ovarian and lung cancer, and heart and vascular disease—either because they lack insurance, the services are not covered by their insurance plans, or because the large copayments required by their insurance companies for these screenings are beyond their financial means." *Id.* The adoption of the Women's Health Amendment "recognized that women have unique health care needs," which "include contraceptive services." 78 Fed. Reg. at 39872 (*citing* S. Amdt. 2791 to S. Amdt. 2786 to H.R. 3590 (Service Members Home Ownership Tax Act of 2009) (Dec. 3, 2009); *Clinical Preventive Services for Women*, at p. 9).

The inclusion of contraception in preventive services for women "should come as no surprise," as "[n]inety-nine percent of American women aged 15 to 44 who have engaged in sex with men have used at least one form of birth control," and "[a] woman's ability to control whether and when she will become pregnant has highly significant impacts on her health, her child's health, and the economic well-being of herself and her family." *Korte*, 735 F.3d at 725 (Rovner, J., dissenting) (*citing Clinical Preventive Services for Women*, at p. 103); Guttmacher Inst., *Fact Sheet:*

Contraceptive Use in the United States, at 1 (Aug. 2013); W. Mosher & J. Jones, Centers for Disease Control, Nat'l. Ctr. for Health Statistics, *Use of Contraception in the United States: 1928–2008*, pp. 5, 15, & Table 1 (Aug. 2010)).

The documented public health benefits of the Mandate include:

- Reducing Unintended Pregnancy: "[W]omen experiencing an unintended pregnancy may not immediately be aware that they are pregnant, and thus delay prenatal care. * * * Studies show a greater risk of preterm birth and low birth weight among unintended pregnancies." 78 Fed. Reg. at 39872 (*citing* J.D. Gipson, *et al.*, *The Effects of Unintended Pregnancy on Infant, Child and Parental Health: A Review of the Literature*, 39(1) Studies in Family Planning 18-38 (2008)). *See also Korte*, 735 F.3d at 725 (Rovner, J., dissenting) (*citing Clinical Preventive Services for Women*, at p. 103) ("Unintended pregnancies pose risks to both mother and fetus in that a woman, neither planning to be pregnant nor realizing that she is, may both delay prenatal care and continue practices (including smoking and drinking) that endanger the health of the developing fetus.").
- Improving Birth Spacing: "[C]ontraceptive use helps women improve birth spacing and therefore avoid the increased risk of adverse pregnancy outcomes that comes with pregnancies that are too closely spaced. Short interpregnancy intervals in particular have been associated with low birth weight, prematurity, and small-for-gestational age births."

78 Fed. Reg. at 39872 (*citing* A. Conde-Aguledo, *et al.*, *Birth Spacing and Risk of Adverse Perinatal Outcomes—A Meta-Analysis*, 295(15) JAMA 1809-23 (2006); B. Zhu, *Effect of Interpregnancy Interval on Birth Outcomes: Findings from Recent U.S. Studies*, 89 Int'l J. of Gynecology & Obstetrics S25-S33 (2005); E. Fuentes-Afflick & N. Hessol, *Interpregnancy Interval and the Risk of Premature Infants*, 95(3) Obstetrics & Gynecology 383-90 (2000)). *See also Korte*, 735 F.3d at 725 (Rovner, J., dissenting) (*citing Clinical Preventive Services for Women*, at p. 103) ("Intervals between pregnancies also matter, as pregnancies commencing less than eighteen months after a prior delivery pose higher risks of pre-term births and low birth weight.").

- Reducing Invasive Abortions: "[B]y reducing the number of unintended pregnancies, contraceptives reduce the number of women seeking abortions." 78 Fed. Reg. at 39872 (*citing Clinical Preventive Services for Women*, at p. 105; J. Peipert, *et al.*, *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120(6) Obstetrics & Gynecology 1291-97 (2012); J. Bongaarts & C. Westoff, *The Potential Role of Contraception in Reducing Abortion*, 31(3) Studies in Family Planning 193-202 (2000)). *See also Korte*, 735 F.3d at 725-26 (Rovner, J., dissenting) (citations omitted) ("[U]nintended and unwanted pregnancies naturally account for the lion's share of induced abortions.").

- Other Medical Benefits: Contraceptives have "medical benefits for women who are contraindicated for pregnancy, and there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy (for example, prevention of certain cancers, menstrual disorders, and acne)." 78 Fed. Reg. at 39872 (*citing Clinical Preventive Services for Women*, at p. 107). *See also Korte*, 735 F.3d at 725 (Rovner, J., dissenting) (*citing Clinical Preventive Services for Women*, at pp. 103-04) ("Pregnancy is contraindicated altogether for women with certain health conditions.").

Contraceptive coverage has also been shown to provide significant cost savings to health plans, due to the economic effect of reducing unintended pregnancies. A 2000 study "estimated that it would cost 15 to 17 percent more not to provide contraceptive coverage in employee health plans than to provide such coverage" after accounting for direct and indirect costs. 78 Fed. Reg. at 39872 (*citing* R. Bonoan & J.S. Gonen, *Promoting Healthy Pregnancies: Counseling and Contraception as the First Step*, Washington Business Group on Health, Family Health in Brief, Issue No. 3 (August 2000)).[4]

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[4] These findings have been borne out by experiences adding contraceptive coverage to the Federal Employees Health Benefits Program and by multiple cost savings analyses. *See* 78 Fed. Reg. at 39872-73 (*citing* C. Dailard, *Special Analysis: The Cost of Contraceptive Insurance Coverage*, Guttmacher Rep. on Public Policy (March 2003); R. Sawhill, *et al.*, *An Ounce of Prevention: Policy Prescriptions to Reduce the Prevalence of Fragile Families*, 20(2) Future of Children 133-55 (2010); J. Frost, *et al.*, *Contraceptive Needs and Services, National and State Data, 2008 Update* (2010)).

Again, this public health benefit is not abstract; it is specific in its application to Claimants and their employees. Depriving Claimants' employees and covered family members of contraceptive coverage under the Mandate through a RFRA exemption either deprives them of the direct health benefits of contraceptive coverage or obligates them to incur the unequal out-of-pocket costs of funding their own preventive services. The specific impact upon any individual employee may vary depending on the scope of the employer's religious objection and the particular contraceptive needs of the employee, but it cannot be questioned that more than 14,000 employees working for Claimants, as well as their covered family members, would be deprived in whole or in part of the public health benefits of full contraceptive coverage.

Even where, as in this case, Claimants' religious objections are limited to specific methods of post-coital emergency contraception such as Plan B, the public health consequences are very real. Plan B and similar emergency contraceptive measures reduce unintended pregnancies and induced abortions where primary contraception fails or is not used, and reduces state and federal healthcare expenditures. A. Ziebarth & K.A. Hansen, *Hormonal emergency contraception: a clinical primer*, 60(3) J. of the S.D. State Med. Ass'n 99 (2007); F. Davidhoff & J. Trussell, *Plan B and the Politics of Doubt*, 296 JAMA 1775, 1775 (2006). Its efficacy is time-sensitive and access is important; delaying the first dose even by several hours substantially increases the likelihood of pregnancy, and its efficacy diminishes linearly with time. *Id*. Even

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See also Korte, 735 F.3d at 725 (Rovner, J., dissenting) (*citing* Guttmacher Inst., *Fact Sheet: Facts on Unintended Pregnancy in the United States* (Oct. 2013)).

a limited religious objection, therefore, has the consequence of impeding access to emergency contraceptive methods necessary to the Mandate's public health objectives.

C. The Religious Employer Exemption and Other Exemptions to the Mandate Do Not Diminish the Government's Compelling Interests

Notwithstanding the demonstrated and particularized benefits of the Mandate in promoting the government's interests in gender equality and public health, Claimants and several courts have nonetheless argued that these are merely abstract interests, and have questioned their vitality as compelling interests. This argument relies upon the Court's statement in *O Centro* that the "invocation" of a "general interest in promoting public health and safety" or similarly "broadly formulated interests" are "not enough" to satisfy RFRA's compelling interest test. *See, e.g., Conestoga*, 724 F.3d at 413 (Jordan, J., dissenting) (*quoting O Centro*, 546 U.S. at 41, 435, 438). The "existence of numerous exemptions" already made to the Mandate—such as for religious employers, *see* 45 C.F.R. §§ 147.130, 147.131,[5] "grandfathered" plans, 42 U.S.C. § 18011, and employers with fewer than 50 full time employees, 26 U.S.C. § 4980H—is then cited as evidence of its

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[5] The regulations include both an "exemption" for religious employers who, *inter alia*, have as their purpose the inculcation of religious values and primarily employ persons sharing their religious tenets, 45 C.F.R. § 147.130(a)(iv)(B), and an "accommodation" for religious employers who, *inter alia*, are organized and operate as nonprofit entities and hold themselves out as religious organizations, 45 C.F.R. § 147.131(b). Houses of worship would generally fall in the first category, while religious colleges or schools may satisfy the second.

"arbitrary underinclusiveness" and as proof that no "compelling interest" would be undermined by extending a "similar exception" to a "similarly situated plaintiff." *Conestoga*, 724 F.3d at 413-14 (Jordan, J., dissenting) (*citing O Centro*, 546 U.S.at 433; *Newland v. Sebelius*, 881 F. Supp.2d 1287, 1297 (D. Colo. 2012)). *See also Hobby Lobby*, 723 F.3d at 1143-44; *Korte*, 735 F.3d at 686.

This attempt to employ *O Centro* to diminish the compelling nature of the government's interests under the Mandate is fundamentally misplaced. *O Centro* is both qualitatively and quantitatively inapposite to the present case. There, the Court could not reconcile the Controlled Substances Act's statutory exemption for religious use of mescaline in peyote, applicable to "hundreds of thousands of Native Americans practicing their faith," with the government's refusal to grant "a similar exception for the 130 or so American members of the UDV who want to practice theirs." 546 U.S. at 433. The Court found that the "mere invocation of the general characteristics" of controlled substances "cannot carry the day." *Id*. at 432.

O Centro thus dealt with the broad assertion of a general law enforcement interest to prevent conduct by a tiny group of individuals which was indistinguishable from essentially identical conduct already exempted from the law's reach as to hundreds of thousands of others. Here, by contrast Claimants are attempting to block the provision of benefits to third parties by invoking dissimilar exceptions with a narrower reach and entirely distinct focus from that proposed by Claimants' requested RFRA opt-out.

Unlike *O Centro*, this is not a case in which hostility or indifference to one group's sincere religious beliefs has manifested in capricious burdens on religious practice. Nor do the exemptions to the Mandate for religious employers, "grandfathered" plans, and employers with fewer than 50 full time employees evidence the kind of extreme "arbitrary underinclusiveness" of a "similarly situated" party from an exception already afforded to many others on indistinguishable grounds. Rather, the Court is being asked to craft an entirely new exception to the Mandate, with profound and singularly harmful consequences compromising its public policy objectives.

1. The Religious Employer Exemption Does Not Reduce the Government's Compelling Interests

Beginning with the religious employer exemption, the regulatory record is clear that the government granted an exemption to the Mandate for religious employers due to the inextricable connection between their religious objections to the Mandate and their core religious purpose. Unlike a for-profit corporation, which may arguably hold the religious viewpoint of its owners but exists for a separate, predominantly economic purpose, a religious employer exists for a religious purpose and its objections to the Mandate arise from that religious purpose. *See* 45 C.F.R. §§ 147.130(a)(iv)(B), 147.131(b). There is "a demonstrable difference between a not-for-profit employer whose mission is expressly defined by religious goals and a secular corporation whose business is commerce for profit." *Korte*, 735 F.3d at 729 (Rovner, J., dissenting). Among other obvious differences, employees of a religious employer are on unequivocal notice of their employer's religious principles, while employees of a for-profit corporation may be entirely unaware of their employer's religious views.

The overt and predominantly religious purpose of non-profit religious employers not only magnifies the importance of their objection, but diminishes the likelihood of competing views between the employer and its employees on the subject of contraception. "Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39874. This type of exemption is "a feature common to any number of federal statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–1(a), and the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12113(d)[.]" *Korte*, 735 F.3d at 729 (Rovner, J., dissenting).

Moreover, unlike *O Centro*, where the Court extended an exemption already applied to hundreds of thousands of individuals to an additional 170 persons, here the Court is being asked to take an exemption of very limited applicability and offer it to an exponentially larger population. Religious workers comprise a negligible proportion of the United States workforce. The most recent data from the Bureau of Labor Statistics estimate religious workers to be only 0.054% of the workforce. *See* Bureau of Labor Statistics, *National Occupational Employment and Wage Estimates, United States* (May 2012) (available online at http://www.bls.gov/oes/current/oes_nat.htm#00-000).[6]

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[6] The Bureau of Labor Statistics' definition of religious employment likely differs in some respects from the standards used to define the religious employer exemption and accommodation to the Mandate, *see* 45 C.F.R. §§ 147.130(a)(iv)(B), 147.131(b), but

By comparison, the for-profit private sector accounts for more than 83% of the total workforce. *See* Bureau of Labor Statistics, *Table B-1a. Employees on nonfarm payrolls by industry sector and selected industry detail, seasonally adjusted* (Jan. 10, 2014) (available online at http://www.bls.gov/web/empsit/ ceseeb1a.htm).

This is not a "slippery slope"; the numerical consequences are immediate. Granting a RFRA exemption to Claimants alone and depriving their more than 14,000 employees of coverage would materially add to the very modest anticipated impact of the existing religious employer exemption. Moreover, even assuming only a small percentage of other private employers invoke similar RFRA exemptions, the impact in terms of employees excluded from coverage under the Mandate could be multiplied by magnitudes of hundreds or thousands. As discussed in the two preceding sections, each employee excluded from contraceptive benefits she would otherwise use suffers adverse consequences through exclusion from the Mandate's equalizing effects and its promotion of women's health. By expanding the reach of the very limited religious employer exemption far beyond its intended scope and regulatory purpose, therefore, Claimants would fundamentally compromise the goals of the Mandate.

2. The Grandfather Rule and 50-Employee Requirement Do Not Reduce the Government's Compelling Interests

Turning to the exemptions for "grandfathered" plans and employers with fewer than 50 full time employees, these are not even arguably "similar" to

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is nonetheless illustrative of the difference in magnitude between the existing regulatory exemption and Claimants' proposed RFRA exemption.

Claimants' proposed RFRA exemptions, nor are Claimants "similarly situated." Neither rule has anything to do with coverage of contraception. The "grandfather" rule is "designed to ease the transition of the healthcare industry into the reforms established by the [ACA] by allowing for gradual implementation of reforms through a reasonable grandfathering rule." 75 Fed. Reg. at 34541 (June 17, 2010). The 50-employee requirement is the minimum threshold for an employer to be subject to the requirements of the ACA; employers with fewer than 50 employees are not required to provide workplace coverage to their employees at all, with or without contraception. 26 U.S.C. § 4980H. These "are not specific exemptions to the contraceptive mandate; instead, they are general exemptions to the mandate that employers comply with all of the ACA's new essential minimum coverage requirements." *Roman Catholic Archbishop of Washington v. Sebelius*, No. 13-1441 (ABJ), --- F. Supp.2d ---, 2013 WL 6729515, *30 (D.D.C. 2013).

By seeking to use these exemptions to justify a new exception to the Mandate, Claimants appear to be arguing that, unless *all* employers are subject to the Mandate, the exclusion of *any* employer from its terms cannot be seen as contrary to a truly "compelling" government interest. That is a *non sequitur*. This is not a case in which Congress has left "appreciable damage to [a] supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (*quoting Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part)). The fact that Congress has adopted a reasonable transition plan through a grandfathering rule, and drawn economically sustainable boundaries around the scope of the ACA through the 50-employee requirement, cannot be construed as inflicting "appreciable damage" on its interests in promoting gender equality and public health.

The grandfathering rule "balances [the ACA's] objective of preserving the ability to maintain existing coverage with the goals of expanding access to and improving the quality of health coverage." 75 Fed. Reg. at 34540. Gradual implementation of the ACA "does not appear to be indicative of how important the Government considers the interests of regulating public health and furthering gender equality." *Legatus*, 901 F. Supp.2d at 994. Nor does it denigrate the importance of any religious practices. Rather, it "seems to be a reasonable plan for instituting an incredibly complex health care law while balancing competing interests." *Id*. To hold otherwise would "perversely encourage Congress in the future to require immediate and draconian enforcement of all provisions of similar laws, without regard to pragmatic considerations, simply in order to preserve 'compelling interest' status." *Id*.

Moreover, it is virtually certain that a substantial majority of the grandfathered plans already provide contraceptive coverage. Even before the Mandate took effect, twenty-eight states had adopted mandates requiring insurers to include coverage of prescription contraceptives. *Grote v. Sebelius*, 708 F.3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting) (*citing* Nat'l Women's Law Center, *Guaranteeing Coverage of Contraceptives: Past & Present* (Aug. 1, 2012)). And a 2002 study found that more than 89 percent of insured plans covered contraceptives. 78 Fed. Reg. at 39873 (*citing* A. Sonfield, *et al.*, *U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates*, 36(2) Perspectives on Sexual and

Reproductive Health 72-79 (2002)). In all events, the government estimated that grandfathered plans would relinquish their status over time, with between 33% and 69% estimated to do so by 2013. 75 Fed. Reg. at 34552. Whatever "damage" the grandfathering rule may be causing, therefore, is not appreciable and is diminishing over time.

Likewise, the 50-employee requirement does not arbitrarily exclude employees from contraceptive coverage; it acknowledges the "financial burdens associated with workplace health plans," and adopts an "entirely practical, logical, and justifiable accommodation to the financial needs of small employers, particularly in the first phase of a national effort to expand access to healthcare." *Korte*, 735 F.3d at 728 (Rovner, J., dissenting). Employees of these employers are not left without contraceptive coverage. Instead, like part-time employees, self-employed, and unemployed persons, they are "steered to the insurance exchanges established under the ACA, where the government offers subsidies to those who cannot shoulder the full cost of insurance on their own." *Id*.

Thus, neither the grandfathering rule nor the 50-employee requirement appreciably diminishes the government's compelling interests in pursuing gender equality and public health through contraceptive coverage under the Mandate. They "do not tend to show that the government has created so many specific exemptions to the contraceptive rules to counteract their efficacy in promoting public health and women's equality." *Roman Catholic Archbishop of Washington*, 2013 WL 6729515, at *30.

III. The Mandate Is the Government's Least Restrictive Means of Promoting Gender Equality and Protecting Women's Health

Having established the government's compelling interests in gender equality and public health under the Mandate, the next step under RFRA's compelling interest test is to evaluate whether application of the Mandate to Claimants is the least restrictive means of furthering these interests. 42 U.S.C. § 2000bb–1(b)(2). This Court has employed different methods of measuring whether application of a challenged policy constitutes the least restrictive means of furthering its purpose. One method is to consider whether the challenged policy is "overbroad" or "underinclusive." *Lukumi*, 508 U.S. at 546. Another method, often applied in the context of protected speech, is to ask whether the policy is the "least restrictive means among available, effective alternatives." *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (*quoting Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004)).

Here, under either measure, applying the Mandate to Claimants and denying them a RFRA exemption is the least restrictive means to further the government's interests. The Mandate is neither overbroad nor underinclusive; its goals cannot be achieved less restrictively by granting RFRA exemptions to for-profit religious objectors, as the effectiveness of the policy depends upon mandatory, comprehensive national participation. Likewise, Claimants' proposed alternatives are not remotely workable as means of accomplishing the same interests, and may not even address Claimants' own religious objections.

A. The Mandate Is Not Overbroad or Underinclusive as Applied to Claimants

Claimants' position that the Mandate is overbroad or underinclusive, and therefore fails the least restrictive means test under *Lukumi*, largely overlaps the argument addressed in the preceding section that the government's interests are not sufficiently "compelling" due to the existence of other exemptions. *See* Section II.C, *supra*. And it suffers from the same erroneous reasoning. The argument describes the mandate as "self-defeating" because it "fail[s] to prohibit nonreligious conduct that endangers [its asserted] interests in a similar or greater degree" by granting "small businesses, businesses with grandfathered plans (albeit temporarily), and an array of other employers" an exemption from the Mandate or the ACA. *See, e.g., Gilardi v. U.S. Dept. of Health and Human Services*, 733 F.3d 1208, 1222 (D.C. Cir. 2013).

The errors in this mischaracterization of the grandfathering rule, 50-employee requirement, and religious employer exemption as "self-defeating," and the fundamental flaws in the assumption that the exemptions "endanger[]" the government's interests in gender equality and public health in a "similar or greater degree," have already been addressed and need not be repeated here. *See* Section II.C, *supra*. As discussed above, none of the current exemptions are contrary to the government's interests in a generally applicable contraceptive mandate as a means of promoting women's equality and health. *Id*. Accordingly, they do not render the Mandate overbroad or underinclusive.

Moreover, this Court already considered and rejected the same argument in *United States v. Lee*, 455 U.S. 252 (1982). There, the Court considered whether imposition of Social Security taxes is unconstitutional as applied to persons of the Amish faith, who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds. *Id.* at 254. Notably, Congress had already provided a statutory exception accommodating self-employed Amish and members of other religious groups with similar beliefs. *Id.* at 255 (*citing* 26 U.S.C. § 1402(g)). This exception was unavailable to the claimant in *Lee*, because it extended only to the self-employed, not employers and employees, leading the claimant to seek a constitutional exemption. *Id.* at 256.

The Court rejected the requested exemption, holding that the requested judicial narrowing of the Social Security statute's general rules of applicability was incompatible with the government's compelling interest in preserving a "nationwide" system which "serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees." *Id.* at 258. The Court observed that "mandatory participation is indispensable to the fiscal vitality of the social security system," as providing for "voluntary participation" by religious objectors in a "comprehensive national social security system" would be "almost a contradiction in terms and difficult, if not impossible, to administer." *Id.*

The Court further held that accommodating the Amish belief and granting a constitutional exemption to participation in the Social Security system would "unduly interfere with fulfillment of the governmental interest," notwithstanding the existing statutory exception for self-employed Amish. *Id.* at 259-60. The Court observed, "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated . . . but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.'" *Id.* at 259 (*quoting Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)). Attempting to accommodate a nationwide system with "myriad exceptions flowing from a wide variety of religious beliefs" would impede its ability to function. *Id.* at 259-60.

Thus, while "Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause," every person "cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." *Id.* at 261. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.*

Here, much like the claimant in *Lee*, Claimants seek a religious exception carving themselves out from a comprehensive nationwide system of insurance designed to serve the public interest by providing uniform contraceptive coverage benefits. Yet by eliminating coverage, whether in whole or in part, for preventive contraception, Claimants' proposed RFRA opt-out would immediately undermine the Mandate's basic purpose and interests by imposing "a significant barrier to access to contraception." 78 Fed. Reg. at 39873.

Claimants' requested exemption to the Mandate cannot be reconciled with the government's direct interests in promoting gender equality and public health for Claimants' employees, whose own beliefs and interests are left unaccounted in Claimants' proposed relief. Nor can the government plausibly be expected to find adequate *ad hoc* work-arounds to accommodate Claimants' religious objections, much less the "myriad" other exceptions flowing "from a wide variety of religious beliefs." *Lee*, 455 U.S. at 259-60. Claimants cannot superimpose their limits of conscience and faith to unduly interfere with both the basic purpose and administration of the Mandate. *See id.* at 261.

Courts allowing RFRA exemptions to the Mandate have acknowledged *Lee* and recognized the "private veto" concern associated with granting such religious exemptions, but state that *Lee* requires proof of "the incompatibility of the requested religious exemption" with the statute, to such a degree as to "render the statutory scheme unworkable." *See, e.g., Gilardi*, 733 F.3d at 1223. It is suggested that depriving employees of contraceptive coverage under the Mandate would not render the entire scheme unworkable, because they "will still receive an array of services" apart from the objected contraception methods, which "by and large fulfills the statutory command for insurers to provide gender-specific preventive care." *Id.* at 1224.

That is too glib by half. The benefits to women's equality and public health arising from the Mandate are not generalized to "gender-specific preventive care" writ large; they are particularized to full coverage of contraceptive care, based on the consensus recommendations of an independent panel of medical experts. *See* Sections II.A, B, *supra*; *Clinical Preventive Services for Women*, at pp. 9, 103-07. Depriving Claimants' employees (as well as other similarly situated private employees) of full contraceptive coverage thus deprives them of an entire category of medical care with acknowledged and demonstrable economic and medical benefits, which cannot be recovered through the provision of unrelated "gender-specific preventive care." *Id*. Even other methods of contraception do not provide the same health benefits as emergency post-coital contraception such as Plan B and Ella. *See* Section II.B, *supra*. A RFRA exemption, even a limited one, thus renders the Mandate unworkable by depriving large numbers of employees, including all of Claimants' employees, of the coverage benefits the Mandate is designed to provide on a nationwide, uniform basis.

B. Claimants' Proposed Alternatives Are Not Less Restrictive Means of Furthering the Same Interests

Turning to the second method—a comparison of the Mandate against available, effective alternatives—in the dozens of RFRA cases brought by private corporations seeking exemptions from the Mandate, no alternative has emerged that is remotely workable and would effectively further the same compelling interests in a less restrictive manner. The analysis of available, effective alternatives does not obligate the government to refute "every conceivable option" that "the ingenuity of the human mind, especially if freed from the practical constraints of policymaking and politics," could imagine. *United States v. Wilgus*, 638 F.3d 1274, 1288-89 (10th Cir. 2011) (*quoting Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996)).[7] Nonetheless, given the volume of RFRA litigation arising in response to the Mandate, it is reasonable to expect that any alternative that could plausibly be conceived has at this point been proposed.

---

[7] *See also Fowler v. Crawford*, 534 F.3d 931, 940 (8th Cir. 2008); *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 41 n. 11 (1st Cir. 2007); *May v. Baldwin*, 109 F.3d 557, 563 (9th Cir. 1997).

Here, Claimants' alternatives all involve some variation of publicly-funded contraception programs, through (i) expanded funding of existing federal or state government subsidized contraception programs, (ii) tax credits to women forced to incur the costs of buying their own contraception, (iii) a government-offered free or subsidized contraception coverage plan, or (iv) incentives to insurance or pharmaceutical companies to offer contraceptives to vulnerable populations. *See, e.g.*, Conestoga Br., at pp. 63-64. The D.C. and Seventh Circuits have accepted similar proposals as "less restrictive" means of achieving the same ends as the Mandate. *See Korte*, 735 F.3d at 686; *Gilardi*, 733 F.3d at 1222. They are mistaken. The proposed alternatives are wholly unworkable and may not even adequately address Claimants' own religious objections.

With respect to workability, as noted in *Lee*, it is "difficult, if not impossible, to administer" *ad hoc* exclusions to accommodate a "myriad" of objections stemming "from a wide variety of religious beliefs." 455 U.S. at 258-60. Claimants' alternatives describe outcomes, not implementation. It is easy enough to assert that employees excluded from contraceptive coverage as a consequence of RFRA opt-outs could receive alternative coverage through existing contraception programs, tax credits, a new coverage plan, or incentives to private industry, but the burden to devise, enact, fund, and implement these new or expanded programs would fall on the government.

As concerned this Court in *Lee*, it would be difficult if not impossible for the government to track individual employees excluded from different types of coverage due to case-specific RFRA religious objections, to identify the specific methods of contraception for which each of these employees has been denied coverage, to devise new coverages to make up these employee-specific gaps, to inform the employees of their alternative options, to secure enrollment and participation in these alternative options, or to fund these programs from the public coffers. When the proposed alternatives are scrutinized, a "host of administrative and logistical problems" emerge, raising serious questions as to their workability. *Legatus*, 901 F.Supp.2d at 995-96. It is "not feasible to expect the government to establish a public insurance option that picks up responsibility for the crazy-quilt of individual services that any individual employer might find incompatible with his individual religious beliefs." *Korte*, 735 F.3d at 727 (Rovner, J., dissenting).

Even if Claimants' proposed alternatives could be enacted and implemented, which they cannot, they could not work even remotely as effectively as the Mandate. The provision of comprehensive preventive care for women under the Mandate, including full coverage of all methods of contraception, is designed to redress "a history of gender-based inequalities in healthcare and health insurance." *Korte*, 735 F.3d at 727 (Rovner, J., dissenting). Carving out contraceptive coverage in whole or in part and requiring it to be provided separately, in addition to requiring "[a]dditional transaction costs," also "reinforces the very disparities that motivated the [Women's Health] Amendment" by segregating contraception from standard insurance coverage and "stigmatiz[ing] both these services and the employees who wish to access them." *Id.* It is difficult to see how a segregated contraception program requiring separate enrollment and participation could secure anywhere close to the same level of adoption as full coverage of contraceptive services as part of standard preventive insurance coverage.

Additionally, it is questionable whether Claimants' alternatives even address Claimants' own religious objections to the Mandate, much less whether they would address other corporations' objections, insofar as the alternatives only shift Claimants' financial support of the objectionable contraceptives from one pocket to another. Conestoga, for example, objects to the Mandate's command "to buy a healthcare policy that funds abortifacients in conflict with their religious beliefs regarding the destruction of human life." Conestoga Br., at p. 13. From this statement, the religious objection arises from compulsory funding of the contraceptive methods at issue. Yet Claimants' alternatives would all require the diversion of public funds from other uses to fund the same abortifacients for Claimants' employees, with Claimants' tax dollars thus being used in place of health insurance costs to pay for the objectionable methods of contraception.

Conestoga has not taken the position that it finds compulsory funding of abortifacients through its tax dollars less religiously objectionable than compulsory funding through healthcare policies. Nor could it make that claim on behalf of other religious objectors. As the Court observed in *Lee*, there is no "principled way" to distinguish between "general taxes" used to fund religiously objectionable activities and taxes imposed under the Social Security Act. 455 U.S. at 260. Similarly, Claimants' proposed alternatives do little more than change the funding source without eliminating the objectionable compulsory funding of abortifacients.

Thus, whether measured by the standard of overbreadth, underinclusiveness, or available, effective alternatives, the Mandate is the least restrictive means of furthering the government's compelling interests in promoting gender equality and public health through full coverage of all methods of contraception.

CONCLUSION

A nation as large, diverse, and religiously inclusive as the United States simply could not function if it were required to accommodate every citizen's religious objections under all circumstances. Where the government undertakes action in furtherance of an important interest, but which is offensive to the sincerely held religious beliefs of some of its citizens, as is the case here, RFRA prescribes the rigorous standard under which the competing claims must be analyzed. And where the government meets its burden, as it has in this case, of demonstrating that its actions are both in furtherance of a compelling governmental interest and the least restrictive means of doing so, it may proceed. Here, the Mandate furthers the compelling interests of promoting women's equality and improving the public health through coverage of preventive contraceptive care without cost sharing. It is the least restrictive means of furthering these interests. For these reasons, the Court should reject Claimants' requests to be exempted from the Mandate under RFRA.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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IN THE

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KATHLEEN SEBELIUS, SECRETARY OF HHS, *ET AL.*,
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v.

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Respondents.

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On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., INDIVIDUAL PHYSICIANS AND CITIZENS' COUNCIL FOR HEALTH FREEDOM AS *AMICI CURIAE* IN SUPPORT OF PRIVATE PARTIES

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QUESTIONS PRESENTED

1. Whether Congress provided authority to promulgate the contraceptive coverage requirements.
2. Whether a closely held for-profit corporation has free exercise rights that are violated by the contraceptive coverage requirements.

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On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae ("*Amici*") are individual physicians, an association of physicians whose membership spans the nation, and a nationwide organization of patients and doctors who support health freedom for patients and doctors.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents in Case No. 13-356 have given blanket consent to the filing of *amici curiae* briefs, as have the Petitioners in Case No. 13-354. Those consents are on file with the Clerk of the Supreme Court. The Respondents in Case No. 13-354 have consented to the filing of this brief. A copy of their consent is being filed concurrently with this brief.

Since 1943, *Amicus* Association of American Physicians and Surgeons, Inc. ("AAPS"), has been dedicated to the highest ethical standards of the Oath of Hippocrates and to preserving the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 933 (2000) (citing an *amicus* brief by AAPS); *id.* at 959, 963 (Kennedy, J., dissenting) (same). Because AAPS has also commenced an action against the governmental parties which contains allegations of unconstitutionality, the disposition of these Petitions may affect the rights of AAPS and its members. *Association of American Physicians and Surgeons, Inc. v. Sebelius*, 901 F. Supp. 2d. 19 (D.D.C. 2012) *appeal docketed as* 13-5003 (D.C. Cir. 2013).

Amicus Citizens' Council for Health Freedom ("CCHF") is organized as a Minnesota non-profit corporation. The CCHF exists to support patient and doctor freedom, medical innovation, and the right of citizens to a confidential patient-doctor relationship.

Amicus Janis Chester, M.D., privately practices psychiatry in Delaware, serves as chair of the Department of Psychiatry at a community hospital, is a member of the faculty at Jefferson Medical College and holds a variety of positions with organized medicine and psychiatry, locally and nationally.

Amicus Mark J. Hauser, M.D. privately practices psychiatry and forensic psychiatry in Massachusetts and Connecticut.

Amicus Graham Spruiell, M.D., is a psychoanalyst and forensic psychiatrist who has a private practice in Wellesley, Massachusetts.

Amici have studied the introduction, passage and implementation of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010) ("ACA"), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, 124 Stat. 1029 ("HCERA ") as well as various regulations related to ACA. This includes 45 C.F.R. §147; 29 C.F.R. §2590; and 26 C.F.R. §54 (collectively, the "Contraceptive Coverage Requirements" or "CCRs"). 76 Fed. Reg. 46621 *et seq.* *Amici* believe that the CCRs and their authorizing legislation, 42 U.S.C. §300gg-13(a)(4) ("Subsection 13(a)(4)"), enacted as part of Section 1001 of ACA, are unconstitutional and void. If upheld, the CCRs will undermine, in fundamental and dangerous ways, the freedom of religion enjoyed by everyone.

Because *Amici* argue that Subsection 13(a)(4) is unconstitutional, they submit this brief in support of the Petitioners in case no. 13-356[2] and Respondents in case no. 13-354[3] (collectively, the "Private Parties") and opposition to the Respondents in case no. 13-356 and Petitioners in case no. 13-354 (collectively, the "Governmental Parties").

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[2] *Conestoga Wood Specialties Corp. v. Sebelius* ("*Conestoga Wood*").

[3] *Sebelius v. Hobby Lobby Stores, Inc.* ("*Hobby Lobby*").

PRELIMINARY STATEMENT

We must begin with the basics and recognize that our nation "was conceived in liberty." Abraham Lincoln, *Gettysburg Address* (1863) (referencing the date of the Declaration of Independence 87 years earlier). The American Revolution was fought to obtain our liberty and freedoms.

The founders of the United States of America (the "Founders") understood that if the government had the power to carve out even a modest exception to particular freedoms, including religious freedom, then everyone's freedoms would be at risk. Fearing encroachment upon their newly won freedoms, the Founders drafted and ratified a Constitution that dispersed and diffused power along multiple axes in order to prevent an undue concentration of governmental power in anyone's hands, *i.e.* regardless of whether that power were to be exercised by the President, Congress, or even an overbearing faction of citizens, whether those citizens are in the majority or minority. The Founders designed a Constitution that would tend "to break and control the violence of faction." *The Federalist No. 10* at 77 (J. Madison) (Clinton Rossiter, ed. 1961). James Madison explained:

> The latent causes of faction are thus sown into the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning **religion**, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously

> contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities that where no substantial occasion presents itself the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts.

Id. at 79.[4] As James Madison explained later, a tyranny of the majority is every bit as dangerous as a tyranny of a single monarch. *See generally The Federalist No. 51* (J. Madison).

Our Constitution diffuses power in various ways. Allowing a wide variety of religions to exist and coexist, under the First Amendment, is but one of them. First, power is divided between the federal sovereign and the state sovereigns. Second, power is further diffused among the three branches of the federal government, *i.e.* the Legislative Branch, U.S. CONST. art. I, the Executive Branch, U.S. CONST. art. II, and the Judicial Branch, U.S. CONST. art. III.[5] The

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[4] The members of this Court are well aware of the instances in world history, from ancient times until today, where religious conflict has led to prolonged wars (*e.g.*, the Crusades), and hatred of a religious group or groups by certain governments has horrifically led to genocide (*e.g.*, during World War II).

[5] *Muskrat v. United States*, 219 U.S. 346, 352 (1911) ("That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that

Bicameral Clause further diffuses federal legislative power by dividing Congress into two separate chambers, the Senate and the House of Representatives. U.S. CONST. art. I, §1.

The Constitution further diffuses power by limiting the length of the terms of the President and of members of the Senate and the House of Representatives. The President is elected for four years. U.S. CONST. art. II, § 1, cl. 1. A Senator is elected for six years. U.S. CONST. art. I, § 3, cl. 1&2 and U.S. CONST. amend. XVII. And, a member of the House of Representatives is elected for two years. U.S. CONST. art. I, § 2, cl. 1. Finally, the Founders sought to partition society into "so many parts, interests and classes of citizens," that neither the rulers nor a "majority united by a common interest" could infringe or eliminate the rights of a minority. *The Federalist No. 51* (J. Madison) at 322 ("Ambition must be made to counteract ambition"). James Madison pointed out that:

> [i]n a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the **multiplicity of sects**. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government.

Id. at 324 (emphasis added).

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it is the duty of each to abstain from, and to oppose, encroachments on either").

Although the Government's "Question Presented" asks the Court to focus on the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, that focus misdirects the Court's energies because the RFRA need not be invoked. Petitioners' Brief on the Merits in 13-354. It is black-letter law that without a Constitutional Amendment enacted pursuant to Article V, a statute may only augment, not detract from, the First Amendment. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995) ("*Thornton*"); and *Clinton v. City of New York*, 524 U.S. 417, 449 (1998). The Court may not utilize rationales related to the RFRA to analyze the First Amendment because the First Amendment rights are available under the facts of this case. In other words, the Court should look at the First Amendment first. *Compare Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) ("*Citizens United*") *with Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936).

SUMMARY OF ARGUMENT

Based on the unqualified language and history of the Free Exercise Clause, a corporation may bring a Free Exercise challenge against the Federal Government. The unqualified language of the Free Exercise Clause stands in striking contrast to the Fifth Amendment's requirement that process only be "due" or the Fourth Amendment's requirement that a search and seizure be "reasonable".

The CCRs should be considered void, *i.e.* non-existent, based upon the failure of Congress to adhere to the Constitution's strict lawmaking requirements. Congress impermissibly transferred legislative power to the governmental authorities because the CCRs are legislative in nature, scope and effect, which requires bicameral passage by Congress and presentment to the President. Congress also violated the Non-Delegation Doctrine by delegating rulemaking authority to the Governmental Parties without any boundaries or limits on the delegations.

By ignoring the statutory incoherence that results from the admitted grammatical errors in Subsection 13(a)(4), and interpreting that subsection as though it were written differently, the courts below have erred. A court's duty is take a statute as it is written. No court, including this Court, has the power to rewrite the words (and punctuations) of Congress. The Court should not overstep its constitutionally assigned role and serve as a judicial "Council of Revision."[6]

ARGUMENT

Failure to comply with the Constitution's strict lawmaking requirements renders any law void *ab initio*. Any non-compliant law must be declared unconstitutional, regardless of its merits and regardless of whether the law was passed by a single vote or by a unanimous vote in both chambers. By protecting Congress from itself, the Court protects the People. *Amici* believe that Subsection 13(a)(4) is such a non-compliant law.

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[6] *See infra* page 24.

I. CONGRESS PROVIDED NO AUTHORITY TO PROMULGATE THE CONTRACEPTIVE COVERAGE REQUIREMENTS BECAUSE SUBSECTION 13(a)(4) IS VOID.

In *National Federation of Independent Business v. Sebelius,* 132 S. Ct. 2566 (2012) ("*NFIB*"), this Court made and re-made the point that every action by the Federal Government must not only be based on an enumerated power and but also not violate any other provision of the Constitution. *NFIB,* 132 S.Ct. at 2577 (Robert, C.J.) ("Today, the restrictions on government power foremost in many Americans' minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play, however, only where the Government possesses authority to act in the first place."); *see also id.* at 2598 ("Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution"). The Bicameral Clause and the Non-Delegation Doctrine have been violated herein.

A. Subsection 13(a)(4) Is Void Because It Directs the Governmental Parties to Issue Regulations Which Are Legislative in Nature, Scope and Effect, in Violation of the Bicameral Clause.

Although not every action taken by Congress is subject to the bicameralism and presentment requirements, those requirements must be met whenever legislative power is exercised by Congress or any other Federal entity. U.S. CONST. art. I, § 1 ("**All legislative power** shall be vested in a

Congress of the United States, which shall consist of a Senate and House of Representatives").[7] Whether particular actions are an "exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in character and effect.'" *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 952 (1983) (*quoting* S. Rep. No. 1335, 54th Cong., 2d Sess. (1897)).

The legislative character of an action may be established by examining the Congressional action that it supplants. This "Supplantation Principle" was used to analyzed the constitutionality of the legislative veto in *Chadha*. *Chadha*, 462 U.S. at 952 ("The legislative character of the one-House veto in these cases is confirmed by the character of the Congressional Action it supplants"). The Court should now extend that principle to actions of executive departments, independent agencies and the judiciary. *Amici* suggest that there is no reason not to apply that principle to non-Congressional exercises of legislative power.

In *Chadha*, the constitutionality of the legislative veto provision in Section 244(c)(2) of the Immigration and Nationality Act was at issue. This Court examined Section 244(c)(2) and found that it had an essentially legislative purpose and effect. Although the Court acknowledged that Section 244(c)(2) authorized one house, by resolution, to require the Attorney General to deport an alien whose deportation would otherwise be canceled under

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[7] Congress may act unilaterally in certain defined circumstances. *Chadha*, 462 U.S. at 955-56.

Section 244, the Court reasoned that "the House took action that had the ***purpose and effect of altering the legal rights, duties and relations of persons***, including the Attorney General, Executive Branch officials and Chadha, all outside the Executive Branch." 462 U.S. at 952 (emphasis added). The Court explained that without the House's action, Chadha would remain in the United States. Congress had acted and that action had altered Chadha's status. Without the challenged provision, Chadha's deportation could only have been accomplished by legislation requiring deportation, if at all. *See id.* at 953-54.

The Court also examined the nature of the decision implemented by the legislative veto. "After long experience with the ... private bill procedure, Congress ... [chose] to delegate to the ... Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances." *Id.* at 954. The Court stated the choice to delegate was

> precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation - that is, Congress' decision to deport Chadha - no less than Congress' original choice to delegate ... involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

Id. at 954-55.

Subsection 13(a)(4) impermissibly delegates legislative power in two ways. First, any alleged authority of the Governmental Parties to promulgate the regulations arises only after the Institute of Medicine makes recommendations to the Health Resources and Services Administration ("HRSA"). Second, these regulations had the purpose and intended effect of altering the rights, duties, and relations of persons, including employers, employees, patients, providers, health insurance issuers, and health plans, all outside of Congress.

The intervals specified in Subsection 13(b) reinforce this conclusion. Subsection 13(b) provides:

> The Secretary shall establish a minimum interval between the date on which a recommendation described in subsection (a)(1) or (a)(2) or a guideline under subsection (a)(3) is issued and the plan year with respect to which the requirement described in subsection (a) is effective with respect to the service described in such recommendation or guideline.

This suggests that Congress was writing on a blank slate when it enacted Subsection 13(a)(4) because Congress needed to be better informed regarding such recommendations and guidelines.

This understanding is consistent with Subsections (a)(1,2, &3) under which Congress explicitly sought recommendations from the United States Preventative Services Task Force and the Advisory Committee on Immunization Practices of the Centers for Disease Control and guidelines from the HRSA. Subsections (a)(1,2 & 3) and (b) reveal that Congress had not yet made any policy determination or value judgment regarding the recommendations and guidelines when it enacted Subsection 13(a)(4). Subsection 13(a)(4) left the difficult policy choices to the unelected HRSA and IOM. *See* Marci Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 820 (1999) [hereinafter, "*Representation and Nondelegation*"] ("The legislature holds primary responsibility to make the national policy choices, and the President may not take on those choices."); *Clinton*, 524 U.S. at 442-45, 445 n.38. Congress had not yet balanced the interests of various constituencies regarding the subject matter specified in Subsection 13(a)(4).[8]

By declaring that Subsection 13(a)(4) is unconstitutional on the basis that it impermissibly delegates legislative power to the Governmental Parties, the Court may avoid a much thornier constitutional issue - whether delegated legislative authority is subject to the same time limit as imposed on each and every member of the House of Representatives by his or her two year term. This issue arises here because the HRSA had not issued its guidelines prior to August 3, 2011, a date that is eight months after the expiration of the 111th Congress. 76 Fed. Reg. 46624, at col. 2 (Aug. 3, 2011). There is a two-year limit on the legislative franchise given to each and every member of the House of Representatives. It is axiomatic that Congress may not delegate what it can never possess. The 111th Congress could not have enacted the guidelines as legislation beyond the last day of its term. Therefore, it is impossible for the agent of Congress – the HRSA – to do so. Indeed, this Court has recognized that "each branch, in its own way, is the people's agent, its fiduciary for certain purposes." *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) ("*MWAA*") (internal citation omitted). Under the Constitution, the people give each and every member of Congress two and only two years to act. U.S. CONST. art. I, § 2, cl. 1.

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[8] Institutionally Congress is better able to balance multiple viewpoints than a single agency, executive department, or quasi-governmental entity:

> The legislative branch serves the people by filtering the factions in the society and distilling those laws that will best serve the nation .... [P]ositions must be funneled through a large number of ports before becoming governing law. ... As a result, it is capable of reaching more nuanced compromises on national issues.

Representation and Nondelegation, 20 CARDOZO L. REV. at 814. In contrast, when lawmaking is delegated to an agency, executive department, or quasi-governmental entity, the viewpoint is narrower and without any electoral accountability.

B. Subsection 13(a)(4) Is Void Because Its Delegations to the Governmental Parties Are Unbounded.

Under the "intelligible principles" test, it is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of the delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (*quoting American Power & Light Co. v. S.E.C.*, 329 U.S. 90, 105 (1946)). In addition, a delegation is always subject to the legislation that authorized it. *Chadha*, 462 U.S. at 953-54 n.16.

The Court has repeatedly held "the lawmaking function belongs to Congress, U.S. Const. Art. I, § 1, and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996). Accordingly, "Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). "[I]t is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) ("The Executive, except for recommendation and veto, has no legislative power"); *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution").

It has been suggested that delegation to administrative agencies leaves a gaping hole in the Constitution's balanced structure of checks and balances whenever agencies become arbitrary and unaccountable. "The nondelegation doctrine in this scenario is crucial to liberty, because it prohibits general lawmaking from occurring in a structure both capable of arbitrary action and removed from the national scrutiny to which both Congress and the President are exposed by the constitutional structure." *Representation and Nondelegation*, 20 CARDOZO L. REV. at 821.

Subsection 13(a)(4) provides no marker or check to determine whether HHS exceeded the authority passed by Congress. *See Yakus v. United States*, 321 U.S. 414, 423-24 (1944); *Chadha*, 462 U.S. at 953.

This subsection containing the phrase "such additional preventive care and screenings not described in paragraph (1)" is a problem. That phrase removed any and all limits on the authority of the Governmental Parties. *See A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935).

By omitting boundaries from Subsection 13(a)(4), Congress enables the Governmental Parties to address an infinite number of subjects.[9] In *Whitman v. American Trucking Associations, Inc.*, the Supreme Court said, "[t]he very choice of which portion of the power to exercise – that is to say, the prescription of the standard that Congress had omitted – would *itself* be an exercise of the forbidden legislative authority." 531 U.S. 457, 473 (2001). HHS has exercised such forbidden legislative authority.

II. BECAUSE SUBSECTION 13(a)(4) IS DIRECTED AT SINCERELY HELD RELIGIOUS BELIEFS, IT VIOLATES THE FREE EXERCISE CLAUSE AND IS VOID.

As the Private Parties contend, the Contraceptive Coverage Requirements are antithetical to their sincerely held religious beliefs. The Governmental

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[9] To clarify this point, the Court might consider the following hypothetical example involving another Executive Department,. Assume *arguendo* that Congress passed a statute that authorized the United States Department of Agriculture ("DoA") to issue regulations concerning "at least" broccoli, ketchup, and hot dogs. Under the construction of Subsection 13(a)(4) suggested by the Governmental Parties, the DoA would be allowed to regulate not just those three items, but also would be allowed to regulate an infinite number of other items (*e.g.* cauliflower, oranges, tomatoes, *etc.*), even if Congress and the President never agree to regulate those other items.

Parties do not dispute this contention. Governmental Parties, Brief for Petitioners in 13-354 at 12 ("The Greens' sincerely held religious opposition to certain forms of contraception is not subject to question in these proceedings, and their personal beliefs merit the full measure of protection that the Constitution and laws provide."). Instead, the Governmental Parties suggest that Free Exercise rights may be asserted only by individuals and not by for-profit corporations. The First Amendment is not so limited.

Indeed, on numerous occasions, the Court has held that corporations are entitled to First Amendment protections. *Citizens United*, 558 U.S. at 342 (citing approximately twenty Supreme Court cases for the proposition that "[t]he Court has recognized that First Amendment protection extends to corporations"). Here, the Court should hold that violations of the Free Exercise Clause are also protected by the First Amendment.

A. The First Amendment Protects Inward Beliefs and Outward Expressions.

In *Citizens United*, the Justice Kennedy said:

> Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker. It must be noted, moreover, that this undertaking would require substantial litigation over an extended time, all to interpret a law that beyond doubt discloses serious First Amendment flaws. The interpretive process itself would create an inevitable,

> pervasive, and serious risk of chilling protected speech pending the drawing of fine distinctions that, in the end, would themselves be questionable. First Amendment standards, however, must give the benefit of any doubt to protecting rather than stifling speech.

Citizens United, 558 U.S. at 327 (inner quotation marks omitted). The line protecting the free exercise of religion must be so bright and clear that there can be no doubt that religious exercise is protected rather than prevented.

"Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints." *Citizens United,* 558 U.S. at 340. The First Amendment protects both inward beliefs, U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...."), and outward expressions, U.S. CONST. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press .... "). The First Amendment also protects the right of the people to act collectively. U.S. CONST. amend. I ("Congress shall make no law ... abridging ... the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

B. Corporations May Assert Free Exercise Clause Violations Because Religions Have Both Collective and Individual Aspects.

The essence of the Governmental Parties' argument is that only individuals and certain not for-profit entities may challenge the Government's actions.[10] This argument simply ignores the fact that most religions have collective as well as individual aspects and members of many religions construct buildings for group prayer. For example, one may find group prayer in a Buddhist temple, a Catholic or Protestant Church, or a Jewish synagogue. *See e.g.*, Merriam-Webster's Encyclopedia of World Religions 239 (Wendy Doniger, consulting ed., 1999) (Under the entry for "CHURCH" we find "[t]he Greek word *ekklesia*, which came to mean church, was originally applied in the classical period to an official **assembly** of citizens.") (emphasis added).

In many towns and cities across this country one may find churches, temples, etc. for the collective exercise of religion along either "Main Street" or a street whose name reflects the religious building located thereon.[11] For example one may find Church Avenue in the center of Brooklyn, New York, Church Street in lower Manhattan, New York, and Temple Street in New Haven, Connecticut.

In his dissent to the *Conestoga Wood* decision below, Judge Jordan eloquently made the point that exercising freedom of religion is both a collective right and an individual right. He said:

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[10] Judge Jordan quoted *Hobby Lobby* in observing, "Because the First Amendment protects speech and religious activity generally, an entity's profit-seeking motive is not sufficient to defeat its speech or free exercise claims. 'We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression.'" *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 404 (3d Cir. 2013) (Jordan, J., dissenting) (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013), internal citation omitted).

[11] *See* Merriam-Webster's Encyclopedia of World Religions.

> Contrary to the Majority's conclusion, there is nothing about the "nature, history, and purpose" of religious exercise that limits it to individuals. Quite the opposite; **believers have from time immemorial sought strength in numbers. They lift one another's faith and, through their combined efforts, increase their capacity to meet the demands of their doctrine. The use of the word "congregation" for religious groups developed for a reason.** Christians, for example, may rightly understand the Lord's statement that, "where two or three are gathered together in my name, there am I in the midst of them," Matt. 18:20, to be not only a promise of spiritual outpouring but also an organizational directive. It thus cannot be said that religious exercise is a purely personal right, one that "cannot be utilized by or on behalf of any organization, such as a corporation." *United States v. White*, 322 U.S. 694, 699 (1944).

Conestoga, 724 F.3d at 400-01 (Jordan, J., dissenting) (emphasis added). The organizational directive in the Old Testament perhaps is even clearer. In Deuteronomy 18:16 we find the people assembled to receive the Torah.

Finally, the Court might also consider that corporations do not exist in a vacuum, but, rather, are operated and managed by their officers, directors and employees. Consequently, corporations should be able to assert violations of the Free Exercise Clause.

Amici strongly believe that the free exercise rights of the Private Parties are within the broad reach of the First Amendment. As Judge Noonan of the Ninth Circuit said:

> The First Amendment, guaranteeing the free exercise of religion to every person within the nation, is a guarantee that [for-profit corporations may] rightly invoke [ ]. Nothing in the broad sweep of the amendment puts corporations outside its scope. Repeatedly and successfully, corporations have appealed to the protection the Religious Clauses afford or authorize. Just as a corporation enjoys the right of free speech guaranteed by the First Amendment, so a corporation enjoys the right guaranteed by the First Amendment to exercise religion.

EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 623 (9th Cir. 1988) (Noonan, J., dissenting).[12]

C. While the Language of the Fourth And Fifth Amendments Qualifies Their Protections, The Language of the First Amendment Is Unqualified.

Religious freedom has been inextricably intertwined with our nation's history, from the earliest settlers until today. The First Amendment protects this and other freedoms. The protections afforded by the language of the First Amendment are not qualified. This contrasts with the language qualifying the protections afforded by the Fourth Amendment ("reasonable" searches and seizures) and the Fifth Amendment ("due" process). The government's position, challenging the right of corporations to bring Free Exercise Clause cases, is directly antithetical to the First Amendment (which recognizes the right "peaceably to assemble"). Furthermore, the government's position cannot be reconciled with the *Citizens United* case.

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[12] Cited in Judge Jordan's dissent in *Conestoga Wood*, 724 F.3d at 404-05 (Jordan, J., dissenting).

Strict adherence to the Free Exercise Clause is consistent with our nation's history of serving as a beacon to those escaping from religious persecution. Shortly after the ratification of the Constitution and during the ratification of the Bill of Rights, Tench Coxe wrote:

> The situation of religious rights in the American states, though also well known, is too important, too precious a circumstance to be omitted. Almost every sect and form of Christianity is known here—as also the Hebrew church. None are [just] tolerated. **All are admitted,** aided by mutual charity and concord, and supported and cherished by the laws. In this land of promise for the good men of all denominations, are actually to be found, the independent or congregational church from England, the protestant episcopal church (separated by our revolution from the church of England) the quaker church, the English, Scotch, Irish and Dutch presbyterian or calvinist churches, the Roman catholic church, the German Lutheran church, the German reformed church, the baptist and anabaptist churches, the hugonot or French protestant church, the Moravian church, the Swedish episcopal church, the seceders from the Scotch church, the menonist church, with other christian sects, and the Hebrew church. **Mere toleration is a doctrine exploded by our general condition; instead of which have been substituted an unqualified admission, and assertion, "that**

> **their own modes of worship and of faith equally belong to all the worshippers of God, of whatever church, sect, or denomination."**

Tench Coxe, Notes Concerning the United States of America (1790) (emphasis added) (capitalizations in original), *reprinted in* The Founders' Constitution, Volume 5, Amendment I, Document 55 (Philip B. Kurland and Ralph Lerner eds., 1987).

Finally, the Court should look at the current religious and ethnic composition of the United States to realize that the Founders "got it right" when they ratified the religion clauses of the First Amendment right. ProQuest, Statistical Abstract of the United States 2013, at Table 80 (December 2012) (Listing population statistics for 26 religious sects with populations greater than 500,000 persons); *see also*, Emma Lazarus, *The New Colossus* (1883) (This poem is engraved on a bronze plaque mounted within the pedestal of the Statue of Liberty) ("Give me your tired, your poor, your huddle masses yearning to breathe free…").[13]

III. THE COURT MAY NOT AGGRANDIZE LEGISLATIVE POWER BY IGNORING THE STATUTORY INCOHERENCE RESULTANT FROM THE GRAMMATICAL ERRORS IN SUBSECTION 13(a)(4).

This case is about the allocation of powers between and among the branches. It is not about what the law "ought to be" or "should be." It is about what the law "is". *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say **what the law is.**") (emphasis added).

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[13] www.libertystatepark.com/emma.htm (viewed on 1/24/14).

As enacted, Subsection 13(a)(4) provides: "with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. § 300gg-13(a)(4), 124 Stat. at 131.

Despite the maxim that legislators are presumed to know the rules of grammar, Congress enacted Subsection 13(a)(4) with several grammatical errors that render its text incoherent. The judiciary, like the President, has no power to rewrite a statute.[14] Furthermore, the idea that the judiciary be joined with the executive in a "council of revision" was considered and expressly rejected by the Drafters of the Constitution. Brief of Senators Robert C. Byrd, Daniel Patrick Moynihan, and Carl Levin as *Amici Curiae* in Support of Appellees 9-10 in *Clinton v. City of New York* (Docket No. 97-1374).

Specifically, Congress placed a period both before and after Subsection 13(a)(4). It also placed the word "and" between Subsections 13(a)(2) and 13(a)(3). This period provides strong evidence that Subsection 13(a)(3) terminates Subsection 13(a) and establishes Subsection 13(a)(4) as its own sentence. As a separate sentence, Subsection 13(a)(4) is an incomplete thought. It is a subject without a predicate. No conduct is permitted, prohibited or directed.

Furthermore, the reference to "paragraph 1" in Subsection 13(a)(4) is extremely unclear. It does not refer to Subsection 13(a)(1). If Congress had wanted to refer to Subsection 13(a)(1) there, it would have used the term "Subsection 13(a)(1)". Indeed, Congress specifically referred to "Subsection 13(a)(1)" in Subsection 13(b)(1). Congress expressly used the word "subsection" in referring to Subsections 13(a)(2) and 13(a)(3) as well. Subsection 13(b)(1) provides:

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[14] That power is not transferrable to the Judiciary by Congress.

> The Secretary shall establish a minimum interval between the date on which a recommendation described in **subsection (a)(1) or (a)(2)** or a guideline under **subsection (a)(3)** is issued and the plan year with respect to which the requirement described in **subsection (a)** is effective with respect to the service described in such recommendation or guideline.

42 U.S.C. § 300gg-13(b)(1), 124 Stat. at 132 (emphasis added). *Amici* believe that these mistakes render Subsection 13(a)(4) void. To avoid the possibility that Subsection 13(a)(4) is void, the Governmental Parties have made arguments that make sense only if the Court interprets the law as it "should be" rather than as it is written. On the first two pages of the Appendix to their brief, the Governmental Parties admitted to three grammatical errors that Congress made involving Subsection 13(a)(4). Appendix to Petitioners' Brief 13-354, at 1a n.1&2 and 2a n.2 (footnotes explicitly suggesting what the law should be).

While, under the Recommendation Clause, U.S. CONST. art. II, § 3, the Executive Branch always may suggest to Congress what the law "should be," it is irrelevant to the Judiciary what the law "should be." The Judiciary is compelled to take a Federal statute as it is written and interpret it accordingly. When

Subsection 13(a)(4) is taken as written, *i.e.* a separate sentence, it provides no regulatory authority to the Governmental Parties.

The Separation of Powers Doctrine, as implemented by the language and structure of the Constitution, prevents the Judiciary from altering the language passed by Congress and signed by the President. *Amici* suggest that the Contraceptive Coverage Requirements are only authorized if the Court interprets Subsection 13(a)(4) as it "should be" rather than as it was enacted. Neither the Judiciary nor the Executive Branch may expand or contract what Congress has said. Thus, a judicial modification to enacted legislation, no matter how slight, ignores the Presentment and Bicameral Clauses. In *Clinton,* the Court struck down a Presidential line item veto to enacted legislation. 524 U.S. 417. The Court reasoned that "[i]f one paragraph of that text had been omitted at any one of those three stages, Public Law 105-33 would not have been validly enacted." *Id.* at 448. *Amici* suggest that a change of even a single word or punctuation is sufficient to void a statute as evading the "single, finely wrought and exhaustively considered procedure" contained in the Bicameral and Presentment Clauses. *Clinton*, 524 U.S. at 439-40; *Chadha*, 462 U.S. at 951; *MWAA*, 501 U.S. at 276.

The principle that neither the Judiciary nor the President may unilaterally exercise legislative power applies equally to the Executive Departments and their subordinate agencies. Thus, the Governmental Parties are prevented from pursuing an argument based on what the law "should be" instead of what was enacted. *See* Appendix to Petitioners' Brief 13-354 at 1a n.1&2 and 2a n.2. In other words, based on Subsection 13(a)(4), as written, the Contraceptive Coverage Requirements were promulgated *ultra vires.* The Contraceptive Coverage Requirements conflict with Subsection 13(a)(4) as it was written. The existence of such a dispensing power in the Governmental Parties is not permitted.

Concerns of encroachment and aggrandizement of legislative power, as well as the abdication of legislative power by Congress, have been an integral part of this Court's Separation of Powers jurisprudence. *Mistretta*, 488 U.S. at 382 ("It is this concern of encroachment and aggrandizement that has animated our separation of powers jurisprudence ....").

The Separation of Powers Doctrine does not merely protect each branch from encroachments by the other two branches. Rather, the doctrine protects the people from an undue concentration of power in any branch. *MWAA*, 501 U.S. at 272 ("The structure of our Government as conceived by the Framers ... disperses the federal power among the three branches ... placing both substantive and procedural limitations on each. *The ultimate purpose of this separation of powers is to protect the liberty and security of the governed*") (emphasis added).[15]

Furthermore, when an agency or executive department picks or chooses which laws or regulations to "faithfully execute", it turns rulemaking or executive action on its head – agency or executive department actions would control legislation instead of the rulemaking or executive action being controlled by the legislation. Such a doctrine – agency or department control of legislation – has no support in the Constitution. It asserts a principle which would provide the executive departments, independent agencies and the President with an unlimited power – "a power to control the legislation of [C]ongress and paralyze the administration of justice." *Kendall v. United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524, 613 (1838).

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[15] In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court indicated the system of separated powers and checks and balances was regarded by the Framers "as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 122.

Because Subsection 13(a)(4) is separate and distinct from Subsections 13(a)(1-3) as well as from Subsection 13(a)(5), Subsection 13(a)(4) provided no basis for the promulgation of the Contraceptive Coverage Requirements. The CCRs are a nullity. For the CCRs to become the law of the land, a corrected version of Subsection 13(a)(4), containing Subsection 13(a)(4) as it "should be," would have to be introduced into and passed by both Houses of Congress and then be signed by the President.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision in *Hobby Lobby* and reverse the decision in *Conestoga Wood*.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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AND
BRIEFS

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In The
Supreme Court of the United States

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KATHLEEN SEBELIUS, ET AL.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

◆

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL.,
Respondents.

◆

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And The Tenth Circuits

◆

BRIEF OF *AMICI CURIAE* AZUSA PACIFIC UNIVERSITY, ALLIANCE DEVELOPMENT FUND, BETHANY INTERNATIONAL, BIBLICA US, INC., BILLY GRAHAM EVANGELISTIC ASSOCIATION, COMPASSION INTERNATIONAL, EVANGELICAL COUNCIL FOR FINANCIAL ACCOUNTABILITY, FELLOWSHIP OF CATHOLIC UNIVERSITY STUDENTS, FELLOWSHIP OF CHRISTIAN ATHLETES, MARILYN HICKEY MINISTRIES, NEW TRIBES MISSION, ONE CHILD MATTERS, PINE COVE, POINT LOMA NAZARENE UNIVERSITY, REACH BEYOND, SAMARITAN'S PURSE, SIMPSON UNIVERSITY, SKY RANCH, SUMMIT MINISTRIES, THE CHRISTIAN & MISSIONARY ALLIANCE, THE NAVIGATORS, WATERSTONE, YOUNG LIFE AND UPWARD UNLIMITED IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici constitute a diverse group of religious ministry organizations and collectively they conduct many different types of activities including humanitarian relief, community development, camping, education in "arts and sciences" at all levels, church construction financing, financial standards accreditation, congregational care, foreign missions and training in religious texts and religious living. *Amici* conduct all of their activities in furtherance of their respective Christian missions and in a manner that distinctly expresses and exercises their religious convictions. In doing so, they operate under a variety of legal structures, including for-profit subsidiaries or affiliates.

As social or commercial legislation expands in scope, *amici* increasingly rely upon religious exemptions to conduct their activities in a manner consistent with their distinct religious convictions. *Amici* have a direct interest in how this Court characterizes the applicable religious liberty and governmental interests in this consolidated case, not least because many if not all of the *amici* hold religious beliefs regarding contraceptives (including those used to induce abortions) similar to the beliefs at issue in this case. In addition, this Court's analysis will likely establish a framework for religious exemptions in other areas of the law. Adopting a narrow construction of religious exercise or granting too much deference to governmental interests would undermine this country's defining commitment to religious liberty and severely impair the ability of *amici* to accomplish their missions while preserving their character.

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Therefore, *amici* urge this Court to affirm and apply broad religious exemptions based on constitutional principles of religious deference and neutrality. These principles dictate deferential standards for determining when laws burden religious exercise, and rigorous standards of strict scrutiny to justify such laws.

The religious character and mission of the *amici* are as follows.

Azusa Pacific University ("APU") is a comprehensive, evangelical, Christian university located near Los Angeles, California. APU is committed to God First and excellence in higher education. APU serves more than 10,000 students on campus, online and at seven regional centers, offering more than 100 associate's, bachelor's, master's and doctoral programs.

Alliance Development Fund is a corporate subsidiary of The Christian and Missionary Alliance formed to provide construction loans and other financial services for member churches of the denomination. In so doing, the organization advances the mission of transforming people's lives through local Alliance churches.

Bethany International is a Christian missions training and sending organization dedicated to mobilizing disciples of Jesus and the church worldwide for the increase of God's Kingdom. Bethany's graduates have served as missionaries, planted churches, founded Christian bookstores and literature distribution networks, trained church and mission leaders, and partnered with national ministries in more than 50 countries.

Biblica US, Inc. is a Christian organization founded in 1809 that translates and publishes the Bible in more than 100 languages. Biblica serves in over 50 countries around the world focusing on translation, children and youth ministry, specialized ministry outreach, Bible and church engagement and scripture outreach. Based in Colorado Springs, Biblica currently has approximately 900 employees worldwide, including translators, ministry program personnel, fulfillment staff and administrative staff.

Billy Graham Evangelistic Association ("BGEA") was founded by Billy Graham in 1950 to proclaim the Gospel of Jesus Christ by every effective means and to equip others to do the same. BGEA ministers to people around the world through a variety of activities including festivals and celebrations, television and internet evangelism, and the

Billy Graham Library. BGEA has over 850 employees and over 50,000 volunteers.

Compassion International is a Christian child advocacy ministry that, in response to Christ's instructions to his followers, releases children from their spiritual, economic, social and physical poverty and enables them to become responsible and fulfilled Christian adults. Based in Colorado Springs, Compassion and its member churches provide regular support to more than one million children in over 24 countries.

Evangelical Council for Financial Accountability ("ECFA") provides accreditation to leading Christian nonprofit organizations that faithfully demonstrate compliance with established standards for financial accountability, fundraising and board governance. ECFA members include Christian ministries, denominations, churches, educational institutions and other tax-exempt 501(c)(3) organizations. ECFA has approximately 1,800 member organizations.

Fellowship of Catholic University Students ("FOCUS") is a national outreach that meets college students where they are and invites them into a growing relationship with Jesus Christ and the Catholic faith. Over the past 15 years, FOCUS has grown from four missionaries serving one campus to over 350 missionaries serving 83 campuses in 34 states across the nation.

Fellowship of Christian Athletes ("FCA") is a Christian organization that has been challenging coaches and athletes on the professional, college, high school, junior high and youth levels to use the powerful medium of athletics to impact the world for Jesus Christ since 1954. FCA's mission is to present to coaches and athletes, and all whom they influence, the challenge and adventure of receiving Jesus Christ as Savior and Lord, serving Him in their relationships and in the fellowship of the church.

Marilyn Hickey Ministries is a Christian organization that is sending a clear message of love, hope and healing to people around the world through Bible teaching, international healing meetings, group ministry tours, pastors' and leaders' conferences, humanitarian efforts, and a daily television program. Marilyn Hickey has ministered in nearly 130 countries around the world.

New Tribes Mission ("NTM") and its more than 3,000 missionaries start tribal churches among people who have no concept of the God of the Bible. Based in Sanford, Florida, NTM missionaries in over 20 countries seek to establish mature churches that can take their rightful place as agents of change in their own communities and partners in the Great Commission of Jesus Christ.

One Child Matters is an international child development ministry that seeks to demonstrate the love of Jesus to children in poverty by meeting their basic needs and providing opportunities for development and growth. One Child Matters is working in 16 countries in the world, bringing hope, truth, life, love, and mercy to more than 40,000 children through child sponsorship.

Pine Cove offers Christian camping programs and facilities year round in Texas and other states. Pine Cove serves children, youth, and families each summer, and provides outdoor education, retreats and conferences in other seasons, accommodating over 20,000 visitors each year. Pine Cove employs over 160 full-time and part-time resident staff, and over 1,500 college-age staff work at the camps every summer.

Point Loma Nazarene University ("PLNU") is a Christian liberal arts college based near San Diego and founded in 1902 as a Bible college by the Church of the Nazarene. PLNU serves more than 3,500 students in more than 60 undergraduate areas of study and graduate programs. PLNU offers many ministry opportunities, including chapel, community and discipleship ministries, international and worship ministries.

Reach Beyond is an evangelical missionary organization, that assists its partners with staff, training, funding and technology. Since its founding in 1931, Reach Beyond has been using new technologies in mass media as an effective, efficient way of reaching into people's homes – touching hearts and changing lives. Reach Beyond provides a wide variety of programs including sports, preventative healthcare, culture, travel and music, airing via shortwave, AM, FM, satellite, Internet, chat rooms or SMS messaging.

Samaritan's Purse is a nondenominational evangelical Christian organization formed in 1970 to provide spiritual and physical aid to hurting people around the world. The organization seeks to follow the command of Jesus to "go and do likewise" in response to the story of the Samaritan who helped a hurting stranger. Samaritan's Purse operates in over 100 countries providing emergency relief, community development, vocational programs and resources for children, all in the name of Jesus Christ.

Simpson University is a Christian University of liberal arts and professional studies based in Redding, California. Simpson offers undergraduate, graduate and teaching credential programs in a Christ-centered learning community committed to developing each student in mind, faith and character for a lifetime of meaningful work and service in a constantly changing world. Simpson students are associated with more than 30 different denominations and represent a mix of ethnic backgrounds.

Sky Ranch is a Christian organization providing an outdoor ministry with a mission to facilitate an encounter with Christ on the mountaintops. Its vision of outdoor ministry is to unleash a spirit-driven community that is transforming hope in the world. Sky Ranch seeks to plant the seed of faith in its campers and other program participants to equip them with a better understanding of the Bible and of their vocation, and with the skills for congregation ministry leadership.

Summit Ministries is an evangelical, nondenominational Christian ministry. Summit is viewed as one of the foremost leaders in training Christians in apologetics, worldview analysis, and social engagement. Currently, about 1,500 students graduate from Summit each year.

The Christian & Missionary Alliance is a church denomination and missionary organization with over 400,000 members in over 2,000 churches in all 50 states. In addition, there are over 800 missionaries in 58 nations supported by the organization. Based in Colorado Springs, the organization also sponsors a number of educational institutions and retirement centers around the country.

The Navigators is an international, Christian ministry established in 1933. The Navigators are characterized by an eagerness to introduce Jesus to those who don't know Him, a passion to see those who do know Jesus deepen their relationship with Him, and a commitment to training Jesus' followers to continue this nurturing process among the people they know. Based in Colorado Springs, the Navigator staff family – 4,600 strong – includes 70 nationalities.

WaterStone is a Christian community foundation formed in 1980. The mission of WaterStone is to educate and encourage donors to achieve Christ-centered giving objectives by providing excellence in innovative, personalized charitable giving solutions and educational resources. By helping individuals and families increase their ability to give to their favorite charities and ministries, WaterStone has become a launching pad for Christian work nationally and internationally.

Young Life is a Christian ministry that reaches out to middle school, high school and college-aged students in all 50 of the United States as well as in more than 90 countries around the world. Young Life's ministries include camping programs around the country and ministries in approximately 6,000 schools. In 2012, the number of children impacted by Young Life in the U.S. and internationally was over 1.2 million.

Upward Unlimited provides the world's largest Christian sports program for children. Each year some one million people around the world play, coach, referee or volunteer in Upward leagues and camps hosted by more than 2,400 churches. These churches have taken Upward programs to 67 countries. Upward Unlimited has its headquarters in Spartanburg, South Carolina.

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SUMMARY OF ARGUMENT

In connection with a provision in the Patient Protection and Affordable Care Act, the Secretary of Health and Human Services and other governmental parties in this consolidated case (collectively, the

"Secretary") enacted regulations requiring certain employers to include prescription contraceptives in their health plans (the "Coverage Mandate").[2] 42 U.S.C. § 300gg-13; 45 C.F.R. § 147.130(a)(i)(iv). The corporate employers in this consolidated case assert that the Coverage Mandate requires them to act in violation of their religious beliefs regarding certain contraceptives. As such, they claim that the Coverage Mandate violates the *Free Exercise Clause* of the U.S. Constitution, U.S. Const. amend. I, and the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb ("RFRA").

In evaluating claims under the *Free Exercise Clause*, this Court has adopted the rule that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi*

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[2] The Secretary also enacted regulations to provide an exemption for organizations described in Internal Revenue Code § 6033(a)(3)(A)(i) and (iii), which sections describe organizations treated for tax purposes as churches or their integrated auxiliaries or the exclusively religious activities of religious orders. The Secretary labels this exemption as the "religious employer" exemption even though it does not include most non-church religious organizations. For certain nonprofit, non-church religious organizations (labeled as "eligible" organizations), the regulations separately provide a so-called "accommodation." In contrast with the "religious employer" exemption, the "accommodation" uses the healthcare plans of the "eligible" organizations to provide contraceptive coverage for participants in the plans. *See* 45 C.F.R. § 147.131(a), (b).

Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (*citing Employment Division v. Smith,* 494 U.S. 872 (1990)). However, "[a] law *failing to satisfy these requirements* must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi,* 508 U.S. at 531-32 (emphasis added).

RFRA provides even broader religious liberty protection for federal laws, striking down any such law that substantially burdens religious exercise unless the law satisfies the same strict scrutiny standards. *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal,* 546 U.S. 418, 424 (2006) ("The only exception recognized by the statute requires the Government to satisfy the compelling interest test – to demonstrate that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.").

Within this legal framework, this consolidated case asks the following questions related to the impact of the Coverage Mandate on religious exercise:

1. What are the defining characteristics of the religious exercise protected by the *Free Exercise Clause* and RFRA?
2. Does the Coverage Mandate substantially burden religious exercise?
3. Is the Coverage Mandate a generally applicable law?

4. Does the Coverage Mandate satisfy strict scrutiny standards (*i.e.,* is it narrowly tailored to, or the least restrictive means of furthering, a compelling governmental interest)?

With respect to the first question, constitutional principles of religious deference and neutrality dictate a deferential definition of religious exercise that encompasses all activities and policies of an organization that are based on or further the organization's sincerely held religious beliefs. In determining whether an organization is asserting religious beliefs sincerely or as a sham, government officials may consider a wide range of potentially relevant factors. They may, for instance, consider whether an organization has consistently asserted that it is taking actions in accordance with religious beliefs.

But government officials have no constitutional competence or authority to measure the religious exercise in an organization's activities based on some litmus test of perceived religious content, or on whether they align with the organization's religious beliefs. In addition, government officials cannot exclude from religious exercise certain activities or policies that are based on sincerely held religious beliefs merely because such activities or policies appear to be too secular, too commercial, or too public, or because they are conducted by a for-profit corporation. These limitations simply ignore and effectively marginalize the wide diversity of religious beliefs and activities in this country.

In addition, the Secretary's proposed blanket rule that for-profit corporations cannot exercise religion fundamentally misconceives the distinction in corporate law between nonprofit and for-profit corporations. Many for-profit corporations seek to further sincerely held beliefs or values (some religious and others not). That a corporation may be structured to distribute net earnings to shareholders does not inherently undermine the sincerity with which it holds its beliefs or values.

Most if not all *amici* hold religious beliefs similar to those asserted by the corporate employers in this consolidated case. Although the question of whether the corporate employers sincerely hold such beliefs is a factual matter outside the scope of this brief, *amici* have no reason to doubt that they do. And for purposes of identifying religious exercise, *amici* urge this Court to affirm that this is the only relevant question.

With respect to the substantial burden and generally applicable standards, this Court should apply interpretations deferential to religious liberty interests. Because the Coverage Mandate requires employers to participate through their health plans in providing contraceptives, the mandate substantially burdens the religious exercise of employers who object on religious grounds to the use of contraceptives. Indeed, the Secretary's "religious employer" exemption and "accommodation" concede this point. In addition, this Court should affirm that the generally applicable standard requires more than merely that a law not target religion. The Coverage Mandate's limited reach and substantial exemptions establish that it is not generally applicable.

Finally, this Court should reject the Secretary's position that the Coverage Mandate is the least restrictive means of furthering compelling governmental interests. The Coverage Mandate cannot satisfy the rigorous strict scrutiny standards articulated by this Court for the same reason that it is not generally applicable. The fact that the Coverage Mandate gives priority to so many other interests concedes that the interests it does serve are not compelling. And given the mere speculation upon which the regulations rely, the Coverage Mandate fails to satisfy the least restrictive means requirement.

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ARGUMENT

Religious liberty in this country reflects, among other things, the twin propositions that duty to God transcends duty to society and that true religious faith cannot be coerced. James Madison captured these propositions in his *Memorial and Remonstrance Against Religious Assessments:*

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member

> of Civil Society, he must be considered as a subject of the Governor of the Universe[.]

Id., reprinted in Everson v. Board of Education of Ewing, 330 U.S. 1, 64 (1947) (appendix to dissenting opinion of Rutledge, J.). Thomas Jefferson incorporated the same propositions into the Virginia Act for Religious Freedom, which in its preamble asserts that any attempt by the government to influence the mind through coercion is "a departure from the plan of the Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do. . . ." Va. Code Ann. § 57-1 (West 2003). Because individuals possess an inalienable right and duty to worship God as they deem best, government can have no authority over religious exercise as such. Put differently, civil government is not the highest authority in human affairs.

Building on these propositions, religious liberty principles of deference and neutrality set forth in this Court's decisions establish a deferential definition of religious exercise encompassing all activities or policies grounded in sincerely held religious beliefs. Further, the Coverage Mandate substantially burdens religious exercise by requiring organizations to act in violation of their religious beliefs. Finally, the Coverage Mandate is not generally applicable in any meaningful sense, and it fails to satisfy this Court's rigorous application of strict scrutiny standards.

I. Religious exercise includes a wide range of activities or policies that further an organization's sincerely held religious beliefs.

A. Organizations exercise religious beliefs through many types of practices.

The short descriptions of *amici* in the Statement of Interests section of this brief reveal that *amici*, like many other organizations, engage in a wide variety of activities serving the physical, emotional and spiritual needs of people. A number of organizations, such as Compassion International and Samaritan's Purse, focus on delivering humanitarian relief and basic life sustenance resources and services to the desperately needy. These organizations and others have been on the front lines responding to catastrophic events around the world.

While some organizations serve a range of human needs, others focus on the specific needs of certain social segments. For instance, Upward Unlimited operates youth programs providing recreational opportunities and biblical instruction, and many *amici* provide camping experiences. Azusa Pacific University, Point Loma Nazarene University, and Simpson University are higher educational institutions providing a wide range of degree granting programs. Other *amici* engage in various forms of missionary work, spreading the Christian faith and planting and nurturing local church communities in the U.S. and around the world.

Amici and other organizations view their respective activities, whether serving the poor, providing education, or offering distinctly religious worship or evangelism, both as service to God and as an expression of their religious faith. For example, Compassion International performs humanitarian work in response to the "Great Commission" (Jesus' command to his followers to make disciples). Mission Statement, *available at* http://www.compassion.com/mission-statement.htm (last visited Jan. 22, 2014). Similarly, Samaritan's Purse affirms that its activities are done "with the purpose of sharing God's love through His son, Jesus Christ." About Us, *available at* http://www.samaritanspurse.org/our-ministry/about-us (last visited Jan. 22, 2014).

In carrying out their activities, organizations often adopt operational policies to implement their religious beliefs. Such religious operational policies help these organizations ensure that their activities, some of which may be similar to secular activities, comply with their distinctive religious commitments. The point is not just that services are being provided, but that services are being provided in a manner consistent with their religious beliefs.

This Court has repeatedly recognized that such operational policies, which may encompass, for example, who can conduct certain activities or how activities are to be conducted, are a form of religious exercise. Most recently, this Court held that the *First Amendment* provides a "ministerial exception" that protects organizations from employment discrimination laws applied to minister employees. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012). Because religious associational policies establishing who may carry out or lead an organization *exercise* religion, this Court affirmed that the *Free Exercise Clause* protects "a religious group's right to shape its own faith and mission through its appointments." *Id.* at 706; *see also Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 341-43 (1987) (Brennan, J., concurring) ("[R]eligious organizations have an interest in autonomy in ordering their internal affairs so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions.") (internal quotation omitted).

Religious beliefs may determine not only who conducts activities, but also how activities are conducted. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court held that the Amish may educate their children in accordance with their beliefs and contrary to applicable state law. This Court observed that "Old Order Amish communities today are characterized by a fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence. This concept of life aloof from the world and its values is central to their faith." *Id.* at 210. This Court further noted that the Amish base this concept on "their literal interpretation of the Biblical injunction from the Epistle Of Paul to the Romans, 'be not conformed to this world. . . .'" *Id.* at 216.

Clearly different organizations will reach different conclusions regarding the particular activities and operational requirements that best nurture and carry out the dictates of their faith. Perhaps not many organizations believe the separation requirements apply as broadly as do the Amish. But the important point is that in each case, organizations are exercising religion by engaging in activities or adopting policies based on their religious beliefs. As demonstrated by the numerous challenges to the Contraceptive Mandate (and the "accommodation"), such religious exercise clearly includes policies prohibiting the provision of certain contraceptives in connection with an organization's healthcare plan.

B. An activity or policy of an organization constitutes religious exercise if it furthers religious beliefs sincerely held by the organization.

In determining whether an activity or policy of an organization is religious exercise, the only relevant issue is whether the specific activity or policy furthers a sincerely held religious purpose or belief of the organization. This definition of a religious exercise, based on the religious beliefs or purpose(s) of an organization, is reflected in statutory exemptions. For instance, federal law provides an exemption from unemployment insurance obligations for employers which are "operated primarily for religious purposes."

26 U.S.C. § 3309(b). Similarly, the Internal Revenue Code exempts from income tax organizations which are organized and operated exclusively for religious purposes. 26 U.S.C. § 501(c)(3). Further, the Third Circuit Court of Appeals recently determined that an organization qualified for the Title VII religious employer exemption because its "primary purpose was religious." *Leboon v. Lancaster Jewish Community Center Ass'n*, 503 F.3d 217, 231 (3d Cir. 2007); *see also Widmar v. Vincent*, 454 U.S. 263, 271 n.9 (1981) (explaining that the distinction between religious and nonreligious speech is based on the purpose of such speech).[3]

To answer the question of whether the religious beliefs asserted by an organization are sincerely held (and not merely a sham), government officials can and should examine an organization's activities. Government officials may, for instance, inquire into whether the organization has previously asserted religious beliefs. They may also determine whether the organization has taken distinctive action in accordance with such beliefs (such as choosing, in contrast with competitors, not to open for business on Sundays). In *U.S. v. Ballard*, 322 U.S. 78 (1944), this Court held that although courts cannot inquire into whether an individual's asserted religious beliefs are true, they can inquire into whether the individual honestly and in good faith actually holds such beliefs. *See also Hosanna-Tabor,* 132 S. Ct. at 711 (Thomas, J., concurring) (concluding that the plaintiff should be treated as a minister because the evidence demonstrated that the church sincerely considered her a minister).

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[3] In Colorado, the general assembly expressly affirmed these principles in a statutory finding supporting religious property tax exemptions:

> The general assembly hereby finds and declares religious worship has different meanings to different religious organizations; . . . and that *activities of religious organizations which are in furtherance of their religious purposes constitute religious worship for purposes of* . . . the Colorado constitution.

Colorado Revised Statutes § 31-3-106(2) (emphasis added).

As applied in this consolidated case, the question of whether the policies at issue are based on religious beliefs sincerely held by the corporate employers is a factual matter outside the scope of this brief.[4] But *amici* urge this Court to affirm that this is the only relevant question for purposes of identifying religious exercise.

II. Imposing additional limitations on religious exercise denigrates religious liberty.

The Secretary takes the position that religious exercise must be limited so that it does not include the activities or policies of for-profit corporations. But the reasoning underlying the Secretary's proposed blanket rule – that persons cannot at the same time engage in commercial activity and exercise religion – imposes a government defined orthodoxy that improperly bifurcates the religious and the secular. Government officials have no constitutional competence or authority to navigate this line based on perceived religious content. And by recognizing religious exercise only at the margins of civil society, the Secretary's position disregards the myriad ways in which religious beliefs relate to virtually all aspects of life. Finally, the Secretary's proposed blanket exclusion of for-profit corporations from religious exercise misconceives the distinction in corporate law between nonprofit and for-profit corporations, which distinction has nothing to do with religious exercise.

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[4] *Amici* have no reason to doubt that the corporate employers sincerely hold the asserted religious beliefs, which beliefs are similar to those held by many, if not all, *amici*.

A. Limiting religious exercise to activities perceived to be religious violates constitutional principles of deference and neutrality.

In determining whether an activity or a policy regarding how an activity is conducted furthers religious purposes, government officials cannot seek to identify those activities that have sufficient religious content or conform to traditional perceptions of religious activity. Doing so draws government officials into making unconstitutional religious determinations and results in favoring certain types of religious exercise over others.

This Court has repeatedly held that government officials have no competence or constitutional authority to interpret or apply religious beliefs, or to determine based on their own standards the religious significance of various activities. In *New York v. Cathedral Academy*, 434 U.S. 125 (1977), for example, this Court struck down a statute which required government officials to "review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for sectarian activities." *Id.* at 132. This Court noted that the requirement would place religious schools "in the position of trying to disprove any religious content in various classroom materials" while at the same time requiring the state "to undertake a *search for religious meaning* in every classroom examination offered in support of a claim." *Id.* at 132-33 (emphasis added).

Ten years later, this Court in *Amos* upheld against an *Establishment Clause* challenge, a religious exemption that applied to all activities of a religious organization, not just its *religious activities*. This Court noted that "Congress' purpose in extending the exemption was to minimize governmental 'interfer[ence] with the decision-making process in religions.'" *Amos*, 483 U.S. at 336. Further, this Court observed that "[t]he line [between religious and secular activities] is hardly a bright one and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission." *Id.* at 336.

This limitation applies not just to distinctions between religious and secular activities, but also to different types of religious activities. In *Widmar v. Vincent*, this Court rejected a proposal to permit students to use buildings at a public university for all religious expressive activities except those constituting "religious worship." 454 U.S. 263, 269 n.6 (1981). This Court observed that the distinction between "religious worship" and other forms of religious expression "[lacked] intelligible content," and that it was "highly doubtful that [the distinction] would lie within the judicial competence to administer." *Id.* Indeed, "[m]erely to draw the distinction would require the [State] – and ultimately the Courts – to inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." *Id.*; *see also id.* at 272 n.11 (noting the difficulty of determining which words and activities constitute religious worship due to the many and various beliefs that constitute religion).

As another example, the Court of Appeals for the D.C. Circuit struck down a *substantial religious character* test used by the National Labor Relations Board to determine whether it could exercise jurisdiction over a religious organization. *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). In evaluating a religious school, for instance, the test required the NLRB to consider "such factors as the involvement of the religious institution in the daily operation of the school, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty." *Id.* (quotation omitted). The court concluded that because the test "boil[ed] down to '[I]s [an institution] sufficiently religious?'" it was fatally flawed. *Id.* at 1343.

Moreover, the extent of distinctly religious content in a particular activity is not a reliable indicator of the activity's religious character. Bible reading is a religious activity if performed out of a desire to know and obey God, but it is not if performed merely as a study of literature. Eating bread and drinking wine is a religious activity if performed as part of a communion service, but it is not if performed merely to satisfy physical needs or desires. Ingesting peyote and killing chickens are generally not religious activities, but they become so when conducted as a sacrament in certain religions. *Employment Division v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). The purpose, not the content, is what matters.

In addition, when government officials seek to determine the religious content in activities or policies, they effectively create an implicit state-defined orthodoxy regarding religious activities and they interfere with the right of religious institutions to determine and apply their own doctrine. *Hosanna-Tabor,* 132 S. Ct. at 710 (Thomas, J, concurring) ("A religious organization's right to choose its ministers would be hollow, however, if secular courts could second-guess the organization's sincere determination that a given employee is a "minister" under the organization's theological tenets.").

Distinctions based on a court's view of the relative religious significance of various activities inevitably favor expressly religious or conventional methods of accomplishing a religious mission over other more ecumenical or unorthodox methods. In *Fowler v. Rhode Island*, 345 U.S. 67 (1953), this Court struck down a city ordinance that in critical respects was the opposite of the proposed policy rejected in *Widmar*. Specifically, the ordinance permitted churches and similar religious bodies to conduct *worship services* in its parks, but it prohibited *religious meetings*. The ordinance resulted in the arrest of a Jehovah's Witness as he addressed a peaceful religious meeting. This Court held that the distinction required by the ordinance between *worship* and an *address on religion* was inherently a religious question and invited discrimination:

> Appellant's sect has conventions that are different from the practices of other religious groups. Its religious service is less ritualistic, more unorthodox, less formal than some. . . . To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Fowler, 345 U.S. at 69-70. As Justice Thomas stated in his concurring opinion in *Hosanna-Tabor*, "[j]udicial attempts to fashion a civil definition of 'minister' through a bright-line test or multi-factor analysis risk disadvantaging those religious groups whose beliefs, practices, and membership are outside of the 'Mainstream' or un-palatable to some." *Hosanna-Tabor*, 132 S. Ct. at 711 (Thomas, J., concurring); *see also id.* at 712 (Alito J., concurring) ("Because virtually every religion in the world is represented in the population of the United States, it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one.").

In short, a narrow definition which requires government officials to weigh all significant religious and secular characteristics to determine whether an activity or policy is sufficiently religious sets government officials adrift in a sea of subjective religious determinations which they have no competence or authority to navigate. Such a definition will inevitably produce arbitrary and discriminatory results.

B. Limiting religious exercise to exclusively religious activities improperly confines religion to the margins of civil society.

The premise that certain activities are secular and not religious if they are conducted by others for nonreligious reasons effectively secularizes a vast array of religious activity. It would essentially mean, for instance, that six of the Ten Commandments (honor your parents and do not murder, steal, lie, covet or commit adultery – Exodus 20:2-17) are no longer religious because they have been widely embraced by society. The Third Circuit Court of Appeals in *Leboon* rejected an argument that a Jewish Community Center was not a religious organization because it promoted principles, such as tolerance and healing the world, which are shared by nonreligious persons. The court held that "[a]lthough the [community center] itself acknowledges that some of these principles exist outside Judaism, to the extent that [the community center] followed them as Jewish principles this does not make them any less significant." *Leboon*, 503 F.3d at 230.

The court in *University of Great Falls* also rejected this premise, affirming that a litany of "secular" characteristics of the University:

> . . . says nothing about the religious nature of the University. Neither does the University's employment of non-Catholic faculty and admission of non-Catholic students disqualify it from its claimed religious character. *Religion may have as much to do with why one takes an action as it does with what action one takes.*

278 F.3d at 1346 (emphasis added).

More recently, this Court in *Hosanna-Tabor* unanimously held that a teacher qualified as a minister even though her primary duties consisted of teaching secular subjects. In rejecting the EEOC's argument that the religious exemption at issue in the case should be limited to employees engaged in "exclusively religious functions," this Court observed:

> Indeed, we are unsure whether any such employees exist. The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities.

Hosanna-Tabor, 132 S. Ct. at 708-09.

Indeed, even religious worship may encompass "secular" activities. In *Maurer v. Young Life*, 774 P.2d 1317 (Colo. 1989), the Colorado Supreme Court upheld a determination by the Board of Assessment Appeals that camp property owned and operated by Young Life qualified for a religious worship exemption. The court cited the testimony of Young Life's president that:

> To us, skiing, horseback riding, swimming, opportunities to be with young people in a setting and in an activity that is wholesome is all a part of the expression of God in worship. There is no ["]we are now doing something secular, we are now doing something spiritual.["]

Id. at 1328.

These cases affirm that purposes and activities are no less religious merely because some persons may embrace similar purposes or conduct similar activities for nonreligious reasons. Put differently, *religious purposes* cannot be limited to *exclusively religious purposes* (*i.e.*, only those purposes that could not be embraced for nonreligious reasons). To hold otherwise would mean that many organizations which believe as a matter of religious conviction that they are called to serve tangible human needs or even to engage in the commercial marketplace would be required to sacrifice their religious character in order to fulfill their calling. Such a result trivializes religious exercise.

C. Limiting religious exercise to nonprofit corporations fundamentally misconceives the distinction between corporate forms.

Finally, the Secretary's proposed blanket rule that no for-profit corporation can engage in religious exercise both denigrates religious exercise and undermines constitutional deference. First, almost all organizations (including all *amici*) are incorporated. In cases such as *Amos* and *Lukumi*, this Court has repeatedly protected the religious exercise of corporations. Therefore, securing the benefits of corporate status does not require surrendering religious liberty protection. Indeed, the Secretary concedes this much.

But the Secretary does not identify any inherent distinction between a nonprofit and a for-profit corporation that would conclusively preclude all of the latter from exercising religion. Instead, the Secretary merely asserts that no for-profit corporation can exercise religion because no court (except the Tenth Circuit in this case) has definitively held that they can.[5] Of course, any lack of case law definitively addressing whether for-profit corporations can exercise religion proves nothing about the answer to the question. It is merely a restatement of why the issue is now before this Court.

The Secretary also asserts, as if it were an axiom, that because for-profit corporations engage in commercial activities, they cannot at the same time exercise religion. This assertion entirely fails to comprehend the extent to which religion may direct the conduct of activities and the diversity of religious exercise. Indeed, many organizations (including some *amici*) engage in commercial activities, either directly or through for-profit entities, specifically to advance their religious mission. Among other things, such activities may include the sale of educational services or camping experiences, product sales and construction loans. Activities conducted through for-profit affiliates could include the funding, training and/or operating of micro-enterprises used to provide job opportunities in economically distressed areas, or the operation of cafes designed to reach out to demographic groups such as college students or business professionals, or small businesses that may operate in communities or countries where a conventional nonprofit religious organization may not be welcome.

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[5] The Secretary incorrectly asserts that the exemptions for religious employment discrimination in Title VII do not include for-profit corporations. The Secretary fails to note the exemption applicable to all employers that applies when religion is a bona fide occupational qualification for a position. 42 U.S.C. § 2000e-2(e). Moreover, there is no case law holding that a for-profit corporation cannot qualify as a religious corporation under the Title VII organizational exemption.

The blanket exclusion also ignores the rules of deference and neutrality discussed above. Based on these rules, the proper inquiry for a court is to determine whether the applicable religious beliefs are sincerely held by the corporation (including, in this consolidated case, the belief that prohibits facilitating abortions by providing certain contraceptives in its healthcare plan). For this question, the only relevant difference between a nonprofit and a for-profit corporation is that the latter can distribute net earnings to shareholders and the former cannot. Bruce R. Hopkins, *The Law of Tax-Exempt Organizations*, § 1.1, Tenth Edition, 2011, John Wiley & Sons, Inc. There may be less reason to doubt that asserted religious beliefs are sincerely held when they support exclusively religious activities conducted by a nonprofit corporation in which no profits can be distributed to shareholders. And, indeed, a record of activities taken contrary to such beliefs to increase the profits being distributed to shareholders might undermine sincerity. But nothing about the "for-profit" structure of an organization or its commercial activities inherently precludes it from sincerely holding and exercising religious beliefs in connection with its activities.

Because the blanket rule proposed by the Secretary evades the relevant question of sincerity and undermines the scope of religious convictions and diversity, this Court should clearly reject it.

III. The Coverage Mandate is subject to and does not survive the rigorous strict scrutiny standards designed to protect religious liberty.

The principles of religious deference and neutrality dictate not only a broad understanding of religious exercise, but also deferential standards to resolve disputes between religious exercise and civil laws. These standards include both a deferential determination of how a law may burden religious exercise and a strict interpretation of the general applicability requirement. They also require a rigorous application of strict scrutiny when triggered.

A. The Coverage Mandate is subject to strict scrutiny under RFRA because it substantially burdens religious exercise.

Determining what constitutes a sufficient burden on religious exercise in order to trigger strict scrutiny under RFRA (and the *Free Exercise Clause*) can raise difficult questions involving both the application of religious doctrine to the actual requirements of the law and the nature of the burden imposed. In addressing these questions, courts should adhere to the principles of religious deference and neutrality discussed above. So, for instance, a court could determine whether the burden alleged by an organization is based on a correct understanding of the actual requirements of the law. But assuming the legal requirements are correctly understood, the court cannot second guess the organization's conclusion that such law requires the organization to act in violation of its religious beliefs. Further, although the substantial burden standard may not apply to laws that only burden religious exercise indirectly by making the activity more costly to perform, the standard must apply to any law that requires action that violates religious beliefs.

And there can be no doubt that this is what the Coverage Mandate requires. Indeed, the Secretary's "religious employer" exemption concedes that the Coverage Mandate can substantially burden the religious exercise of those organizations with religious objections to the use of some or all the required contraceptives. Alleviating this burden is the sole reason for this exemption. Moreover, the Secretary has conceded that the Coverage Mandate can burden the religious exercise of organizations not covered by the "religious employer" exemption. For some of these organizations, the Secretary has created a separate "accommodation" that purports to remove this burden while providing contraceptive coverage for the eligible organizations' employees.[6]

The burden imposed by the Coverage Mandate and recognized by the Secretary derives in part from the fact that the Coverage Mandate conscripts employer healthcare plans to provide contraceptives. Because organizations are required to provide healthcare benefits, the Coverage Mandate requires organizations to participate in an overall scheme that uses their employer plans as a means of providing contraceptive coverage to the plan participants. Moreover, the Coverage Mandate relies on the economics of the employer group plan to fund the coverage of contraceptives.

This Court in *Amos* recognized that a religious nondiscrimination requirement creates "significant governmental interference with the ability of religious organizations to define and carry out their mission." *Amos*, 483 U.S. at 335; *see also id.* at 336 (noting that requiring an organization "to predict which of its activities a secular court will consider religious" imposes a significant burden and that "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission."). The Coverage Mandate burdens religious exercise in precisely the same way, significantly interfering with the ability of an organization to define and carry out its religious convictions. By requiring organizations to provide contraceptive coverage in direct violation of their firmly held religious convictions, the Coverage Mandate substantially burdens their religious exercise.

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[6] The fact that the government has retained the "religious employer" exemption constitutes a tacit admission that the "accommodation" does not adequately remove the burden. If the "accommodation" did remove the burden, there would be no need to retain the "religious employer" exemption and with it the loss of contraceptive coverage for employees of "religious employers."

B. Because the Coverage Mandate is not generally applicable, it must survive strict scrutiny under the *Free Exercise Clause*.

In assessing the general applicability of a law, the U.S. Supreme Court has stated that "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. Part of the rationale underlying this concern can be stated as follows:

> First, the legislature cannot place a higher value on some well-connected secular interest group with no particular constitutional claim than it places on the free exercise of religion. Second, . . . if burdensome laws must be applied to everyone, religious minorities will get substantial protection from the political process. . . . If a burdensome proposed law is generally applicable, other interest groups will oppose it, and it will not be enacted unless the benefits are sufficient to justify the costs. But this vicarious political

> protection breaks down very rapidly if the legislature is free to exempt any group that might have enough political power to prevent enactment, leaving a law applicable only to . . . groups too weak to prevent enactment.

Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 Cath. Law. 25, 35-36 (2000) (footnotes omitted). *See also Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (holding that a ban on beards for police officers was not generally applicable since it provided an exception for medical purposes); *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996) (holding that a university policy requiring all freshmen to live in on-campus dormitories was not generally applicable since it included exemptions for married students, older students, and students commuting from their parents' home as well as for reasons such as familial responsibility, medical need, or emotional difficulties).

Because the Coverage Mandate includes exemptions that undermine its immediate objectives, it is not a generally applicable law. The Coverage Mandate includes exemptions for grandfathered plans, 42 U.S.C. § 18011, and plans of religious employers. In addition, the law does not provide cost-free access to contraceptives for members in a "recognized religious sect or division" that objects on conscience grounds to acceptance of public or private insurance funds, 26 U.S.C. §§ 1402(g)(1), 5000A(d)(2)(A) and (B), or for individuals who choose not to obtain health coverage and instead pay the applicable tax.

In the face of these exemptions, a holding that the Coverage Mandate is generally applicable would effectively eliminate this requirement. The result would be a test that only invokes strict scrutiny of a law if it targets religion, which is precisely what the neutrality requirement already covers.

C. The Coverage Mandate is not the least restrictive means of furthering any compelling governmental interests.

Because the Coverage Mandate substantially burdens religious exercise (and, for *Free Exercise* purposes, is not generally applicable), it is subject to strict scrutiny. And this Court has emphasized that the strict scrutiny test must be rigorous:

> A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests.

Lukumi, 508 U.S. at 546 (citations omitted).

Strict scrutiny first requires an examination of the interests furthered by the Coverage Mandate. In this regard, the focus must be on the immediate objectives of the law, such as facilitating cost-free access to prescription contraceptives. The government cannot assert a broad and abstract interest, such as protecting employee rights in a broad statutory scheme or promoting gender equality, which when stated in such terms most people would agree are important and perhaps even "compelling" interests. Applying such broadly stated interests simply waters down the test.

Further, when a law is not generally applicable, it usually is not furthering a compelling governmental interest. "[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Gonzales*, 546 U.S. at 433, *quoting Church of the Lukumi Babalu Aye, Inc. v City of Hialeah*, 508 U.S. 520, 547 (1993) (quotation marks and ellipses omitted). This is certainly the case with the Coverage Mandate. By creating a religious employer exemption (in addition to the grandfathered plan exemption and others), the Secretary has conceded that at least in some situations religious liberty interests (or certain political interests) should prevail over the interests furthered by the Coverage Mandate. If such interests were truly compelling, there would be no exceptions for these other interests.

Finally, the Coverage Mandate was only recently enacted by administrative regulation (not by Congress), and has not even been fully implemented yet for nonexempt plans. Therefore, it strains credibility to assert that the immediate objectives of the Coverage Mandate are interests "of the highest order."

Nor is the Coverage Mandate narrowly tailored to any such interest. As an initial matter, courts have repeatedly held that the government cannot satisfy its strict scrutiny burden with mere speculation. To the contrary, the government must present evidence to support its assertions. *See, e.g., Larson v. Valente*, 456 U.S. 228, 249 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 224-25 (1972); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995). The Secretary has no idea how exempting other organizations (in addition to those already exempt under the religious employer, grandfathered plan and other exemptions) will impact cost-free access to contraceptives for women who would choose to use them. The Secretary justifies the narrow religious employer exemption on the unfounded and entirely speculative assertion that church employees (and their families) are more likely to share their employer's beliefs than are employees (and their families) of other organizations. The Secretary has no data to support this assertion, and the speculation simply betrays an implicit, government-imposed understanding of churches and other organizations.

In addition, the Coverage Mandate is also clearly not the least restrictive means of accomplishing the government's objectives. Whether these objectives are stated in terms of cost-free access to contraceptives or promotion of health, there are clearly ways to accomplish these objectives that do not conscript organizations with religious objections into the program. There is no reason, for instance, that the government must pursue these objectives solely through the structure of employer health plans (even if that may be a convenient approach). And even within the confines of the ACA, the Secretary has demonstrated ample capacity for regulatory creativity. The fact that the Secretary has limited the government's options to employer health plans reflect political considerations rather than a priority on religious liberty interests.

◆

CONCLUSION

This country's constitutional commitment to religious liberty is necessarily humbling to civil authority. Broad religious liberty protection enforces the inherent limits of civil government. Just as importantly, it also fosters religious diversity and invigorates the marketplace of ideas. As this Court observed in *Yoder*, " . . . in the Middle Ages important values of the civilization of the Western World were preserved by members of religious orders who isolated themselves from all worldly influences against great obstacles. There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.'" *Yoder*, 406 U.S. at 223-24. This Court further noted that "[e]ven their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage." *Id.* at 226.

With the Coverage Mandate, the Secretary is sacrificing this commitment to religious liberty and the long-term benefits of religious diversity without any compelling justification. For these reasons, *amici* respectfully request this Court to affirm a deferential definition of religious exercise and a rigorous strict scrutiny of laws that burden religious exercise.

Respectfully submitted,

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KATHLEEN SEBELIUS ET AL., *Petitioners,*
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents.*

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL., *Respondents.*

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE TENTH AND THIRD CIRCUITS

BRIEF OF BEVERLY LAHAYE INSTITUTE AND JANICE SHAW CROUSE, PH.D. AS AMICI CURIAE IN SUPPORT OF HOBBY LOBBY STORES INC. AND CONESTOGA WOOD SPECIALTIES CORP., ET AL.

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INTEREST OF AMICI CURIAE[1]

The Beverly LaHaye Institute (BLI) is the think tank and research arm of Concerned Women for America. BLI provides accurate academic and scientific data with sound analysis to inform and substantiate policy positions on contemporary issues from a traditional pro-family, pro-women perspective. Through professional research and writings, BLI stands strong in defense of marriage, women, children, and families. BLI sponsors policy forums, provides legislative testimony, compiles and analyzes social science behavioral data. Additionally, BLI publishes literature reviews, opinion editorials, reports, and monographs in an effort to advance women's well-being through sound public policy.

Janice Shaw Crouse, Ph.D., Executive Director and Senior Fellow at the Beverly LaHaye Institute, is a recognized authority on national and international cultural, children's and women's concerns. She was Woman of the Year for the international World Congress of Families 2012. She has twice served the president as an official delegate to the United Nations (2002 and 2003). Her books, *Children at Risk* (2010) and *Marriage Matters* (2012), were released by Transaction

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Court. No counsel for a party authored this brief in whole or in part. No party or counsel for a party contributed money intended to fund preparing or submitting this brief. No person other than *Amici* or their counsel has contributed money that was intended to fund preparing or submitting this brief.

Publishers, the publisher of record for international social science research.

In this brief, *Amici* examine the evidence adduced by the Government purporting to show that the HHS preventive services mandate promotes compelling governmental interests. Amici demonstrate that the Government's facile assertion that mandating the provision of free contraceptives[2] will reduce the rate of unintended pregnancies or provide other health and societal benefits is based on flawed research and faulty logic.

SUMMARY OF THE ARGUMENT

Petitioner Conestoga Wood Specialties, Inc. and Respondent Hobby Lobby Stores, Inc. have argued that the HHS preventive services mandate requiring coverage of all FDA-approved contraceptives, including abortifacient drugs and devices ("HHS Mandate")[3], cannot meet the test of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §2000 that a governmental action imposing a substantial burden on religious exercise "further[] a compelling governmental interest."

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[2] The term "contraceptive" as used in this brief reflects terminology used by the Government in the HHS Mandate. *Amici*, however, affirm the scientific basis of Hobby Lobby and Conestoga Woods Specialties' religious objection to the capacity of some of the so-called "contraceptive" drugs and devices to terminate the life of a human being at the embryonic stage of development.

[3] *Certain Preventive Services under the Affordable Care Act*, finalized at 77 Fed. Reg. 8725 (Feb. 15, 2012.)

A close examination of the Government's evidence and arguments reveals how far short the Government has fallen from meeting its burden of demonstrating that imposition of the HHS Mandate on every health plan, whether group or individual, furthers any compelling governmental interest, particularly the most frequently asserted interests of promoting women's health and gender equity.

Amici address the logical gaps and misinformation in the Institute of Medicine Report that formed the basis for the Government's decision to impose the Mandate. *Amici* demonstrate that the purported benefits of the mandated drugs and devices rest entirely on the combined false premises that providing free contraceptives will decrease unintended pregnancies and promote gender equity, and that "unintended" pregnancies threaten women's health.

ARGUMENT

I. The Government Cannot Meet its Burden Under RFRA of Demonstrating that the Mandate Furthers its Asserted Interest in Promoting the Health and Well-Being of Women.

On August 1, 2011, pursuant to the Affordable Care Act, the Government agency known as HRSA (Health Resources and Services Administration) adopted in full the guidelines recommended by a report of the Institute of

Medicine (IOM).[4] That 2011 IOM Report recommended that no-cost "preventive services" for women include drugs and devices that Hobby Lobby and Conestoga Wood Specialties object to as gravely immoral under the teachings of their faith.

Where a government action substantially burdens religious exercise, the Government has the burden of demonstrating that the challenged regulation "furthers a compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under RFRA, "the term 'demonstrates' means meets the burden of going forward with the evidence and of persuasion." 42 U.S.C. §2000bb-2(3). The Government's burden is not met by showing hypothetical or insignificant advances in the service of its interests: "The government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Entm't Merchs. Ass'n.*, 131 S.Ct. 2729, 2749 n.9 (2011).

The Government styles its interest as "advanc[ing] the public health, which is unquestionably a compelling governmental interest." Brief for the Petitioners at 46. However, such an interest is too "broadly formulated" for the purposes of satisfying RFRA (*Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)), so the Government attempts to narrow it down to something involving contraceptives, but without providing a succinct formulation. Is the Government's interest increasing access to contraceptives? Saving women money on the contraceptives they already buy? Encouraging the use of contraceptives with the goal of reducing unintended pregnancies?

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[4] Institute of Medicine, *Clinical Preventive Services For Women: Closing the Gaps* (2011) ("2011 IOM"), *available at* http://books.nap.edu/openbook.php?record_id=13181 (emphasis added).

The D.C. Circuit correctly described the Government's formulations of its interests as "sketchy," "highly abstract," "tenuous," "unconvincing," and "nebulous[]." *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1220, 1221 (D.C. Cir 2013) Even giving the Government the benefit of the doubt as to the negative health consequences for women of unintended pregnancies, "the health concerns underpinning the mandate can be variously described as legitimate, substantial, perhaps even important, but it does not rank as *compelling*, . . ." Id. at 1221 (original emphasis).

For purposes of this brief, Amici will assume that the Government's interests are 1) promoting women's health through reducing unintended pregnancies, and 2) promoting gender equity through equalization of health care costs. Like the D.C. Circuit, Amici will assume, contrary to fact, that these interests are compelling. Nonetheless, the Government's evidence that the Mandate will further these "compelling" interests falls far short of meeting its burden under RFRA.

A. The IOM Report Does Not Support the Government's Assertion that Increased Use of Contraceptives Will Promote Women's Health.

Relying entirely on the 2011 IOM Report, the Government asserts that by increasing access to contraceptives, the Mandate will promote public health by decreasing unintended pregnancies.[5]

At the risk of stating the obvious, getting pregnant is not like catching a contagious disease. Myriad factors – e.g., religion, age, marital status, social situation, medical condition, cultural background, economic circumstances– will play a part in when and whether a woman engages in sexual activity and whether, doing so, she is seeking to get pregnant, is trying to avoid pregnancy, is ambivalent about getting pregnant, or does not consider whether she will get pregnant. Thus, the Government's "vaccination model" of decreasing unintended pregnancies (i.e., assuming increased availability of contraception will decrease incidence of the "disease" of unintended pregnancy) grossly oversimplifies the issues involved.

Indeed, right from the outset, the Government's case is based on a false premise, i.e., that there is a clear distinction between intended and unintended pregnancies. In fact, "[r]esearchers have long abandoned the false dichotomy of intended versus unintended pregnancy." Some women welcome "unintended" pregnancies, and some "intended" pregnancies end in abortion due to complications or a change in a woman's social situation.[6]

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[5] The Government also asserts that increased contraceptive use will promote what it contends is "healthy" birth spacing. Assuming that the Government does not intend to employ coercive measures to achieve "healthy" birth spacing, this goal can be subsumed under the more general goal of reducing unintended pregnancies

Even assuming arguendo that there is a clear-cut, measurable category of pregnancies that are "unintended," the Government has failed to demonstrate that 1) lowering the costs of contraceptives (to zero) for those covered by insurance will lead to any appreciable increased usage among those currently at risk of unintended pregnancy within that population and to a decrease in unintended pregnancies within that population, and 2) unintended pregnancies have negative health consequences for women. Rather, the Government's argument is based on a chain of presumed causes and effects, and the evidence supporting each link is attenuated, ambiguous, disputed, or non-existent. Indeed, "[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology." *Brown, supra,* 131 S.Ct. at 2739 (quotation marks omitted).

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[6] Harvey, Jacqueline C., *Outdated Lexicons and obsolete solutions: A response to the editorial in the February 2013 issue of Contraception,* Reproductive Research Audit (February 12, 2013), *available at* http://reproductiveresearchaudit.com/wpcontent/uploads/2013/02/Pregnancy-Ambivalence-1.pdf. *See also* Trussell, J., Vaughn, B. & Stanford, J., *Are All Contraceptive Failures Unintended Pregnancies? Evidence from the 1995 National Survey of Family Growth,* Family Planning Perspectives, 31(5) (1999).

1. The Government has failed to show that the Mandate will lead to increased usage among those at risk of unintended pregnancy or to a decrease in unintended pregnancies among those covered by the Mandate.

The Government hypothesizes that women are deterred from obtaining contraceptives because of their cost, and that therefore the Mandate will increase utilization of contraceptives. However, its evidence is based on supposition, dubious analogies, and assumed but unproven correlations.

The IOM Report cites a Kaiser Family Foundation report as evidence that women are more likely than men to report cost-related barriers to receiving medical care. The study in question asked men and women whether they *or a family member* had delayed or foregone certain health care in the past year because of the cost.[7] Thus, the fact that more women than men, by a factor of a few percentage points, reported they *or a family member* had done so says little about which gender is actually foregoing medical care because of the cost.

The IOM also cites studies showing that the costs of cancer screening, dental services, mammograms and pap smears may deter women from receiving those services.[8] Yet, even if these studies in fact supported the IOM's statement,[9] none of them makes the necessary connection between women deferring or foregoing this type of care (i.e., screening tests) and women failing to buy contraceptives because of the cost. It is far from a logical corollary that a woman who delays getting her annual pap smear because of the cost will also decide to stop using contraceptives because of the cost.

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[7] Focus on Health Reform. *Impact of health reform on women's access to coverage and care*. Washington, DC: Henry J. Kaiser Family Foundation (2010), *available at* http://www.kff.org/womenshealth/ upload/7987.pdf.

Regarding contraceptives in particular, the IOM's own sources show that 89% of women avoiding pregnancy are already practicing contraception,[10] and that among the other 11%, lack of access is not a statistically significant reason why they do not contracept.[11]

The IOM's citation to a study by Santelli and Melnikas in support of its argument that increased use of contraceptives will lead to declines in the rate of unintended pregnancy is typical of its approach to this topic.[12] The Santelli study examined, *inter alia*, whether increased **use** of contraception by **teens** was associated with decreased pregnancies. Thus, the study is based on increased usage, a factor that the IOM failed to establish will result from the Mandate, because it failed to prove that cost was a deterrent factor to contraceptive use. Second, the study was limited to teens, a subgroup far narrower than and differing in significant ways from the group affected by the Mandate.[13]

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[8] 2011 IOM at 19.

[9] One of the two studies cited for the proposition that women forego mammograms and pap smears because of the cost (2011 IOM at 19) has nothing to do with that topic. Trivedi, A. N., H. Moloo, and V. Mor. 2010. *Increased ambulatory care copayments and hospitalizations among the elderly*. New England Journal of Medicine 362(4):320–328.

[10] The Guttmacher Institute, *Facts on Contraceptive Use in the United States* (June 2010), *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited September 20, 2012).

[11] Mosher WD and Jones J, *Use of contraception in the United States: 1982–2008, Vital and Health Statistics* (2010) Series 23, No. 29, at 14 and Table E, *available at* http://www.cdc.gov/NCHS/data/series/ sr_23/sr23_029.pdf.

Indeed, this failure to consider the particular demographic involved is a common flaw in the studies cited by the IOM and other defenders of the Mandate. Being limited to, e.g., teens or poor women, these studies lack probative value on the effect of the Mandate on the demographic at issue: employed women, the wives of employed men, and the female dependents of employed parents.

Undeterred, the IOM Report concludes, "The elimination of cost-sharing for contraception therefore could greatly increase its use, including use of the more effective and long-acting methods, especially among poor and low-income women most at risk for unintended pregnancy."[14] The final logical lapse in the IOM's treatment of this topic is that poor and low-income women are already eligible to receive no-cost contraceptives under myriad state and federal programs.[15] Yet, as the Report itself notes, they have significantly higher rates of unintended pregnancy than that part of the female population not guaranteed free contraceptives.

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[12] Santelli, J. S., and A. J. Melnikas. 2010. *Teen fertility in transition: Recent and historic trends in the United States.* Annual Review of Public Health 31:371–383.

[13] Having found that many other factors contributed to the observed decline in the teen pregnancy rate over the applicable time period, the authors specifically disclaimed the intent to "resolve this debate" over the causes of teen pregnancy. *Id.* at 379-380. Even less so, then, should their study be used as a prescription for "resolving" the debate over whether increased access to contraception will reduce unplanned pregnancies among other demographic groups.

The IOM Report, and similarly the Government, seems oblivious to the lessons learned over the five decades since the advent of hormonal contraceptives, namely, that while for the individual, a contraceptive drug or device may prevent a pregnancy, this result cannot be extrapolated to a societal scale. Increasing access to contraceptives affects not only those who were already at risk for unintended pregnancy. Rather, it changes behaviors and expectations across society.

For example, Duke University Professor Peter Arcidiacono found that data from the 1997 National Longitudinal survey of Youth suggested that while access to contraception decreases teen pregnancy in the short run, it increases teen pregnancy in the long run by encouraging sexual activity.[16] Multiple studies have analyzed the effect of access to emergency contraception (EC) on pregnancy and abortion rates. Not only have ECs failed to lower teen pregnancy rates according to every relevant study in myriad countries, but they are disturbingly and regularly associated with increases in teen pregnancy and abortion rates.[17] In two studies conducted in 2000 and 2005, teens admitted to researchers that they "had been more careless about birth control and more likely to have had unprotected sex."[18]

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[14] 2011 IOM at 109.

[15] 2011 IOM at 108.

[16] P. Arcidiacono et al., *Habit Persistence and Teen Sex: Could Increased Access to Contraception Have Unintended Consequences for Teen Pregnancies?* Working Paper, Duke Univ. Dept. of Economics (Oct. 3, 2005), *available at* http://public.econ.duke.edu/~psarcidi/ teensex.pdf.

Emergency contraceptives appear similarly ineffective at reducing unintended pregnancies for the general population. A meta-analysis of 23 studies evaluating the effectiveness of Plan B concluded that "*no study* has shown that increased access to [Plan B] reduces unintended pregnancy or abortion rates on a population level."[19]

A Guttmacher Institute report on unintended pregnancy between 2001 and 2006, concluded that changes in contraceptive method and use did not decrease the overall proportion of pregnancies that were unintended, despite CDC data showing that more women in the years between 2002 and 2008 were accessing methods of contraception deemed "more effective" by the IOM, the CDC and Guttmacher.[20]

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[17] J. Duenas, et al., *Trends in the Use of Contraceptive Methods and Voluntary Interruption of Pregnancy in the Spanish Population during 1997-2007*, 83 Contraception 82 (2011) (over ten year period, 63% increase in contraceptive use accompanied by a 108% increase in the abortion rate); D. Paton, *The Economics of Family Planning and Underage Conceptions*, 21 J. of Health Economics, 207 (2002).

[18] Roni Caryn Rabin, *Teenagers and the Morning After Pill*, The New York Times, Dec 3, 2012, *available at* http://well.blogs.nytimes.com /2012/12/03/teenagers-and-the-morning-after-pill/?ref=ronicarynrabin.

[19] Elizabeth G. Raymond, James Trussel & Chelsea B. Polis, *Population Effect of Increased Access to Emergency Contraceptive Pills: A Systematic Review*, 109 Obstetrics & Gynecology 181 (2007).

Considering a broader perspective, in 1972 an estimated 35.4% of pregnancies in the United States were unintended.[21] Medicaid has, since 1972, required coverage for contraceptives in all state programs and has exempted the drugs from cost-sharing requirements. Over half the states now also operate Medicaid-funded contraceptive programs for low-income women who exceed Medicaid's income guidelines. Following suit, most private employers now include contraceptive coverage in their plans, and 28 states require private employers to cover contraceptives.[22]

The 2011 IOM Report places the current rate of unintended pregnancy at 49%.[23] This 40% increase since 1972 has occurred despite – or possibly because of – multiple programs and policies operating on the same premise as the HHS Mandate does, namely, that lowering or erasing the cost of contraceptives will decrease unintended pregnancies.[24]

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[20] Lawrence Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: incidence and disparities, 2006*, 84 Contraception 478 (2011).

[21] Christopher Tietze, *Unintended Pregnancies in the United States, 1970-1972*, 11 Fam. Planning Perspectives 186 (1979).

[22] 2011 IOM at 108.

[23] 2011 IOM at 102.

The Government has signally failed to show that the Mandate, by forcing all health plans to provide contraceptives at no cost, will further the asserted governmental interest in promoting women's health through decreasing unintended pregnancies.

2. The Government has failed to show that unintended pregnancies have negative health consequences for women.

The IOM admits that for many negative outcomes from unintended pregnancy, "research is limited."[25] The IOM cites its 1995 report, which similarly emphasizes the fundamental difficulty in defining which pregnancies are "unintended," and in distinguishing between association and causation in assessing the risks of unintended pregnancies.[26]

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[24] The IOM also states that 42% of these unintended pregnancies end in abortion, i.e., 21% of all pregnancies. 2011 IOM at 102. Assuming that accidental loss of pregnancy is evenly distributed among intended and unintended pregnancies, the IOM's statistics mean that the 28% of pregnancies that are unintended and carried to term make up about 35% of all births in the U.S. (28% [percent of all pregnancies that are unintended and carried to term] divided by 78% [percent of all pregnancies carried to term]). Thus, the Government's goal of reducing the numbers of unintended pregnancies, presumably to zero, without any concomitant effort to increase the number of intended pregnancies and births, would plunge the United States into a steep demographic decline.

[25] 2011 IOM at 103.

The 1995 IOM Report concedes that no causal link has been established for most of its alleged factors. This makes sense, since a pregnancy's status as intended or unintended cannot itself physiologically change the pregnancy's health effect. Thus, a delay in seeking prenatal care for an unintended pregnancy may be "no longer statistically significant" for women who are not already disposed to delay or who have a "support network,"[27] – as do Hobby Lobby and Conestoga Wood Specialties' insured employees, as well as the employees' spouses and dependents.

The IOM Report cites to other behavioral risk factors linked with unintended pregnancy, including smoking, drinking, depression, and domestic violence.[28] However, it is impossible to say, and the IOM Report does not attempt to prove, that unintended pregnancy leads to these negative behaviors and unhealthy situations. Rather, the linkage between them and unintended pregnancy is in many cases likely to be one of association, not causation.

For example, on the topic of depression, the IOM Report cites a 2008 meta-analysis, but fails to reveal that the study's authors concluded there that, due to the "paucity of studies investigating the impact of unintended pregnancy on psychosocial health and well being, and their limitations in terms of establishing causality, the existing research should only be considered to be *suggestive* of such an impact." [29] This study also states that all research regarding the "effects" of unintended pregnancies on mothers' health is "plague[d] by the problem of establishing causality between unintended pregnancy and subsequent health outcomes," and that "*causality is difficult if not impossible to show*."[30]

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[26] Institute of Medicine, *The Best Intentions* (1995) ("1995 IOM"), *available at* http://books.nap.edu/openbook.php?Record_id=4903&page=64 (last visited September 20, 2012).

[27] *Id*. at 68.

[28] 2011 IOM at 103.

Further, the preventive services recommended by the U.S. Preventive Services Task Force, already required by the ACA to be provided without a co-pay, include counseling for pregnant women concerning smoking and drinking, while domestic-violence prevention is a separately recommended preventive service for women within the 2011 IOM Report itself.[31]

The IOM's suggestion that increased access to contraceptives will reduce low birth weight and prematurity overlooks the fact that, like other cited factors, these are merely "associated" with, not caused by, unintended pregnancy (2011 IOM at 103; 1995 IOM at 70); the IOM itself cites studies showing no connection between low birth weight and pregnancy-spacing in the U.S.[32]

Notably, the 2011 IOM Report claims to cite a systematic review on low birth weight, but the citation is incorrect.[33] The IOM Report then cites three studies showing an association between low birth weight/preterm delivery and shorter pregnancy intervals.[34] The IOM Report fails to note that all three studies found these same negative outcomes for lengthy pregnancy intervals, a condition likely to follow upon increased contraceptive use.[35]

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[29] Gipson, J. D., M. A. Koenig, and M. J. Hindin, *The effects of unintended pregnancy on infant, child, and parental health: A review of the literature*, 39 *Studies in Family Planning* 18 (2008) (emphasis added).

[30] *Id.* (emphasis added).

[31] 2011 IOM at 117.

[32] 1995 IOM at 70-71.

Also absent from the IOM's discussion of low birth weight and prematurity is any measure of how detrimental these conditions are for newborns in terms of immediate or long-term health effects. Assuming arguendo some (unstated) percentage of unplanned pregnancies were shown to result in premature or low-birth weight babies, the IOM Report provides no information as to what percentage of these babies will require significant medical intervention or suffer long-term consequences. "The government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown, supra*, 131 S.Ct. at 2749 n.9.

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[33] 2011 IOM at 103, 166 (citing "Shah, et al., 2008"). The Shah study does not address low birth weight; it was study of cardiovascular disease in young women with gestational diabetes. B.R. Shah, R. Retnakaran, and G. L. Booth, *Increased risk of cardiovascular disease in young women following gestational diabetes mellitus*, 31(8) Diabetes Care 1668 (2008).

[34] *Id.* at 103.

[35] The IOM also failed to consider the risks of low birth weight that arise from contraceptive use itself: a 2009 Canadian study shows that women who conceive within 30 days of going off contraceptives significantly increase the risk of low birth weight and very low birth weight. Chen, et al., *Recent oral contraceptive use and adverse birth outcomes*, 144 *European Journal of Obstetrics & Gynecology and Reproductive Biology* 40–43 (May 2009), *abstract available at* http://www.ejog.org/article/S0301-2115(09)00074-8/.

More importantly, however, the IOM makes no attempt to link these alleged negative outcomes of unplanned pregnancy with women's health. The IOM was tasked with making recommendations for women's health, not children's health.[36] "The Institute of Medicine will convene an expert committee to review *what preventive services are necessary for women's health and well-being* and should be considered in the development of comprehensive guidelines for preventive services for women."[37] Thus, unless the Government can point to evidence in the record that caring for children is detrimental to women's health and well-being, the IOM Report's discussion of the purported negative effects of unintended pregnancy on the health of children born of such pregnancies is outside the scope of its mission to recommend specific preventive services to promote women's health.[38]

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[36] One lower court noted the "somewhat odd implication by the Government that the *use* of contraception could somehow have a beneficial impact on a 'developing fetus' that contraceptive use is itself designed to avoid, . . ." *Legatus v. Sebelius*, 2012 U.S. Dist. LEXIS 156144, 2012 WL 5359630 (E.D. Mich., Oct. 31, 2012) (original emphasis).

[37] Office of Secretary, Statement of Task to the Committee on Preventive Services for Women, reprinted at 2011 IOM at 2 (emphasis added).

[38] If the Government intends to broaden the definition of "women's health and well-being," and thus the goal of the Mandate, to include non-health related concepts such as emotional well-being and economic prosperity, then it should likewise have considered the documented negative effects the

In sum, while the Government's general interest in "preventive services" for "women's health and well-being" may be valid, its act of coercing religiously objecting employers and individuals to pay for coverage for drugs that significantly increase risks to women's health,[39] while providing dubious health benefits, certainly fails to further that interest. As explained by the U.S. Supreme Court, "We do not doubt the validity of these interests, any more than we doubt the general interest in promoting public health and safety. . . but under RFRA **invocation of such general interests, standing alone, is not**

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widespread availability of contraceptives has on women's ability to enter into and maintain desired marital relationships. This in turn leads to decreased emotional well-being and economic stability (out-of-wedlock childbearing being a chief predictor of female poverty), as well as deleterious physical health consequences arising from, *inter alia*, sexually transmitted infections and domestic violence. *See, e.g.*, George A. Akerlof, Janet L. Yellen & Michael L. Katz, *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 The Quarterly J. of Econ. 277 (1996); Timothy Reichert, *Bitter Pill*, First Things (May 2010) 25; Jonathan Klick & Thomas Stratmann, *The Effect of Abortion Legalization on Sexual Behavior: Evidence from Sexually Transmitted Diseases*, 32 J. of Legal Studies 407, 431-32 (2003) (citations omitted); Jackson, Nicky Ali, *Observational Experiences of Intrapersonal Conflict and Teenage Victimization: A Comparative Study among Spouses and Cohabitors*, 11:3 Journal of Family Violence at 191-203 (1996) ("regardless of methodology . . . cohabitors engage in more violence than spouses").

[39] See Brief of *Amici Curiae* Breast Cancer Prevention Institute, et al.

enough." *Gonzales v. O Centro, supra*, 546 U.S. at 438 (2006) (emphasis added).

B. The Government Has Failed to Show that the Mandate Furthers its Asserted Interest of Promoting Gender Equity.

1. The Government has failed to show that the Mandate will relieve women of an inequitable financial burden related to health care.

The Government asserts another allegedly compelling governmental interest, namely, promoting gender equity by removing the unequal financial barriers to health care, specifically preventive care, that arise from higher out-of-pocket costs for women's gender-specific conditions. The Government asserts that relieving women of the alleged disparity in costs will lead to equal access to health care, better health, and therefore equal opportunities to participate in the workplace with men. Underlying this argument are a number of premises for which the Government has provided little or no supporting evidence.

First, as set forth in the preceding sections, the Government has failed to show that the Mandate will in fact improve women's health. Indeed, there is substantial evidence that widespread and lengthy use of contraceptives by women has resulted and will result in significant harm to their health.[40] This in and of itself disposes of the Government's alleged "gender equity" interest. If free contraceptives do not in fact promote women's health, they do not promote the Government's asserted interest in gender equity through equalization of the costs of maintaining health.

Even assuming *arguendo* that contraceptives in some measure promote women's health, the evidence presented by the Government to support its premise that women are inequitably burdened by their costs is woefully inadequate.

The Government cites the IOM Report for the proposition that women incur more in out-of-pocket costs for preventive care than men do, owing to reproductive and gender-specific conditions.[41] There are two problems with this "evidence."

First, the two sources cited by the IOM do not support the statement. The first study does not discuss out-of-pocket expenses at all. It compared, by gender, rates of primary care office visits, referrals, and hospitalizations.[42] The second study was focused on "the effect of the lack of health insurance on health care utilization for female-specific conditions." The "female-specific conditions" studied were specific disorders and pathologies, not preventive care.[43] Neither of these studies even identifies contraceptives as a health care cost, much less attempts to quantify to what extent contraceptive coverage contributes to increased health care costs for women.

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[40] The Government itself admits that hormonal contraceptives are "sometimes associated with side effects such as high blood pressure, blood clots, heart attacks, or strokes." Brief for the Petitioners, in *Sebelius v. Hobby Lobby Stores, Inc.*, at 48.

[41] 2011 IOM at 19.

[42] Bertakis, K. D., R. Azari, L. J. Helms, E. J. Callahan, and J. A. Robbins, *Gender differences in the utilization of health care services*, 42 Journal of Family Practice 147 (2000).

Second, the assertion that women incur greater out-of-pocket expenses for preventive care than men (77 Fed. Reg. 8725, 8728) omits a crucial piece of information: out of *whose* pocket?

Three categories of women would receive contraceptives at no cost under the Mandate: covered employees, the wives of covered employees, and the female dependent children of covered employees.

There is no reason to believe the out-of-pocket health care expenses of the wives of covered employees are currently being borne solely by them, rather than being a shared household expense, just as the groceries are. Similarly, the out-of-pocket expenses of the female dependents of the covered persons are presumptively being borne by the persons on whom they are *dependent*. Thus, for spouses and dependents, the Mandate does not relieve women of a burden unequally shared with men. Rather, it shifts a burden from the covered person's household onto others, either an employer or other persons insured in the same pool. As such, it does nothing to further Government's asserted interest in gender equity.

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[43] Kjerulff, K. H., K. D. Frick, J. A. Rhoades, and C. S. Hollenbeak, *The cost of being a woman—a national study of health care utilization and expenditures for female-specific conditions*, 17 Women's Health Issues 13 (2007).

In the case of a covered person herself, the Government simply assumes that her out-of-pocket health care expenses are borne by her alone. However, considering in particular the out-of-pocket expenses for contraceptives, the need for contraceptives indicates she has some intimate relationship with a man, quite possibly her husband. The Government apparently assumes without proof that men – whether husbands, roommates, or in some other role – in intimate relationships with women do not contribute to the costs of whatever contraceptive method is used by the couple. But without such proof, there is no reason to believe that women are carrying an inequitable burden when it comes to the costs of contraceptives nor, consequently, that the Mandate does anything but shift the financial burden of contraceptives, not from the woman, but from the couple onto others – again, doing nothing to further the asserted governmental interest in promoting gender equity. [44]

In sum, the Government has failed to carry its burden of proving that the coercive Mandate **in fact**, not in theory, furthers its asserted interest in promoting women's health or gender equity.

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[44] At this point in the discussion, it is virtually impossible to concede, even for the sake of argument, that the Government's interest is compelling. Even if the Government could prove that covered women employees are bearing the full costs of their contraceptives, it is difficult to credit that the Government has a *compelling* interest in guaranteeing free contraceptives for women who sleep with men who will not contribute to the cost of their birth control.

2. The Government may not compel contraceptive coverage to serve a purported interest in "gender equality."

The Government has also extrapolated from the interest in "gender equity" in health care costs yet another interest purportedly justifying the Mandate, that of promoting "a woman's control over her procreation." In defending the Mandate below, the Government argued that this interest is "so compelling as to be constitutionally protected from state interference." See, e.g., Brief for the Appellees, *Hobby Lobby et al. v. Sebelius*, at 34-35; Brief for the Appellees, *Conestoga Wood Specialties, Inc. v. Sebelius*, at 34-35. (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Griswold v. Connecticut*, 381 U.S. 479 (1965).). This argument is unavailing for several reasons.

First, this interest is found nowhere in the legislative history or language of the Women's *Health* Amendment, an amendment to the *Affordable Care* Act, the only legislative authorization for the Mandate. There is no evidence in the legislative record of either the ACA or the Women's Health Amendment from which the Government could argue that Congress intended to increase access to contraceptives for the sake of assisting women in being able to avoid pregnancy and childbearing as an end in itself ("controlling her own procreation"). Rather, the legislative history shows that Congress's intent was to relieve women of certain inequitable financial burdens they face in maintaining their health.[45]

Second, it is a *non sequitur* to contend that, because a right is protected from governmental interference, the government therefore has a "compelling interest" in furthering the exercise that right. For example, the Government cannot interfere in a person's right to read pornography, but this does not mean that the Government has a compelling interest in assisting people to obtain and read pornography.

Third, the Government's argument fallaciously equates "interference" with the exercise of a constitutional right, with declining to fund the exercise of that right. The Government itself is not required to fund a woman's exercise of "right to control her procreation." *Harris v. McRae*, 448 U.S. 297 (1980) (upholding federal ban on abortion funding). Much less does the Government have a compelling interest in forcing others to fund the exercise of that right.

II. The HHS Mandate Is Not Narrowly Tailored To Serve the Health Needs of a Subset of Women With Particular Medical Problems.

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[45] Sen. Barbara Mikulski, who offered the Women's Health Amendment, stated on the floor of the Senate, "This amendment is strictly concerned with ensuring that women get the kind of preventive screenings and treatment they may need to prevent diseases particular to women such as breast cancer and cervical cancer." Cong. Rec. S12274 (daily ed. Dec. 3, 2009).

The Government, citing the IOM Report, argues that the Mandate also serves the compelling interesting in promoting women's health because some women have medical conditions for which pregnancy in some circumstances may be contraindicated.

This argument ignores the fact that these women comprise a far smaller group than the Mandate covers, and for that reason, the Mandate as currently structured is not narrowly tailored. For example, the Government and the IOM Report cite women with Marfan Syndrome as falling into this category of women who need access to contraceptives because of specific medical conditions. However, only about one in 6,000 to 10,000 women in the United States have Marfan Syndrome.[46] The percentage is even smaller when considering only sexually active women in their childbearing years.

The Mandate is premised on the supposed general need of women for access to contraception as "preventive" care. The argument from Marfan syndrome, lupus, pulmonary hypertension, and similar conditions does not address this premise. These conditions are rare; moreover, they create and/or are part of a whole complex of health-related concerns for the women who have them, which may or may not necessitate avoiding pregnancy if the women are sexually active. Contraceptives are not "preventive" care for these women; these drugs are not preventing or detecting the onset of any disease. To the extent that the underlying diseases necessitate pregnancy avoidance, a prescription of contraceptive drugs for this purpose would be more akin to a prescription of medication to control blood pressure or reduce joint swelling, neither of which are considered regular "preventive" care under the ACA.

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[46] Keane MG, Pyeritz RE, *Medical management of Marfan syndrome*, 117 (21) Circulation 2802–13. (May 2008).

Moreover, the IOM Report appears oblivious to the fact that the very conditions it uses to illustrate why some women need to postpone pregnancy (e.g., diabetes, obesity, pulmonary hypertension) and therefore to justify its recommendation to facilitate access to contraception, are the same conditions that put women at greatly increased risk for cardiovascular problems from contraceptive use. Focused health care to treat women with these conditions -- health care already covered in Hobby Lobby's and Conestoga Wood Specialties' plans -- will better achieve the Mandate's goals of promoting women's health.

The IOM Report also asserts that contraceptives have other health benefits unrelated to preventing pregnancy, such as treating acne, hirsutism, menstrual disorders, and pelvic pain.[47] However, any such other effects are irrelevant to the premise of the Mandate of providing specific "preventive" care at no cost to promote women's health. If Congress had considered acne, hirsutism, or other conditions serious and/or common and/or expensive enough to warrant no-cost coverage of drugs to treat them, whether contraceptive or otherwise, it could have so provided. It did not. Therefore, the fact that contraceptives **might** be used to treat these conditions does not bolster the Government's argument that there is a compelling governmental interest in including contraceptives as part of the preventive care mandate.

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[47] 2011 IOM at 107.

Universal coverage of contraceptives drugs with no co-pay as "preventive" care is not a narrowly tailored means of dealing with the unusual medical situations posited by the Government.

CONCLUSION

For the foregoing reasons, *Amici* request that this Court affirm the Tenth Circuit's grant of injunctive relief to Respondent Hobby Lobby and reverse the Third Circuit's denial of injunctive relief and remand with instructions to enter an injunction as requested by Petitioner Conestoga Wood Specialties.

Respectfully submitted,

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RECORD

Supreme Court, U.S.

JAN 28 2014

Nos. 13-354 & 13-356

IN THE

Supreme Court of the United States

◆

KATHLEEN SEBELIUS, *et al.*,

Petitioners,

—v.—

HOBBY LOBBY STORES, INC.,

Respondents.

CONESTOGA WOOD SPECIALTIES CORPORATION, *et al.*,

Petitioners,

—v.—

KATHLEEN SEBELIUS, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

BRIEF *AMICI CURIAE* OF JULIAN BOND, THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF PENNSYLVANIA, THE ACLU OF OKLAHOMA, THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AND THE NATIONAL COALITION ON BLACK CIVIC PARTICIPATION, IN SUPPORT OF THE GOVERNMENT

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STATEMENT OF INTEREST[1]

Julian Bond has spent his lifetime seeking justice for people of color. He is currently a professor, and is Chairman Emeritus of the NAACP. Given his life's work, Mr. Bond is all too aware that religion has been used through the decades to sanctify slavery, subjugation and segregation. Mr. Bond signs this brief because he believes that the need to prevent the misuse of religion to promote discrimination is as urgent now as ever.

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with more than 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU has a long history of furthering racial justice and women's rights, and an equally long history of defending religious liberty. The ACLU also vigorously protects reproductive freedom, and has participated in almost every critical case concerning reproductive rights to reach the Supreme Court. The ACLU of Pennsylvania and the ACLU of Oklahoma are statewide affiliates of the national ACLU.

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[1] The parties in 13-356 have filed blanket letters of consent to *amicus* briefs in support of either party or neither party. Petitioners in 13-354 have also filed a blanket letter of consent. A letter of consent to the filing of this *amicus* brief from Respondents in 13-354 has been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the preparation of the submission of this brief.

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a non-profit legal organization that, for more than seven decades, has helped African Americans secure their civil and constitutional rights. Throughout its history, LDF has worked to support and provide equal treatment and high-quality medical services, care, and opportunities to African Americans. *E.g., Linton v. Comm'r of Health & Env't*, 65 F.3d 508 (6th Cir. 1995) (preservation of Medicaid-certified hospital and nursing home beds to prevent eviction of patients in favor of admitting more remunerative private-pay individuals); *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (challenge to closure of municipal hospital serving inner-city residents); *Simkins v. Moses H. Cone Mem'l Hosp.*, 323 F.2d 959 (4th Cir. 1963) (admission of African-American physician to hospital staff); *Mussington v. St. Luke's-Roosevelt Hosp. Ctr.*, 824 F. Supp. 427 (S.D.N.Y. 1993) (relocation of services from inner-city branch of merged hospital entity); *Rackley v. Bd. of Trs. of Orangeburg Reg'l Hosp.*, 238 F. Supp. 512 (E.D.S.C. 1965) (desegregation of hospital wards); Consent Decree, *Terry v. Methodist Hosp. of Gary*, Nos. H-76-373, H-77-154 (N.D. Ind. June 8, 1979) (planned relocation of urban hospital services from inner-city community). LDF has a substantial interest in this case because of its continuing commitment to promoting opportunity for African Americans, including access to affordable health insurance and health care.

The National Coalition on Black Civic Participation ("The National Coalition") has been actively engaged in social justice movements on the national, state and local level through our coalition-based campaigns and organizing networks for nearly four decades. The National Coalition is dedicated to the empowerment of women and girls and black youth, particularly Black males through its Black Women's Roundtable and Black Youth Vote! networks, leadership development, and civic engagement programs. The National Coalition believes that utilizing the judicial system to protect individuals right to worship, and to express their religious beliefs, and protecting reproductive freedoms are key to the organization achieving its empowerment goals now and in the future.

FACTUAL BACKGROUND

The Affordable Care Act requires that health insurance plans cover certain preventive services without cost-sharing. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 1001, § 2713(a), 124 Stat. 119, 131–32 (2010) (codified at 42 U.S.C.A. § 300gg-13). The preventive services coverage requirement did not initially include many preventive services unique to women, prompting passage of the Women's Health Amendment ("WHA"). *Id.* § 2713(a)(4), 124 Stat. at 131. In passing the WHA, Senator Mikulski noted, "[o]ften those things unique to women have not been included in health care reform. Today we guarantee it and we assure it and we make it affordable by dealing with copayments and deductibles . . . ." 155 Cong. Rec. S11,979, S11,988 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski); *see also id.* at S11,987 (noting that the ACA did not cover key preventive services for women). In particular, with the WHA, Congress intended to address gender disparities in out-of-pocket health care costs, which stem in large part from reproductive health care:

> Not only do we [women] pay more for the coverage we seek for the same age and the same coverage as men do, but in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men. . . . This fundamental inequity in the current system is dangerous and discriminatory and we must act. The prevention section of the bill before us must be amended so coverage of preventive services takes into account the unique health care needs of women throughout their lifespan.

155 Cong. Rec. S12,019, S12,027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand).

To implement the WHA, the U.S. Department of Health and Human Services ("HHS") looked to the Institute of Medicine ("IOM"), an independent, nonprofit organization, to recommend services that should be covered. IOM recommended that the covered preventive services include, among other things, the full range of Food and Drug Administration ("FDA") approved contraceptives. Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 109-10 (July 2011). In making the recommendation, the IOM noted that "[d]espite increases in private health insurance coverage of contraception since the 1990s, many women do not have insurance coverage or are in health plans in which copayments for visits and for prescriptions have increased in recent years." *Id.* at 109. These cost barriers are aggravated by the fact that women "typically earn less than men and . . . disproportionately have low incomes." *Id.* at 19.

The federal government adopted IOM's recommendations and enacted regulations that require non-grandfathered plans covered by the ACA to provide health care coverage without cost-sharing for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." *See* 45 C.F.R. § 147.130(b)(1); Health Res. & Servs. Admin., U.S. Dep't of Health & Human Servs., *Women's Preventive Services: Required Health Plan Coverage Guidelines*, *available at* http://www.hrsa.gov/ womensguidelines (last visited Jan. 24, 2014).[2]

In announcing the rule, the federal government emphasized the importance of the rule not only to equalize women's health care costs, but to ensure women have the ability to be equal participants in society. As it noted, the inability of women to access contraception

> places women in the workforce at a disadvantage compared to their male co-workers. Researchers have shown that access to contraception improves the social and economic status of women.

---

[2] The regulations authorize an exemption for the group health plan of a "religious employer," 45 C.F.R. § 147.131(a), and an accommodation for the group health plans of religious nonprofit organizations that have religious objections to providing coverage for all or some contraception, 45 C.F.R. § 147.131(b); 78 Fed. Reg. 39870 (July 2, 2013). Neither the accommodation nor the exemption is at issue in this case.

> Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force . . . . The [federal government] aim[s] to reduce these disparities by providing women broad access to preventive services, including contraceptive services.

77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (footnote omitted).

SUMMARY OF ARGUMENT

Amici support the government's argument that the contraception rule does not violate the religious exercise rights of the businesses before the Court, whether those rights arise under the Religious Freedom Restoration Act ("RFRA") or the Free Exercise Clause. *Amici* do not repeat those arguments here. Instead, we submit this brief to highlight an important lesson of history: as our society has moved towards greater equality for racial minorities and women, it has been less willing to accept religion as a justification for discrimination in the marketplace, and properly so.

Religion is a powerful force that shapes individual lives and influences community values. Like other belief systems, it has been used at different times and in different places to support change and to oppose it, to promote equality and to justify inequality. Our constitutional structure recognizes the importance of religion by protecting its free exercise, a commitment to religious tolerance and pluralism that was reinforced by Congress when it enacted RFRA. Public debate can be and often is enhanced by those whose participation in that debate is informed by their faith. But once that debate is resolved through the democratic process, those who disagree with that resolution on religious grounds are no more entitled to an exemption from anti-discrimination laws governing commercial activity of the sort involved here than those who dissent on other ideological grounds. That is because the elimination of discrimination – in the marketplace and outside the realm of constitutionally protected associations, religious or otherwise – has long been recognized as a state interest of the highest order. That is what is at stake in this case given that the contraception rule addresses a vestige of gender discrimination.

Religious leaders, of course, have often led the movement against discrimination. To choose one obvious example, Dr. Martin Luther King, Jr. was a minister whose faith informed and inspired his social justice work. But it is also true that religion has frequently played the opposite role in our nation's history, invoked by those who sought to perpetuate discrimination based on race or gender, whether by opposing changing standards or seeking an exemption to new legal norms. We do not recount that history to suggest that the invocation of religious beliefs to justify the most odious forms of racial discrimination is equivalent to religious opposition to contraception. Rather, we provide this history because it demonstrates that the issues in this case are not new.

Slavery was once defended on religious grounds. So were Jim Crow laws. Even the courts embraced religion to justify continued segregation. A civil war, followed by decades of protest and advocacy, eventually led to change. The change was met with resistance, including resistance motivated by religious beliefs. Congress and the courts faced calls for exemptions to enable those objecting for reasons of faith to avoid compliance with evolving standards in employment, education, marriage recognition, and public accommodation. The courts rejected these claims, recognizing the vital state interest in ending discrimination in these public arenas and embracing a vision of equality that did not sanction piecemeal exemptions.

The story of women's emerging equality follows a similar pattern. Women have been celebrated as mothers while long denied rights and opportunities on the premise that the home was their proper domain. Religious beliefs were invoked to justify restrictions on women's roles, including in suffrage, employment, and access to birth control, and later inspired legislation purportedly to "protect" women, including their reproductive capacities. The last century brought great changes, with women – and men – increasingly able to opt for parenthood and caregiving, as well as to participate in an ever greater array of educational and career opportunities. Many factors contributed to this change, including laws prohibiting discrimination and protecting women's ability to control their reproductive capacity. These measures, like those for racial equality, were met with resistance, including calls based on religion to avoid compliance with evolving legal standards. Again, as with race, Congress and the courts held firm to the vision embodied in newly passed anti-discrimination measures.

This history offers some guidance to this Court as it analyzes the currently claimed right to religious exercise and exemption. The contraception rule addresses a remaining vestige of sex discrimination: the disparities in the cost of health care as between women and men, the longstanding exclusion of services needed only by women from health care coverage, and the need for women to have meaningful access to all forms of contraception if they are to control unintended pregnancies and thus enjoy greater equality in society. As this Court has recognized, women's ability to control their reproductive capacities is essential to women's participation in society. Contraception is not simply a pill or a device; it is a tool, like education, essential to women's equality. Without access to contraception, women's ability to complete an education, to hold a job, to advance in their careers, to care for their existing children, or to aspire to a higher place, whatever that may be, is compromised. The contraception rule makes access to contraception, including the most effective methods, meaningful, and thus takes a giant and long overdue step to level the playing field.

In other contexts, calls for religious exemptions from laws advancing women's equality – be they to pay women less or deny employment to women who violate traditional social norms – have been rejected. The result should be the same here. Those who own a business do not forfeit their right to object to the contraception rule on religious grounds, but their personal religious objection does not give the businesses they own license to disregard the law.

ARGUMENT

I. THE HISTORICAL MOVEMENT TOWARD GREATER EQUALITY FOR RACIAL MINORITIES AND WOMEN HAS BEEN ACCOMPANIED BY A GROWING REJECTION OF EFFORTS TO JUSTIFY DISCRIMINATION IN THE MARKETPLACE ON THE BASIS OF RELIGION.

A. Racial Discrimination

There was a time in our nation's history when religion was used to justify slavery, Jim Crow laws, and bans on interracial marriage. God and "Divine Providence" were invoked to justify segregation, overwhelming secular and religious calls for equality and humanity for decades. Eventually our laws changed, and those who continued to believe in racial discrimination on religious grounds were nonetheless required to obey the nation's anti-discrimination laws. Although, as previously noted, the history of religious justification for slavery, racial discrimination, and racial segregation are different in many ways from the instant request for a religious exemption, the lessons derived from that experience are instructive.

At the beginning of our country's history, religious beliefs were invoked by some to justify the most fundamental inequalities. Indeed, slavery itself was often defended in the name of faith. The Missouri Supreme Court, in rejecting Dred Scott's claim for freedom, noted that the introduction of slavery was perhaps "the providence of God" to rescue an "unhappy race" from Africa and place them in "civilized nations." *Scott v. Emerson*, 15 Mo. 576, 587 (Mo. 1852). Jefferson Davis, President of the Confederate States of America, proclaimed that slavery was sanctioned by "the Bible, in both Testaments, from Genesis to Revelation." R. Randall Kelso, *Modern Moral Reasoning and Emerging Trends in Constitutional and Other Rights Decision-Making Around the World*, 29 Quinnipiac L. Rev. 433, 437 (2011) (citation and quotations omitted). Christian pastors and leaders declared: "We regard abolitionism as an interference with the plans of Divine Providence." Convention of Ministers, *An Address to Christians Throughout the World* 8 (1863), *available at* https://archive.org/details/addresstochristi00phil (last visited Jan. 24, 2014).

Religion was also invoked, including by the courts, to justify anti-miscegenation laws. For example, in upholding the criminal conviction of an African-American woman for cohabitating with a white man, the Georgia Supreme Court held that no law of the State could

> attempt to enforce, moral or social equality between the different races or citizens of the State. Such equality does not in fact exist, and never can. The God of nature made it otherwise, and no human law can produce it, and no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest arch angel in Heaven, down to the meanest

> reptile on earth, moral and social inequalities exist, and must continue to exist through all eternity.

Scott v. State, 39 Ga. 321, 326 (Ga. 1869). In upholding the criminal conviction of an interracial couple for violation of Virginia's anti-miscegenation law, the Virginia Supreme Court reasoned that, based on "the Almighty," the two races should be kept "distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law and be subject to no evasion." *Kinney v. Commonwealth*, 71 Va. 858, 869 (Va. 1878); *see also Green v. State*, 58 Ala. 190, 195 (Ala. 1877) (upholding conviction for interracial marriage, reasoning God "has made the two races distinct"); *State v. Gibson*, 36 Ind. 389, 405 (Ind. 1871) (declaring right "to follow the law of races established by the Creator himself" to uphold constitutionality of conviction of a black man who married a white woman).

Similar justifications were accepted by courts to sustain segregation. In 1867, Mary E. Miles defied railroad rules by refusing to take a seat in the "colored" section of the train car. She brought suit against the railroad for physically ejecting her from the train. A jury awarded Ms. Miles five dollars. The Supreme Court of Pennsylvania reversed, relying in part on the fact that "the Creator" made two distinct races, which "God has made . . . dissimilar," and "the order of Divine Providence" that dictates that the races should not mix. *The West Chester & Phila. R.R. v. Miles*, 55 Pa. 209, 213 (Pa. 1867); *see also Bowie v. Birmingham Ry. & Elec. Co.*, 27 So. 1016, 1018-19 (Ala. 1900) (looking to reasoning from *Miles* to affirm judgment for railroad that forcibly ejected African-American woman from the "whites only" section of rail car). In 1906, the Kentucky Supreme Court affirmed the enforcement of a law that prohibiting whites and blacks from attending the same school, noting that the separation of the races was "divinely ordered." *Berea College v. Commonwealth,* 94 S.W. 623, 626 (Ky. 1906), *aff'd,* 211 U.S. 45 (1908).

These arguments in favor of racial segregation slowly lost currency, but not without resistance. The turning point in our country's history was marked by two events. The first was this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which repudiated the "separate but equal" doctrine established in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and held unconstitutional racial segregation in public schools. The second was Congress' passage of the Civil Rights Act of 1964, which prohibited discrimination in public schools, employment, and public accommodations. Those leading the movement for racial equality included men and women of faith. And those resisting that change included those with religious beliefs opposed to integration.

The resistance, both religiously based and other, was most profound in the context of education. Members of the Florida Supreme Court invoked religion to justify resistance to integration in the schools, noting that "when God created man, he allotted each race to his own continent according to color, Europe to the white man, Asia to the yellow man, Africa to the black man, and America to the red man." *State ex rel. Hawkins v. Bd. of Control,* 83 So.2d 20, 28 (Fla. 1955) (concurring opinion). Indeed, they went so far as to characterize *Brown* as advising "that God's plan was in error and must be reversed." *Id.*

In the years following this Court's enforcement of *Brown*, the number of private, segregated schools – many of which were Christian – expanded exponentially and white students left the public schools in droves. *See* Note, *Segregation Academies and State Action*, 82 Yale L. J. 1436, 1437-40 (1973). In one Mississippi county, within two months of a desegregation order, three private schools opened and the number of white pupils in public school in first through fourth grade dropped from 771 to 28. *See Coffey v. State Educ. Fin. Comm'n*, 296 F. Supp. 1389, 1391 n.7 (S.D. Miss. 1969); *see also* U.S. Comm'n on Civil Rights, *Discriminatory Religious Schs. and Tax Exempt Status* 1, 4-5 (1982) (recounting the massive withdrawal of white students from public schools after *Brown*, and a proliferation of private schools, many associated with churches). The schools were often open about their motives. For example, Brother Floyd Simmons, who founded the Elliston Baptist Academy in Memphis, said, "I would never have dreamed of starting a school, hadn't it been for busing." John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 334 (2001).

In response, the Treasury Department issued a ruling declaring that racially segregated schools would not be eligible for tax-exempt status. The Treasury Department's ruling reflected the changing of the tides:

> Developments of recent decades and recent years reflect a Federal policy against racial discrimination which extends to racial discrimination in education. . . . Therefore, a school not having a racially nondiscriminatory policy as to students is not 'charitable' . . . [and] does not qualify as an organization exempt from Federal income tax.

Rev. Rul. 71-447, 1971-2 C.B. 230.[3] Attempts by the IRS to enforce the Treasury Department's rule met resistance in the courts. Most notably, Bob Jones University brought suit after the IRS revoked the University's tax exempt status based on its policy of first refusing to admit African-American students altogether, and subsequently refusing to admit students engaged in or advocating interracial relationships. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). The sponsors of Bob Jones University "genuinely believe[d] that the Bible forbids interracial dating and marriage." *Id.* at 580. Bob Jones's lesser-known co-plaintiff, Goldsboro Christian Schools, operated a school from kindergarten through high school and refused to admit black students. According to its interpretation of the Bible, "[c]ultural or biological mixing of the races [was] regarded as a violation of God's command." *Id.* at 583 n.6. Both schools sued under the Free Exercise Clause, arguing that the rule could not constitutionally apply to schools engaged in racial discrimination based on sincerely held religious beliefs. This Court rejected the schools' claims, holding that the government's interest in eradicating racial discrimination in education outweighed any burdens on their religious beliefs. *Id.* at 602-04.

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[3] Subsequent efforts by the IRS to adopt guidelines for assessing whether private schools were not discriminatory, and thus eligible for tax exempt status, met with resistance. At a hearing, for example, Senators expressed concern about the impact on religious schools, emphasizing that the issue "involve[d] the rights of two groups of minorities." *See Tax-Exempt Status of Private Schs.: Hearing Before the Subcomm. on Taxation & Debt Mgmt. Generally of the Comm. on Fin.*, 96th Cong. 18, 21 (1979) (statement by Sen. Laxalt).

Progress toward racial equality was not limited to schools. The anti-miscegenation laws fell, although again the path was not a smooth one. The trial court in *Loving v. Virginia* adhered to the reasoning of earlier decades: "'Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.'" 388 U.S. 1, 3 (1967) (quoting trial court). But in the 1960s, unlike in the 1870s, this reasoning did not hold, and this Court struck Virginia's anti-miscegenation law. *Id.* at 2.

The Civil Rights Act of 1964 also faced objections based on religion, but they were ultimately rejected. During the Act's passage, for example, Senator Robert Byrd articulated some of these arguments, including reciting Leviticus 19:19, which discusses the need to keep cattle separate from other animals, to argue that "God's statutes . . . recognize the natural order of the separateness of things." 110

Cong. Rec. 13,207 (1964).[4] And the House passed a broad exemption to exclude religiously affiliated employers entirely from the proscriptions of the Act. *See EEOC v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982) (recounting legislative history of Civil Rights Act of 1964). However, the law as enacted permitted no employment discrimination based on race; it only authorized religiously affiliated employers to discriminate on the basis of religion. *Id.* Later efforts to pass a blanket exemption for religiously affiliated employers again failed. *Id.* at 1277.[5]

Resistance to the 1964 Civil Rights Act based on religion did not stop with its passage. The owner of a barbeque chain who was sued for refusing to serve blacks defended the lawsuit by claiming that serving blacks violated his religious beliefs. The court rejected the restaurant owner's defense, holding that the owner

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[4] Byrd also noted that "[t]he American Council of Christian Churches, representing 15 denominational groups with a total of more than 20 million members wired President Johnson" protesting the civil rights bill. *Id.* at 13,209. His expression of the religious arguments against the bill was only part of the story, of course; religious arguments were also advanced in favor of the bill. *See, e.g., id.* (recognizing the 4,000 clerical and lay representatives at the interfaith rally at the Nation's Capital in support of the bill).

[5] The Act, while barring race discrimination by religiously affiliated entities, respects the workings of houses of worship and also permits discrimination in favor of co-religionists in certain religiously affiliated institutions and positions. *See Corp. of the Presiding Bishop of the Church of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *cf. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012) (recognizing ministerial exception).

> has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishments upon the ground that to do so would violate his sacred religious beliefs.

Newman v. Piggie Park Enters., Inc., 256 F. Supp. 941, 945 (D.S.C. 1966), *aff'd in relevant part and rev'd in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968).

Thus, throughout our country's history, the argument that religious beliefs should trump measures designed to eradicate racial discrimination – whether in toto or piecemeal – has slowly lost its standing. Once having achieved a commitment to end discrimination in education, employment, and public accommodations, society, through the courts and Congress, has refused to grant religious exemptions. And resistance to these measures has steadily waned. In fact, "no major religious or secular tradition today attempts to defend the practices of the past supporting slavery, segregation, [or] anti-miscegenation laws." R. Randall Kelso, Modern Moral Reasoning, *supra*, at 439. Reflecting this evolution, Bob Jones University has apologized for its prior discriminatory policies, stating that by previously subscribing to a

> segregationist ethos . . . we failed to accurately represent the Lord and to fulfill the commandment to love others as ourselves. For these failures we are profoundly sorry. Though no known antagonism toward minorities or expressions of racism on a personal level have ever been tolerated on our campus, we allowed institutional policies to remain in place that were racially hurtful.

See Statement about Race at BJU, Bob Jones Univ., *available at* http://www.bju.edu/about/what-we-believe/race-statement.php (last visited Jan. 21, 2014). Although there are many differences between the racially biased religious justifications described above, and the proposed exemption now before the Court, this experience establishes that close scrutiny is required where, as here, the Court considers a religious exemption to a federal anti-discrimination statute that promotes a compelling governmental interest in equality and opportunity.

B. Gender Discrimination

The path to achieving women's equality has followed a course similar to the struggle for racial equality. *See Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (chronicling the long history of sex discrimination in the United States).[6] Efforts to advance women's equality, like those furthering civil rights, were supported – and thwarted – in the name of religion. Those who invoked God and faith as justification for slavery and segregation also invoked God and faith to limit women's roles. One champion of slavery in the antebellum South, George Fitzhugh, plainly stated that God gave white men dominion over "slaves, wives, and children." Armantine M. Smith, *The History of the Woman's Suffrage Movement in Louisiana*, 62 La. L. Rev. 509, 511 (2002).

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[6] The Court in *Frontiero* noted that "throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War

Religious arguments were invoked to limit women's roles in society. And in this context, as with race, they initially were embraced by courts. For example, this Court held that the State of Illinois could prohibit women from practicing law, and in his famous concurrence, Justice Bradley opined that:

> The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Bradwell v. State, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

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slave codes," emphasizing that women, like slaves, could not "hold office, serve on juries, or bring suit in their own names," and that married women traditionally could not own property or even be legal guardians of their children. *Id*. at 685.

This vision of women – as destined for the role of wife and mother – featured in opposition to suffrage. A prominent antisuffragist, Reverend Justin D. Fulton, proclaimed: "'It is patent to every one that this attempt to secure the ballot for woman is a revolt against the position and sphere assigned to woman by God himself.'" Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 981 n.96 (2002) (quoting Rev. Justin D. Fulton, *Women vs. Ballot*, *in* The True Woman: A Series of Discourses: To Which Is Added Woman vs. Ballot 3, 5 (1869)); *see also id.* at 978 (quoting Rep. Caples at the California Constitutional Convention in 1878-79 as saying of women's suffrage: "It attacks the integrity of the family; it attacks the eternal degrees [sic] of God Almighty; it denies and repudiates the obligations of motherhood.") (internal citation and quotations omitted). And in this same period, the first laws against contraception were enacted, so as to address what was characterized as "physiological sin." Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 292 (1991) (quoting H.S. Pomeroy, *The Ethics of Marriage* 97 (1888)); *see also id.* at 293 (quoting physician in lecture opposed to interruption of intercourse: "She sins because she shirks those responsibilities for which she was created.").

Even as times changed, and women began entering the workforce in greater numbers, they were constrained by the longstanding and religiously imbued vision of women as mothers and wives. As this Court recognized in *Frontiero*, "[a]s a result of notions such as [those articulated in Justice

Bradley's concurrence in *Bradwell*], our statute books gradually became laden with gross, stereotyped distinctions between the sexes." 411 U.S. at 685.[7] Those statutes were often upheld by this Court. For example, in *Muller v. Oregon*, this Court upheld workday limitations for women because "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence . . . . [H]ealthy mothers are essential to vigorous offspring, [and therefore] the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." 208 U.S. 412, 421 (1908); *see also Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (holding women should be exempt from mandatory jury duty service because they are "still regarded as the center of home and family life").

But just as with the movement for racial justice, society progressed, and gradually our country started recognizing women's ability to pursue goals other than, or in addition to, becoming wives and mothers. Indeed, the passage of the Civil Rights Act of 1964 was a gain not just for racial equality but also for gender equality: Title VII of the Act barred discrimination based on sex, as well as race, in the workplace. This protection, like that for race, passed in the face of religious objection and without the broad exemption proposed to permit continued employment discrimination based on sex by religiously affiliated organizations. *See* 110 Cong. Rec. 13,207-08 (1964) (testimony of Sen. Byrd) (noting that the parable of the laborers in Matthew 20:1-15 demonstrates that Christ did not condemn the householder who practiced discrimination when paying employees who worked in his vineyards); *see also Pac. Press Pub. Ass'n*, 676 F.2d at 1276 (discussing legislative history of Civil Rights Act of 1964).[8]

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[7] Concomitant with a restricted vision of women's roles were constraints on the roles of men. In the idealized role, men were heads of households, the wage earners, and the actors in the polity. They were not caretakers, for example. *See, e.g.*, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (recognizing that the historic "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men"). And, for both sexes, the visions were idealized, but not dominant in real lives, particularly the lives of the working poor, where women as well as men labored outside the home.

Slowly the courts too began dismantling the notion espoused by Justice Bradley in *Bradwell* that, based on divine ordinance and the law of the Creator, women should be confined to roles as wives and mothers. For example, this Court held unconstitutional a state law that treated girls' and boys' age of majority differently for the purposes of calculating child support, rejecting the state's argument that girls do not need support for as long as boys because they will marry quickly and will not need a secondary education. *Stanton v. Stanton*, 421 U.S. 7 (1975). This Court reasoned:

> No longer is the female destined solely for the home and the rearing of the

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[8] *But see* Title IX, Education Amendments of 1972, 20 U.S.C. § 1681(a)(3) (providing an exemption for "an educational institution which is controlled by a religious organization if the application of [Title IX] would not be consistent with the religious tenets of such organization").

> family, and only the male for the marketplace and the world of ideas. Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice.

Id. at 14-15 (internal citation omitted); *see also Orr v. Orr*, 440 U.S. 268, 279 n.9 (1979) (holding unconstitutional law that allowed alimony from husbands but not wives, as law was "part and parcel of a larger statutory scheme which invidiously discriminated against women, removing them from the world of work and property and 'compensating' them by making their designated place 'secure'"). When striking a ban on the admission of women to the Virginia Military Institute, the Court noted:

> "Inherent differences" between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications . . . may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.

United States v. Virginia, 518 U.S. 515, 533-34 (1996) (internal citations omitted).

The Court has also dismantled notions that women could be barred from certain jobs because of their reproductive capacity, *International Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991), and affirmed legislation that addresses "the fault-line between work and family – precisely where sex-based overgeneralization has been and remains strongest," *Hibbs*, 538 U.S. at 738. The courts and Congress have thus recognized that "denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second." *Id.* at 736 (internal citations and quotations omitted).

As with race, this progress has been tested, including by religious liberty defenses to the enforcement of anti-discrimination measures. Religious schools resisted notions that women must receive compensation equal to men, invoking their belief that the "Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family." *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990). The courts rejected the claim, emphasizing a state interest of the "highest order" in remedying the outmoded belief that men should be paid more than women because of their role in society. *Id.* at 1398 (citations and quotations omitted); *see also EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (rejecting religious school's argument that it was entitled to offer unequal benefits to female employees based on a similar "head of household" religious tenet); *EEOC v. Tree of Life Christian Schs.*, 751 F. Supp. 700 (S.D. Ohio 1990) (same).[9]

The outer bounds of measures designed to protect against gender discrimination continue to be tested in the name of religious beliefs. In more recent cases, religious employers have essentially claimed that their religious beliefs entitle them to violate Title VII's prohibition on sex discrimination, but courts have limited such arguments. *See, e.g.*, *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012) (reversing summary judgment for religious school that claimed a religious right, based on its opposition to premarital sex, to fire teacher for becoming pregnant outside of marriage, holding that the school seemed "more concerned about her pregnancy and her request to take maternity leave than about her admission that she had premarital sex"); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998) (holding that a religious school could not rely on its religious opposition to premarital sex as a pretext for pregnancy discrimination, noting that "it remains fundamental that religious motives may not be a mask for sex discrimination in the workplace"); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 808-10 (N.D. Cal. 1992) (rejecting free exercise challenge to Title VII by religious school that fired librarian for becoming pregnant outside of marriage, and noting that the school may have discriminated based on sex because "*only* women can *ever* be fired for being pregnant without benefit of marriage").[10]

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[9] Courts considering forms of discrimination other than race or sex have also rejected religious beliefs as a defense to such measures. *See Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (rejecting free exercise and RFRA defenses in case involving housing discrimination based on marital status); *EEOC v. Kamehameha Schs./Bishop Estate*, 990 F.2d 458 (9th Cir. 1993) (rejecting secular school's argument that the court should allow it to discriminate based on religion like religiously affiliated employers); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (holding that company was not required to accommodate religious beliefs of employee under Title VII by allowing him to display anti-gay posters in his cubicle because "an employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers"); *Matthews v. Wal-Mart Stores, Inc.*, 417 F. App'x 552 (7th Cir. 2011) (rejecting employee's claim that she was fired for her religious beliefs rather than violating the company's policy against harassing co-workers after she made religiously based comments against homosexuality to other employees); *see also* Br. of *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., et al. in Support of the Government.

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[10] Even outside the context of anti-discrimination measures, this Court has generally refused to allow claims of religious liberty to prevail if third parties would be harmed. *See United States v. Lee*, 455 U.S. 252, 261 (1982) (refusing to grant religious exemption to social security tax collection because it would "operate[] to impose the employer's religious faith on the employees"); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81 (1977) (holding that it would be an undue hardship to accommodate an employee who asked for his Sabbath off because doing so would violate the union contract rights of other employees with respect to shift preferences based on seniority). Even in cases where this Court has exempted claimants from complying with laws that substantially burden their religious exercise, the Court has been careful to note that such exemptions did not harm others. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 409 (1963) (granting religious exemption to unemployment benefits law but noting that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties"); *cf. Cutter v. Wilkinson*, 544 U.S. 709, 720

II. THIS COURT SHOULD NOT ALLOW THE COMPANIES HERE TO RESURRECT THE DISCREDITED NOTION THAT THEIR RELIGIOUS BELIEFS SHOULD TRUMP A LAW DESIGNED TO ENSURE EQUAL PARTICIPATION IN SOCIETY.

The contraception rule stands in line with Title VII and other anti-discrimination measures as one further step to address a vestige of gender discrimination. And like those laws, the rule is being resisted. The companies before this Court argue that they are entitled to violate the rule based on the owners' religious beliefs.[11] It is a familiar argument and, like similar arguments in the past, should be rejected.

(2005) ("Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630 (1943) (in excusing students from reciting the Pledge of Allegiance for religious reasons, noting that "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so"). *See also* Br. for *Amici Curiae* Church-State Scholars in Support of the Government.

[11] Although the owners of the companies in this case have religious objections to the rule, it does not mean that all people of faith similarly object to the rule. *See, e.g.*, Tom Howell, Jr., *Catholic Hospitals are OK with Obama Contraception Mandate, Protections*, *The Washington Times*, July 19, 2013, *available at* http://www.washingtontimes.com/blog/inside-politics/2013/jul/9/report-catholic-hospital-ok-contraception-mandate/ (last visited Jan. 24, 2014); *see also* Br. of Faith Groups as *Amici Curiae* Supporting the Government.

The contraception rule is an essential step to further equal opportunities for women. At the most fundamental level, the rule ensures women will have meaningful access to contraception. Indeed, nothing evidences the importance of the rule more clearly than the following fact: Today, approximately half of pregnancies are unintended. Guttmacher Institute, *Facts on Unintended Pregnancy in the United States* (Dec. 2013), *available at* http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html (last visited Jan. 24, 2014). Several facts underlie this statistic: Many women are unable to afford contraception – even with insurance – because of high co-pays or deductibles, *see generally*, Su-Ying Liang, et al., *Women's Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills Between 1996 and 2006*, 83 Contraception 528, 531 (2010); others cannot afford to use contraception consistently, *see* Guttmacher Institute, *A Real-Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions*, *available at* http://www.guttmacher.org/pubs/RecessionFP.pdf (last visited Jan. 24, 2014); and costs drive women to less expensive and less effective methods, *see* Jeffrey Peipert et al., *Continuation and Satisfaction of Reversible Contraception*, 117 Obstetrics & Gynecology 1105, 1105-06 (2011) (reporting that many women do not choose long-lasting contraceptive methods, such as intrauterine devices ("IUDs"), in part because of the high upfront cost).[12]

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[12] Moreover, long-acting methods of contraception, like IUDs, are particularly effective because there is less room for human error, unlike, for example, oral contraceptive pills. *See id.* at 1111-12 (noting that the majority of unintended pregnancies

A rule that makes all FDA-approved methods available to women, without a copay or deductible, lifts these barriers. A study in St. Louis, which essentially simulated the conditions of the rule, illustrates its impact: Physicians provided counseling and offered nearly 10,000 women contraception, of their choosing, free of cost. Jeffrey Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 Obstetrics & Gynecology 1291 (2012). In this setting, 75% of the participants opted for a long-acting reversible contraceptive method, with 58% choosing an IUD. *Compare id.* at 1293, *with* Guttmacher Institute, *Fact Sheet: Contraceptive Use in the United States* (Aug. 2013), *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited Jan. 24, 2014)(showing less than 6% of all contraceptive users have IUDs as their method). As a result, among women in the study, the unintended pregnancy rate plummeted. Indeed, the researchers estimate that changes in contraceptive policy simulating their project "would prevent as many as 62-78% of abortions performed annually in the United States." Peipert et al., *Preventing Unintended Pregnancies*, *supra*, at 1296.[13]

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result from "incorrect or inconsistent" contraception use, but IUDs are not "user-dependent" and thus are highly effective).

[13] Notably, the companies seeking an exemption in the cases before this Court object to providing IUDs – the method most often selected by women when given full information and opportunity, and when cost barriers are removed – and methods to prevent pregnancy after contraceptive failure. They would thus deny women meaningful access to the full range of contraception that can radically change women's lives.

In giving women effective access to the tools to control their reproduction, the rule has the promise to transform women's lives, including enabling women to decide whether and when to become a parent, and allowing women to make educational and employment choices that benefit themselves and their families.[14] "Women who can successfully delay a first birth and plan the subsequent timing and spacing of their children are more likely than others to enter or stay in school and to have more opportunities for employment and for full social or political participation in their community." Susan A. Cohen, *The Broad Benefits of Investing in Sexual and Reproductive Health*, 7 The Guttmacher Report on Public Policy 5, 6 (2004). The availability of the oral contraceptive pill alone is associated with a 20% increase in women's college enrollment; roughly one-third of the total wage gains for women born from the mid-1940s to early 1950s; and a sharp increase in the percentage of women lawyers, judges, doctors, dentists, architects, economists, and engineers. *See* Martha J. Bailey, et al., *The Opt-in Revolution? Contraception and the Gender Gap in Wages*, 19, 26 (Nat'l Bureau of Econ. Research Working Paper No. 17922, 2012), *available at* http://www.nber.org/papers/w17922 (last visited Jan. 22, 2014); Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions,* 110 J. Pol. Econ. 730, 749 (2002).

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[14] Moreover, as the Government and other *amici* argue, the rule is also important to protect women's health. This is particularly true for women of color who disproportionately suffer from health conditions that can be aggravated by pregnancy. *See* Br. of Nat'l Health Law Program, et al., as *Amici Curiae* in Support of the Government.

As this Court has recognized, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

Moreover, the contraception rule contributes to the dismantling of outmoded sex stereotypes, including those predicated on religion, because, as made plain above, contraception offers women the tools to decide whether and when to become mothers. The rule therefore remedies the notion, long endorsed by society, that "a woman is, and should remain the 'center of home and family life.'" *Hibbs*, 538 U.S. at 729 (quoting *Hoyt*, 368 U.S. at 62). It reinforces the fundamental premise underlying access to contraception, namely that society no longer demands that women's place is either to accept pregnancy or to refrain from nonprocreative sex. As this Court has so eloquently stated, "these sacrifices [to become a mother] have from the beginning of the human race been endured by women with a pride that ennobles her in the eyes of others . . . [but they] cannot alone be grounds for the State to insist she make the sacrifice." *Casey*, 505 U.S. at 852.

The contraception rule changes women's status in one other fundamental respect. Health care plans that cover preventive care that men need, but not that which women need, send the message that women are second-class citizens, and that they are not employees equally valued by the employer. Plans that cover care that men need, but exclude contraception, suggest that pregnancy is solely a woman's problem. And an exemption countenancing a religious objection to contraception, or to many of the most effective methods, suggests that religious objections are more important than women's equality in our society. For all these reasons, contraception is more than a service, device, or type of medicine. Meaningful access to birth control is an essential element of women's constitutionally protected liberty. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (recognizing that sodomy laws do not simply regulate sex but infringe on the liberty rights of gays and lesbians).

This Court should reject the companies' attempt to resurrect the long-discredited notion that they are entitled to discriminate against their female employees because of the owners' religious beliefs. Although the business owners are certainly entitled to their religious beliefs, the companies are not permitted to invoke those beliefs to discriminate against their female employees. Just as the companies' owners would not be able to use religion to hire only men, or refuse to pay their female employees equally, they should not be allowed to use religion to violate a contraception rule that is designed to promote gender equality. In rejecting the companies' arguments, this Court will not be breaking new ground, but instead will be following a well-established path. *See supra* Sections I and II. Although our country has made great progress toward achieving women's equality, more work is needed, and the contraception rule is a crucial next step forward.

CONCLUSION

The Court should affirm the judgment in *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356, and reverse in *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354.

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BRIEF

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In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL., RESPONDENTS

CONESTOGA WOOD SPECIALTIES CORPORATION, ET AL., PETITIONERS

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH CIRCUIT AND THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF NON-GOVERNMENT PARTIES

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondents in Case 13-354 ("*Hobby Lobby*")[2] and Petitioners in Case 13-356 ("*Conestoga*")[3]. He has recently suggested certiorari in the case of *Easton v. Hawk*,[4] *see* his amicus brief there *passim*,[5] partially in order to protect children from the abuses of an oversexualized and dangerous atmosphere. However, not just born children, but unborn, too, may deserve protection, as may those who value the lives of the unborn; hence this brief, supporting exemptions from the "contraceptive mandate" ("the Mandate") found in 42 U.S.C. § 300gg-13(a)(4) and federal regulations mentioned in, e.g., the January 10, 2014 Brief for Petitioners in 13-356 at 6, *see id.*

The non-Government parties may be referred to here as "Plaintiffs" or "Hobby/Conestoga".

SUMMARY OF ARGUMENT

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, *see* S. Ct. R. 37. Blanket permission to write briefs is on record with the Court except from Hobby Lobby, who granted Amicus permission by e-mail.

[2] *Kathleen Sebelius, Sec'y of Health and Hum. Servs., et al. v. Hobby Lobby Stores Inc., et al.*, 723 F.3d 1114 (10th Cir. 2013) (en banc) (*cert. granted*, 82 U.S.L.W. 3328).

[3] *Conestoga Wood Specialties Corp. et al. v. Kathleen Sebelius, Sec'y of Health and Hum. Servs., et al.*, 724 F.3d 377 (3rd Cir. 2013) (*cert. granted*, 82 U.S.L.W. 3328).

[4] *Easton Area Sch. Dist. v. B.H., a Minor, By and Through Her Mother, Jennifer Hawk, et al.*, 725 F.3d 293 (3d Cir. 2013), *pet. for cert. pending* (U.S. Dec. 5, 2013) (13-672).

[5] *Available at* http://tinyurl.com/EastonPrecertAmicusBrief.

In this somewhat nuanced set of cases, Plaintiffs are asking for less than their Questions Presented request: i.e., they ask for relief only from funding abortifacients. The Court should be careful, then, about whether it should grant relief from funding *every* contraceptive, even non-abortifacients. There are, however, reasons for allowing exemptions from funding any contraceptive that an employer may find morally objectionable, especially seeing that sexual relations without intention to procreate are an erotical and optional recreation, not a necessity.

Calendar-based contraceptive measures are apparently missing from the Mandate, showing a lack of compelling governmental interest, and perhaps a lack of comprehensive thought on these issues by the Government.

As even the brief for *Amici Curiae* Physicians for Reproductive Health et al. in Support of Petitioners in 13-354 (Oct. 21, 2013) inadvertently admits, *see id.* at 19, there is a chance that so-called contraceptives like Plan B or ella could cause an abortion, by the religious standards of Plaintiffs.

And the ensoulment of the embryo at conception, or at least the fully human status of the embryo, deserving respect and life, is an ancient, widespread, and continuing idea.

Thus, the Free Exercise Clause of the First Amendment, and "RFRA",[6] should allow Plaintiffs exemption from funding such abortifacients.

At the same time, to give blanket exemptions to any and all corporations, even huge ones, to deny health care or other benefits on the alleged basis of religion, could be dangerous, and amount to a *sub silentio* overturning of *Employment Division v. Smith* ("*Smith*") (494 U.S. 872 (1990)). Keeping exemptions limited to small, closely-held businesses/corporations where the religious ethos of the owners pervades the company, may be prudent.

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[6] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, codified at 42 U.S.C. § 2000bb *et seq.*

Plaintiffs might do well to articulate a limiting principle or principles for demands of the type they make, since, e.g., someone who objects to *all* health care on a religious basis could simply refuse all health care to his employees and claim religious exemption. Free-exercise and RFRA claims may be abused, after all, even though Hobby/Conestoga are not abusing such claims. (Such a limitation could draw on the fact, explored in various places in this brief, that abortifacients and contraceptives occupy a possibly-lewd, or deadly, sphere.)

As for gender equity: while it is crucial, still, there may be means to promote it besides killing one's own daughter (or son) in the womb, and dragooning one's employer into that effort. And if an abortion does take place, it does not have to be in the pre-implantation period covered by abortifacient contraceptives.

Though using certain abortifacients might *arguendo* help fight some forms of cancer, that might not be sufficient reason for forcing Hobby/Conestoga to fund those abortifacients, considering the possible killing of a baby or potential baby by those abortifacients.

And killing a preborn child also, one notes, kills all the possible descendants of the child over the centuries. *See, e.g.*, the case of Yitta Schwartz and her 2000 living descendants, *infra* at 21. Some may wish to avoid such multi-generational slaughter.

Planned Parenthood of Southeastern Pennsylvania v. Casey ("*Casey*"), 505 U.S 833 (2003), and *Gonzales v. Carhart* ("*Carhart*"), 550 U.S. 124 (2007), show not only continued permission for abortion, but also respect for fetal life and the right to define one's values. The latter two items support Plaintiffs' right to refuse material support of abortions.

The American tradition, after all, in culture and law, is not to have to pay for others' abortions.

Casey, *supra*, also shows, *see id.*, that the great moral gravity of abortion has even bent scrutiny levels away from strict scrutiny, so that abortion-seekers may have to respect life more than in 1973. Similarly, then, those, like Hobby/Conestoga, seeking to respect life re abortion, may need to prove less in order to achieve their desired exemptions (or conversely, the Government may have to prove more in order to deny the exemptions).

There is, in the mind of the Government and its supporters, something bordering on a lack of imagination or sympathy *vis-à-vis* the horror of abortion in the eyes of Plaintiffs and other opponents of abortion. Examples from the worlds of literature, law reviews, and popular culture can help elucidate the horror of abortion, even the abortion of a tiny unimplanted embryo.

In light of the apparent unpleasant dilemmas in the instant cases, the Court's recent order in *Little Sisters of the Poor v. Sebelius*, No. 1:13-cv-02611-WJM-BNB (D. Colo.), shows that creativity and moderation can craft a decent solution regarding these sorts of issues.

If, *arguendo*, the Court does not allow an exemption for Plaintiffs, it can still prevent the fine on them for noncompliance from being more than a nominal or minimal fee, considering due process and the circumstances, e.g., Plaintiffs' sincere disgust with having to materially support abortion.

In all, the Court should provide complete, or very substantial, relief to Plaintiffs, though considering the cases' nuances in order to avoid an overbroad or under-reasoned result.

ARGUMENT

I. ON THE OVERBROAD NATURE OF THE QUESTIONS PRESENTED, SINCE PLAINTIFFS SEEK FREEDOM ONLY FROM FUNDING ABORTIFACIENTS, NOT FROM FUNDING ALL CONTRACEPTIVES

Firstly, Amicus politely notes that Plaintiffs may shortchange themselves by asking in their Questions Presented, *see id.*, for relief from having to provide contraceptives. After all, they are really asking for a much smaller relief from the Court, since it is only *abortifacient* "contraceptives" such as Plan B or ella, that they refuse to fund. But those are only a small subset of the set of contraceptives in general, whether "regular" contraceptives, e.g., "normal" birth-control pills, or contraceptives which could withstand even strict Christian religious scrutiny, such as devices to assist with calendar-based contraception (popularly known as the "rhythm method", and also known as "natural family planning" or "fertility awareness"), following the natural cycles of the body and thus avoiding artificial contraception.

So, some clarification, whether by Plaintiffs or by pronouncements of the Court, may be appropriate here. If Plaintiffs are given relief they weren't even asking for, e.g., freedom from funding *any* mandated contraceptives, that may look tortuous and unjust, and as if the Court had some bias against all contraceptives whatsoever, and is departing from the facts in the cases, by arbitrarily giving a blanket exemption from funding any contraceptive.

At the same time, there are legitimate reasons for offering a conscience exemption from employers' funding any contraceptive they believe is immoral. First, there are the pragmatic issues that: (1) the Questions Presented do imply a variety of contraceptives, even if Plaintiffs only want relief from funding abortifacients; and (2) there are multiple parties in other cases not immediately before the Court, who desire relief from funding any mandated contraceptive at all. Additionally, if those parties against contraception have to wait several years for another case to come before the Court where there are employer-plaintiffs who want relief from non-abortifacient contraceptives, they, and others, may feel that is just too long to wait, seeing the huge imposition on either their conscience, or their wallet, from the contraception mandate.

Second, contraceptives may be considered no true necessity under certain circumstances, since sexual relations are basically a voluntary activity. If sexual relations were a true human need like breathing or food, then Mother Teresa, the Dalai Lama, and many of the popes, would have all dropped dead within a few weeks (or days) of becoming celibate. But they didn't, since sex is only a human want (like bowling or stamp collecting), not an actual *need*. So sex is merely optional—a sort of luxury good, especially when not making any babies, and contraception is meant to prevent babies—, and can be treated as such, at least for the sake of *forcing other people to subsidize it* (or subsidize related matters like contraception) besides the ones who are actually having sex. (Leisure activities, like bowling, are not without merit; but Amicus knows of no "Bowling Shoe Mandate". Thus, if sex is just leisure, not reproduction, why should there be a "Contraceptive Mandate" without any conscience exemptions?) If people like having carnal relations, perhaps they can pay for the consequences of it themselves, instead of making the unwilling, horrified employer pay.

After all, it is considered perverse to force someone to be a voyeur to a sexual situation, which is one reason there are laws against sexual intercourse, or other sexual acts, in public. But by making employers directly fund implements to be used in sexual acts, they are forced to be not just voyeurs, but actual *participants,* in a sense.

(Americans are still allowed to find lewdness disgusting, and the law is still allowed to treat lewdness as a disfavored category, *see generally, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011) (finding sexual material more proscribable than violent material).)

—These matters are controversial and sensitive, and Amicus thanks the Court in advance for a well-reasoned and sensitive treatment of the matters at hand, no matter which side wins the case.

And there may be other reasons as well to grant employers religious exemptions from funding any contraceptives.

II. THE MYSTERIOUS ABSENCE OF CALENDAR-BASED CONTRACEPTION FROM THE MANDATE

Some further attention is needed to calendar-based contraception, which has become more refined in recent decades, *see, e.g.*, Wikipedia, *Calendar-based contraceptive methods*.[7] E.g., *see id.*, there is the "Standard Days" method developed at Georgetown University, which is more effective than the traditional "rhythm method"; and there is now even a "Perimon" software, from Germany, for tracking female fertility cycles.

This form of contraception is not actually mandated by the Government, which is an interesting issue in itself. While calendar-based methods may not always be effective, or invasive, as barrier, drug, or surgical methods of contraception/ defertilization, still, calendar-based methods could supplement barrier, drug, or surgical methods, even if not replacing them. *See Calendar-based contraceptive methods, supra*: "The Standard Days method (SDM) . . . is satisfactory for many women and men; offering it through family planning centers results in a significant increase in contraceptive use among couples who do not want to become pregnant." *Id.*

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[7] http://en.wikipedia.org/wiki/Calendar-based_contraceptive_methods (as of 17:47 GMT, Jan. 15, 2014).

And calendar-based methods are natural ("organic", even), and thus avoid not only religious disapproval, they also avoid medical problems such as the increased risk of heart attack which some oral contraceptive pills cause.

The absence of calendar-based contraception from the Mandate raises an additional issue about how much of a "compelling interest" contraception really is for the State. If it is so compelling, why does the Mandate avoid mandating effective methods like calendar-based methods? (The pharmaceutical industry may like us to believe their pills and devices are the only way to prevent pregnancy; but that belief is false.)

(By the way, Amicus shall leave "strict scrutiny" matters like "compelling interest", "least-restrictive means", and "narrow tailoring" largely to others' briefs and commentary.)

III. THE CONTRACEPTIVES AT ISSUE CAN IN FACT BE ABORTIFACIENTS

Although some parties keep repeating that implantation, not conception, is "the proper" definition for when pregnancy occurs: that is obviously not Plaintiffs' definition. The Government (Petitioners') brief (January 10, 2014) in 13-354 explicitly admits that Plan B, ella, and the copper IUD can prevent implantation of a fertilized egg (zygote/blastocyte/embryo), *see id.* at 9 n.4; which, by Hobby/Conestoga's definition, means that a living human is being thereby aborted. The Government also admits that the progestin IUD can "alter[ ] the endometrium [uterine lining]", *id.*, which could, *cf. id.*, inhibit implantation if that alteration makes the endometrium less welcoming to an embryo.

See also generally Br. of *Amici Curiae* Physicians for Reproductive Health, *supra* at 2, on, e.g., the copper IUD:

> When used as emergency contraception, the Cu-IUD could also act to prevent implantation, due to copper's effect of altering molecules present in the endometrial lining[; h]owever, studies show that the alteration of the endometrial lining prevents rather than disrupts implantation. . . . The Cu-IUD, just like any IUD, can produce an inflammatory response in the reproductive tract and uterus that is toxic for sperm and oocytes (eggs). . . . Critically, because neither IUD has been shown to disrupt pregnancy, they too are properly classified as contraceptives, not abortifacients.

Id. at 19 (citations omitted). Those *amici* support the Government, *see id.*, but ironically, their brief supports Hobby/Conestoga's contention that an abortion from Plaintiffs' point of view is indeed happening, *see id.*

IV. ENSOULMENT AND HUMANITY FROM THE MOMENT OF CONCEPTION: A BRIEF OVERVIEW

A secularist view may be that the embryo before (or during) implantation is just a microdot of flesh, or cells, that might evolve into a human being. However, the religious may follow the ancient, and non-disprovable, idea that there is also an invisible spirit, an individual soul given by God Himself, animating and fully humanizing that tiny ball of cells. Thus, Hobby/Conestoga and similar parties may be aghast that that ensouled little human, or possibly-ensouled little human, might not be given the chance to live. *See* Wikipedia, *Ensoulment*,[8] for a Catholic view, including the recognition that one cannot be sure exactly when ensoulment occurs,

> [R]ecent findings of human biological science . . . recognize that in the zygote resulting from fertilization the biological identity of a new human individual is already constituted. Certainly no experimental datum can be in itself sufficient to bring us to the recognition of a spiritual soul; nevertheless, the conclusions of science regarding the human embryo provide a valuable indication for discerning by the use of reason a personal presence at the moment of this first appearance of a human life: how could a human individual not be a human person? The Magisterium has not expressly committed itself to an affirmation of a philosophical nature, but it constantly

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[8] http://en.wikipedia.org/wiki/Ensoulment (as of 22:40 GMT, Jan. 2, 2014).

> reaffirms the moral condemnation of any kind of procured abortion. This teaching has not been changed and is unchangeable.

Id. (citation and footnote omitted)

Some Jewish religious opinion has also supported ensoulment at conception, *see id.*

Then again, the Talmud claims the fetus is just water for the first 39 days, *see* Wikipedia, *Judaism and abortion.*[9] However, this is scientifically refutable (e.g., ultrasound images showing the fetus is hardly just "water"), as some religious assertions are. Other religious assertions are not scientifically refutable, e.g., the existence of a soul, or the time of ensoulment. Plaintiffs deserve the benefit of the doubt.

V. THE NEED FOR A LIMITING PRINCIPLE RE RELIGIOUS EXEMPTIONS FROM INSURANCE COVERAGE

However, giving Hobby/Conestoga and similarly-situated persons or businesses a religious exemption from funding contraceptives does not mean that any businessperson can blithely claim a religious exemption from doing anything he claims to think is irreligious. There is a real slippery-slope possibility here, if the exemptions granted to Plaintiffs are not narrowly-enough drawn. Such exemptions, whether drawn from the Free Exercise Clause or RFRA, could effectively make *Smith, supra* at 3, a dead letter.

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[9] http://en.wikipedia.org/wiki/Judaism_and_abortion (as of 17:30 GMT, Jan. 25, 2014).

For example, if the principle that "you don't have to give or fund medical care if it offends your spiritual sensibilities" is given unrestricted rein, then some employers could refuse to fund homosexuals' medical care, especially if they honestly feel that the gay employees will just go out and commit sodomy again, instead of being driven to godly repentance on a deathbed due to AIDS—and due to lack of medical care.

Also, say, a Jehovah's Witness businessperson could refuse to fund blood transfusions for his employees. And furthermore, an extreme Christian Scientist might refuse *any and all* medical care, since such care might show lack of faith in "faith healing". So, Amicus hopes the Court gives careful, and appropriately narrow, rationales for any exemptions given to Hobby/Conestoga.

Some issues the Court may wish to consider as part of the whole picture: non-interruptability of emergency care or immediately-lifesaving care; forbiddance of "patient-identity-based" denial of care (e.g., based on race, gender, orientation, or religion of patient); and ability of healthcare employees (or others) to avoid certain types of assignments due to issues of conscience.

However, in the instant cases, there are relatively small companies with a strong religious ethos of which employees should be considered to have had fair warning, by the overt way that the owners conducted themselves. One might assign exemptions to the corporations themselves, although perhaps preferably, the exemptions could be traceable to the owners as individuals instead, so as not to bring up possibly-unnecessary debates about the limits of corporate personhood.

Just as the "piercing the corporate veil" doctrine lets people sue owners who are using the corporate form as a smokescreen, perhaps something of the opposite effect could occur here, by which the sincere religious ethos of the owners suffuses their small corporation, or at least cannot be made impotent, i.e., unable to win exemptions from funding abortifacients, just because the owners are attached to a corporation.

However, there may be more than First Amendment-type rights and issues involved here. *Citizens United v. Federal Election Commission* (558 U.S. 310 (2010)) helped establish that corporations have substantial free speech rights, *see id. passim*. But there may or may not be exactly similar rights to avoid funding employee benefits just because the corporation does not like funding them. *Cf., e.g.*, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (infringement of some economic rights may receive more lenient scrutiny than infringement of more fundamental rights such as speech). So, how much can an "economic right", i.e., the right not to fund abortifacients, be converted into a religious one? There may be real limits, which, thankfully, the Court may not have to address fully here, since Plaintiffs have far smaller companies than AT&T or General Motors, gigantic companies which hardly have a religious ethos.

Cf. also, e.g., the famous quip, "We reject the argument that because 'person' is defined for purposes of FOIA to include a corporation, the phrase 'personal privacy' . . . reaches corporations as well. . . . We trust that AT&T will not take it personally." *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1185 (2011) (Roberts, C.J.). That is, *see id.*, corporations are not identical to actual people, so to grant them identical rights in a facile manner is unworkable. But Amicus suspects the Court can find a balance and give relief to Plaintiffs without overturning *Smith* or granting corporations plenary power to evade obligations.

Untrammeled corporate power, after all, is a real danger, and part of why many people despise the *Citizens United* decision. The Constitutional Accountability Center's pro-Government amicus brief in 13-354 (Oct. 21, 2013), largely focusing, *see id. passim*, on the limited nature of corporate rights, opposes (though wrongly so) Plaintiffs' contentions. Too, the amicus brief of California et al. supporting the Government in 13-354 (Oct. 21, 2013) mentions that those who take the corporate form must accept its disadvantages as well as its advantages, *see id.* at 6; and that, *inter alia*, it could provide unfair competitive disadvantage to corporations who obey mandates, if other corporations are given unfair exemption from them, *see id.* at 6-7. Those objections are not enough to defeat Plaintiffs' claims; there may be alternate ways to provide abortifacient contraceptives to women, and in ways that do not give unfair competitive advantage to exempted corporations, *cf. infra* section VI. But California's objections, and those of the Constitutional Accountability Center, still have a grain of truth, in that corporate power needs restrictions.

Finally, even religious institutions or groups, one hates to say, can become too powerful or too exempt from lawful oversight, as anyone burned to death by the Inquisition could tell us, or anyone who died on 9/11/2001 due to a religious-fanatic terrorist group. One of the causes of the French Revolution, it is said, was the unfair tax exemptions enjoyed by the Church in France, with peasants having to take up the slack. Quite obviously, Hobby/Conestoga are fine and upstanding religious people; but again, Amicus is making the point that religious exemptions from our laws must be carefully judged.

VI. EQUITY TOWARDS ALL PARTIES, AND SOME POSSIBLE SOLUTIONS

While Amicus is not arguing that those employers who want exemptions from funding contraceptives are *legally* obliged to offer something else in place of that missing funding, of roughly equal value to that funding, to employees: it might be an equitable consideration to this Court or others, if employers seeking exemptions did offer such "compensation", whether by reimbursement, voucher, refund, or what-have-you. Otherwise, in the "fervent Christian Scientist" scenario *supra*, that employer could omit *all* health benefits for employees, equal to approximately X substantial amount of dollars, and thus leave employees significantly worse off than employees at other firms which obey all federal mandates.

If, somehow, that employer really were allowed to provide no health benefits or insurance at all: then perhaps, in fairness, he should provide his employees some other benefit of roughly equal value, in a form to which he has no religious objection. And similarly, on a smaller and proportionate scale, for employers who omit any particular part of health coverage, due to religious feeling. It may risk being, or seeming, Pharasaic to omit providing something because of religious reasons, without being "religious" enough to show the kindness of giving something else of similar value (though something sans taint of sin).

At the very simplest level, employers could refund part of an employee's compensation package (considering the employee's company or company-tied health benefits as being such) to the employee, if the employee wants contraceptives/abortifacients that the employer is unwilling to provide. Either

a) part of the amount that the employee paid, as part of her wages, into the employer's health care fund, in proportion to the total amount the employee paid into that fund, in the ratio that the cost of the contraceptive bears to the total cost of all the services the health care fund provides; or

b) the full amount of the cost of the contraceptive itself,

could be used as the figure. Obviously, an employer might rather pay back the amount in "a", *supra*, than the probably larger amount in "b". If only the amount in "a" was paid, though, the Government could take up the slack. I.e., the employee would use her "a"-amount refund to purchase a contraceptive, and the Government would pay anything needed beyond that amount.

Courts may debate whether "a" or "b" would be the better amount for the employer to pay, or some figure or ratio between those amounts, as appropriately calculated. Part of that calculus could, say, include how well or badly employees are being treated already. For example, *see* the 1/10/2014 Br. for Pet'rs in 13-356, "Petitioners have provided generous health benefits to their approximately 950 employees, including preventive care coverage that went beyond what was required by law." *Id.* at 5. If, *see id.*, an employer is already going the extra mile, that may help lower any refund it might have to give otherwise. (Although some might counterargue, that an employee may not be using any "extra" services offered, anyway.)

It may seem too simple a solution to have employers refund some money. But if that is done, then employees are free to buy what contraceptives they want, with their own money, so that the employers are morally off the hook for what employees buy with it.

While Amicus writes on behalf of Plaintiffs, that does not mean that other persons should not receive equitable consideration either. Amicus does not want anyone to feel she has been cheated out of something owed to her. Perhaps a solution is craftable that can show due respect for all parties.

VII. GENDER EQUITY; AND, THE TIMING OF ABORTION: PRE-IMPLANTATION ABORTION IS NOT THE ONLY CHANCE TO ABORT

Indeed, if needless insensitivity has been shown to the unborn, one should not show needless insensitivity to women who wish to avoid pregnancy, either. Some feel that considerable gains have been made for women in the past few decades *vis-à-vis* reproductive freedom, so that those gains, some feel, should not be reversed.

Amicus would not wish an unwanted pregnancy on anyone, but he would not wish any preborn child dead, either. So is compromise possible? and is gender equity possible?

As a first observation, one guesses that at least half of abortees are women (especially given some cultures' devaluing of female children), giving "violence against women" a new, if unheralded, meaning. Second, even if it is an inconvenience to a woman to let her own child live (*but see* Yitta Schwartz, *infra*, who managed to have thousands of descendants with pleasure), there are other ways to promote equality for women, such as extending the military draft to them, or banning sex-selective abortions (which may overly select female fetuses, not male ones, for death), or greater funding for rape kits so that more rapists can be caught, or promoting equal pay for equal work, or improving childcare possibilities. If Hobby/Conestoga have undertaken any special efforts toward gender equity (e.g., a serious effort to promote deserving women to higher positions), they may want to let us all know, soon.

And in the instant cases, the measures in section VI, *supra*, on possible refund or alternative funding for abortifacient contraceptives, can help promote equity for women.

An unwanted pregnancy can be a very ugly situation, as can an abortion. But abortion can always occur later on, after implantation of the embryo, if an abortifacient "contraceptive" is not available initially. So even if that abortifacient is not initially available, that is not the last chance to abort. There may be multiple chances, later on. And *cf. Carhart*, *supra* at 4: "[I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained", *id.* at 159 (Kennedy, J.); so that there may be a silver lining, for not having a quick abortion via abortifacient contraceptive, e.g., that the woman may later find herself happy to have the baby after all.

These factors should militate against Plaintiffs having to fund abortifacients.

VIII. ABORTIFACIENTS AS CANCER-CURE: A BAD AND BORGESIAN IDEA TO FORCE ON PLAINTIFFS

Also relating somewhat to gender equity: the pre-certiorari Brief of Amicus Curiae the Ovarian National Cancer Alliance in Support of Petitioners in 13-354 (undated) says, *see id. passim*, that exemptions from the Mandate would cause a lack of the abortifacient contraceptives and thus hamper the fight against ovarian and other cancers, since those contraceptives may act as risk-reducing treatments.

This should be taken seriously. However, another consideration comes from the following quote by Jorge Luis Borges:[10] "Among Paul Valéry's jottings, André Maurois observes the following: 'Idea for a frightening story: it is discovered that the only remedy for cancer is living human flesh. Consequences.'" *Id.*

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[10] *Available at*, e.g., William H. Gass, *Imaginary Borges*, N.Y. Rev. of Books, Nov. 20, 1969, http://www.nybooks.com/articles/archives/1969/nov/20/imaginary-borges/.

Frighteningly enough, that scenario is more or less come to pass, that a purported way to prevent cancer is to take abortifacients which will indeed likely have the consequence of killing "living human flesh", *id.*, i.e., the embryo, as an effect of using those contraceptives. Quite a price to pay.

Of course, there may be other remedies for cancer. And many people will be able to afford to buy the abortifacient contraceptives on their own money anyway.

However, if there really is a need for those contraceptives as a counter-cancer measure, then instead of risking violating strict scrutiny, it may be right for, say, the Government to use the less restrictive means of providing those drugs itself, free or on discount, to women who cannot easily afford them. It is possible to be considerate both to those women and to Hobby/Conestoga.

IX. YITTA SCHWARTZ AND HER 2000 LIVING DESCENDANTS; OR, "EVERY EMBRYO IS A POTENTIAL PRESIDENT (OR JUSTICE)"

When Hobby/Conestoga want to avoid assisting abortion, by the way, they may not be thinking about just the present, but the future that an abortion might eliminate.

See, e.g., the *New York Times* story *God Said Multiply, and Did She Ever*[11], which remembers Yitta Schwartz, the highly fertile Satmar Hasidic woman who survived the Holocaust before moving to New York, and who, dying at 93, left an estimated 2000 living descendants. One does not know if any of her descendants had abortions ("perish the thought"); but what if Yitta had been aborted herself? All her descendants, and all *their* descendants (who could eventually number in the billions, scattered across the galaxies, for all we know), would never have existed. In scientific or science-fictional terms, there are whole "timelines", or "parallel universes" that would have been wiped out if Yitta had been destroyed in the womb, and thus, all her descendants with her.

Amicus shall note that of the tens of millions of preborns who perished following *Roe v. Wade* (410 U.S. 113 (1973)), many of them, or their children, may have made fine Supreme Court Justices, or fine Presidents, etc. By protecting Plaintiffs from funding abortifacients, then, we may not only protect Plaintiffs' consciences, we may even safeguard our Nation's future as well. *Cf.* U.S. Const. pmbl., "for ourselves and our *posterity*", *id.* (emphasis added).

See also Rabbi Jacob Neusner, *Matters of Opinion: Israel's Holocaust*, Christianity Today, Oct. 26, 1998. 12:00 a.m.,[12]

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[11] Joseph Berger, Feb. 19, 2010, corrected Feb. 28, 2010, http://www.nytimes.com/2010/02/21/nyregion/21yitta.html?_r=0.

[12] http://www.christianitytoday.com/ct/1998/october26/8tc085.html.

> We Jews are experienced in suffering murder, and we preserve the memory of the victims and their murderers. . . . That is why I ask, how is mass abortion in the State of Israel such as is practiced by the secular (but not the religious) portion of the Israeli population not comparable to mass murder of Jewish children in German Europe? . . . As the numbers mount up, when do considerations of volume enter in and validate calling the annihilation of millions of lives "a Holocaust"? I think they do. Here is a Holocaust today. Every Jewish child born in the State of Israel is a survivor of the Holocaust sustained by Israeli law.

Id. Amicus is not endorsing the Rabbi's viewpoint; some may find Neusner's viewpoint brilliant, others may find it offensive. But that fascinating viewpoint, see *id.*, gives some resonance to the poignancy of what would have happened if Yitta Schwartz (and descendants) were aborted. And the poignancy of how ugly it would be to force Plaintiffs to fund abortion.

X. EXPRESSIVE HELP AND EXPRESSIVE HARM IN *CASEY* AND *CARHART* RE ABORTION, THE STATE, THE INDIVIDUAL, AND RESPECT FOR THE UNBORN

Fleeing from "ugliness", *supra*: one of the loveliest things any Court has written is, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S. at 851 (Kennedy, O'Connor, and Souter, JJ.). That "right", *id.*, should be allowed to Plaintiffs as well. As quaint or otherworldly as some might think Plaintiffs' views are, Plaintiffs have a right not to privately subsidize others' abortions, since Plaintiffs think abortions disrespect "the mystery of human life", *id.*

Some may rejoin that that right in *Casey* pertains to individuals, not corporations; but in the present circumstances, the individual Plaintiffs who are so entwined with the running of their corporations in a moral way, should also have that right.

Part of this right is an expressive dimension, a method of moral messaging, which has precedent in *Casey* and elsewhere. Even the State is allowed to send a strong message of respect for preborn life, instead of just being a "neutral arbiter" or "inhuman bureaucracy": "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her [the mother] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term", *id.* at 872; "Regulations which do no more than create a structural mechanism by which the State . . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose", *id.* at 877.

And refusal to fund abortifacients is not a "substantial obstacle" to employees' rights, *id.*, considering all the alternative means of abortifacient delivery available, such as provision by the

Government. In fact, it is not a per se *obstacle* at all, since refusal-to-fund does not violate any "negative liberty", any right to be free from State coercion. It merely denies what at most might be called a "positive liberty", i.e., a State-created entitlement to abortifacient drugs or devices. The famous 24-hour waiting period upheld in *Casey*, *see id.* at, e.g., 844, is far more intrusive on pregnant women's "negative liberty" than a mere refusal to fund abortifacients.

Casey's protection of the State's expressive help (a term Amicus is coining in imitation of the phrase "expressive harm", i.e., harm the State does in the mere message a statute sends) in respecting unborn life protects the *State's* rights to do so; but it can also be extended to individuals like Plaintiffs and their expressive rights. Amicus believes that for Hobby/ Conestoga, this case is not mostly about the money, e.g., trying to "cheat" employees out of some quantum of money by some pretextual claim that Hobby/Conestoga are against abortifacients. Therefore, this case may be largely about expressive issues. (It is also about money to an extent, but Amicus has spoken about that, *see supra* part VI.)

Besides *Casey*, by the way, the more recent case of *Carhart*, *supra* at 4, notes, "The [Partial-Birth Abortion Ban] Act expresses respect for the dignity of human life. . . . The government may use its voice and its regulatory authority to show its profound respect for the life within the woman", *id.* at 157;

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns,

> only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.
> . . . The medical profession . . . . may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. . . .
> . . . It was reasonable for Congress to think that partial-birth abortion . . . . "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world."

Id. at 159-60 (Kennedy, J.) (citation omitted). So, issues like "shock[ ], *id.* at 160, "appropriate role", *id.*, and "perver[sion]", *id.*, despite sounding rather moralistic, are of constitutional dimension, *see id.* (*Pace* the *Carhart* dissent of Justice Ruth Bader Ginsburg, decrying the Court majority's "'moral concerns'", which she puts in quotes, *id.* at 182, 186.) Hence, "shame issues" or "dishonor issues" related to the perceived horror of abortion are, per *Carhart*, issues which may allow Plaintiffs the legal right not to be ashamed, i.e., the right to avoid funding abortifacients, since Plaintiffs clearly wish "to show [their] profound respect for the life within the woman", 550 U.S. at 157.

XI. AMERICAN PUBLIC OPINION ON HAVING TO PAY FOR SOMEONE ELSE'S ABORTION

And traditionally, many Americans have not been happy about paying for other people's abortions. One popular-culture example is in the film *Dirty Dancing*,[13] despite that film's being, *cf. id.*, a relatively lax or "pro-choice" film about the morality of abortion (a hotel worker's abortion is not treated as a moral issue *per se* at all, but more as a "convenience" or "employability" issue). The main character (Frances "Baby" Houseman, played by Jennifer Grey) borrows money from her father, Dr. Jake Houseman (played by Jerry Orbach) to help the hotel worker get an abortion, but "Baby" (a strange name for an abortion advocate…) deliberately fails to tell him what the money is for, *see id.* He eventually finds out what the money was used for and is very unhappy about it and about Baby's breach of trust with him, *see id.* This scenario illustrates fairly well what many Americans think about abortion, i.e., "We won't stop you; but you better pay for it yourself." *See, e.g.*, the Hyde Amendment (seriously limiting federal funding for abortions).[14]

Having to pay for abortions through tax money may be considered too attenuated for Americans to have a legal claim about; but as for the more direct funding of abortion resulting from the Mandate, Plaintiffs should be able to avoid that without suffering crippling, unjust fees or penalties.

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[13] Directed by Emile Ardolino (Great American Films Limited Partnership/Vestron Pictures 1987)

[14] Pub. L. 94-439, tit. II, § 209, 90 Stat. 1434 (1976; amended 2009).

XII. *CASEY'S* WARPING OF THE STRICT-SCRUTINY STANDARD, AND HOW THAT FAVORS HOBBY/CONESTOGA

Casey also shows that abortion is considered so profound an issue that it was actually able to warp the former standard of scrutiny used on abortion regulations, strict scrutiny, to a lower level of scrutiny, "undue burden": "Abortion is a unique act. It is an act fraught with consequences[,] depending on one's beliefs, for the life or potential life that is aborted." 505 U.S. at 852; "Those cases [following *Roe v. Wade*] decided that any regulation touching upon the abortion decision must survive strict scrutiny", *id.* at 871; "In our view, the undue burden standard is [now] appropriate[.]" *Id.* at 876.

This being so, i.e., that Government is more easily able to stand up for unborn life now: then, private citizens should also be able to stand up for unborn life in a relatively untrammeled way, without coercion from the Mandate. Conversely, Government's weapons against Hobby/Lobby and other people of conscience should be fairly limited, after *Casey*'s show of respect for the unborn. Individuals have legal rights to abort, but should also have rights not to, and not to assist abortion.

In that light, some issues of individual conscience are explored below.

XIII. COMBATING THE LACK OF MORAL IMAGINATION AND SYMPATHY TOWARDS THE UNBORN AND THEIR DEFENDERS

Peter O'Toole: "I will not be a common man," he once raged. "I will stir the smooth sands of monotony." Xan Brooks, *Peter O'Toole: a career in clips*, The Guardian (London), Dec. 15, 2013, 6:58 p.m.[15] Like cinema's "Lawrence of Arabia" (RIP), *cf. id.*, if somewhat less feisty, Hobby/Conestoga have decided to be individualists and follow their consciences, even if the State is not happy. And while the State apparently means well with its Mandate, the Mandate is overly coercive towards people of conscience.

Hobby Lobby and Conestoga seem very sincere about their beliefs; and even though they should not suffer for them, they seem be willing to, in a manner which may be seen as heroic in the old and noble style. *See, e.g.*, Georg Friedrich Handel's oratorio *Theodora* (1749) (Christian noblewoman sent to brothel by brutal Roman officials, then martyred by authorities for refusing to worship Roman gods); 2 *Maccabees*, ch. 7, *passim* (religious Jews under foreign occupation refuse to eat pork, even at the cost of their torture and deaths).

Devout Christians, Jews, and others may take horrible offense at performing certain actions, and it is untoward for the State to bludgeon them into doing so, when many alternatives abound.

Sometimes people like Plaintiffs are lampooned, falsely, as a bunch of Bible-thumping stupid hicks who hate sex. The mass media are frequent lampooners, *cf., e.g.*, British comedy troupe Monty Python's infamous song *Every Sperm Is Sacred* (from their film *Monty Python's The Meaning of Life*[16]), which, *see id.*, mocks traditional Christian morality on reproductive matters. However, not only is Python's humor vulgar and insulting, it does not deal with a fertilized egg, which can develop into a human being in a way that a mere sperm cell, or unfertilized egg, cannot. To Plaintiffs, the embryo *is* sacred; and that's no joke.

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[15] http://www.theguardian.com/film/filmblog/2013/dec/15/peter-o-toole-dies-81-movies-clips.

[16] Directed by Terry Jones (Universal Pictures 1983).

Nor is death really funny, including an embryo's death. Though there may be a resurrection at the end of the world: until then, death is monstrously final. When someone is aborted, it is difficult to unabort that person. That's it; no second chance.

Death may be merely a joke on, say, the current FX network television series *American Horror Story: Coven*,[17] where, *see id.*, the titular coven's Supreme Witch (called "the Supreme"), Fiona Goode (played by Jessica Lange), can simply resurrect people from the dead, with a magic spell, at the drop of a pointed hat. By contrast, this (Supreme) Court cannot bring anyone back from the dead; but it can certainly show respect to those, such as Plaintiffs, who really do not want to kill people, especially seeing the horrific permanence and irreversibility of death.

All Plaintiffs are asking is to be spared the "red hands of Herod", complicity in slaughtering the innocent. *See Matthew* 2:16-18 (King Herod orders slaughter of children).

(One pictorial presentation of what may Plaintiffs feel abortion is like is Francisco Goya, *Saturn Eating*

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[17] 20th Century Fox Television/Ryan Murphy Prods. 2013-14.

His Children (1819-1823).[18] The ghastly vision, *see id.*, reminds us of the ugliness of filicide.)

If, after the above, it is still hard for some, including hardcore secularists, to realize how religious people (or even secularists with sympathy for the young) may ascribe humanity to an embryo, a description of the unimplanted embryo which draws on modern popular culture may offer some illustration.

The recent film *Gravity*,[19] *see id.*, features an astronaut, Dr. Ryan Stone (played by Sandra Bullock) who, after a disaster, is alive but stranded far above the Earth, and has to make great efforts to escape from the cold of space, back to the warm and welcoming planet below. Due partially to the heroic efforts of another astronaut, Matt Kowalski (played by George Clooney), she successfully manages to wend her way down to the womb of the earth.

Her journey is remarkably similar to that of the newly-fertilized embryo to the womb for implantation, hoping (if one may ascribe emotion) not to die before making it to safety.[20] The embryo, zygote, or blastocyte, by whatever name, is lone; miniscule; vulnerable; and human, by the reckoning of many people.

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[18] *Available at*, e.g., http://eeweems.com/goya/saturn.html (courtesy of Erik E. Weems).

[19] Directed by Alfonso Cuarón (Esperanto Filmoj/Heyday Films/ Warner Bros. Pictures 2013).

[20] The theme of being tragically, perilously "lost in space" is also found in, e.g., David Bowie's 1969 (Philips/Mercury/RCA) hit rock song *Space Oddity*—a pun on "Space Odyssey"—about fictional astronaut Major Tom, in danger of death: "This is Ground Control to Major Tom/…./Your circuit's dead, there's something wrong/Can you hear me, Major Tom?/…./'Here am I floating round my tin can/Far above the Moon/Planet Earth is blue and there's nothing I can do'", *id.* Outer space makes a fine metaphor, *cf. id.*, for the inner space the embryo inhabits, the

What the Mandate does is to take people, Plaintiffs, who want to help (or not to hurt) the nascent, embryonic child, just as the Clooney character *supra* is trying to help the Bullock character; and punishes those people if they won't agree to hurt the embryo by preventing it from making its way to safety. (Or by funding someone to perform that act of prevention.)

Imagine if *Gravity* had been made with Kowalski trying to *prevent* Stone from getting back to Earth. That would be quite a shocker. And whereas that film is fiction, in real life, every day, the embryo, in every woman with a fertilized ovum, yearns for a womb in which to be implanted and make its way, nine months hence, to its full humanity out among us in the wide world. All that Plaintiffs are asking for is not to be involved in the cruelty of deliberately preventing that from happening. Amicus hopes that that is not too much to ask of the Court.

XIV. THE STRANGE CURVATURE OF SOME IDEAS FROM JURISTIC ACADEME ABOUT THE VALUE OF THE UNBORN

Another venue of insensitivity towards the unborn has been legal academia. One example is the famous (or to some, infamous) article, Laurence H. Tribe, *The Curvature of Constitutional Space: What*

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embryo that all of us have been at some point inside our mothers: facing a lonely death at any moment, beyond everyday human sight, and maybe beyond help, though not beyond being fatally hurt.

Lawyers Can Learn from Modern Physics, 103 Harv. L. Rev. 1 (1989), which featured, *see id.* at introductory n., a certain Barack Obama as a research/editorial aide. This essay, *see id. passim*, colorfully borrows from quantum and Einsteinian physics to present a "post-Newtonian" view of the Constitution. However, "pre-Newtonian" ideas such as consistency (or lack of it) may come into play as well.

The essay appropriately expresses dismay at the way the law treated an abused young man who died, Joshua DeShaney, *see id.* at, e.g., 8. Tribe concludes by bemoaning "the geometry of public indifference that will shape the lives of Joshuas yet unborn." *Id.* at 39.

The problem is that much of the essay is also marked by indifference to the *unborn, see id.*:

> [I]t seems extraordinarily difficult to justify the constitutional distinction . . . . between the state's power to *require* an abortion in certain circumstances and the state's power to *forbid* one. . . .
>
> . . . .
>
> The *Roe v. Wade* opinion . . . . conceptualized abortion not in terms of the intensely *public* question of the subordination of women to men through the exploitation of pregnancy, but in terms of the purportedly *private* question of how women might make intimately personal decisions about their bodies and their lives. That vision described a part of the truth, but only

> what might be called the Newtonian part.

Id. at 14, 16. These observations seem to miss the common-sense observation, one that is not "extraordinarily difficult", *id.*, that maybe human life is worth preserving, and various possible corollaries of that idea, e.g., that little children don't like to be killed; that horrific fetal pain may occur during fetal dismemberment or "termination"; etc. Maybe *that* "justif[ies] the constitutional distinction . . . . between the state's power to *require* an abortion[,] and the state's power to *forbid* one", *id.* at 14.

(*See* again, "The government may use its voice and its regulatory authority to show its profound respect for the life within the woman", *Carhart*, 550 U.S. at 157.)

So for Tribe, *Roe v. Wade* was apparently too *right-wing* a decision, *see Curvature*, *supra*, at 16; interesting, seeing that c. 55 million abortions have occurred in America since that case. That figure could make an argument that America has been wandering in a moral desert for the forty-some years since *Roe*, but one suspects Tribe might not think so.

Tribe's ideas are not wholly valueless: of course, the idea of preventing the subordination of women is important. But maybe the idea of preventing the subordination of young women in the womb, or young men in the womb, by their needless killing, is not valueless either. That, too, is "a part of the truth", *Curvature*, *supra*, at 16.

Curvature's own, if unwitting, "indifference" towards the helpless and innocent tribe of the "unborn" *in general*, right after it laments the

"Joshuas yet *unborn*", *id.* at 39 (emphasis added), is not inspiring, either in level of consistency or in anything else.

Interestingly, Tribe's protégé, Mr. Obama, has been called out for amazing indifference to the unborn—and maybe even his own grandchildren at that. *See, e.g.*, David Brody, *Obama Says He Doesn't Want His Daughters Punished with a Baby*, CBN News, The Brody File, Mar. 31, 2008, 4:00 a.m.,[21] "At a town hall meeting [re contraception and other matters] . . . , Barack Obama told the crowd that he didn't want his daughters, 'punished with a baby.'" *Id.* "Punished"? Quite a term to use in regard to nascent human life.

Without drawing an explicit line of descent from 1) Tribe's *Curvature*, to 2) Obama's opinion of the unborn, and then 3) the abortifacient mandate—and its lack of exceptions—in the instant cases (passed by Obama and Democrats as part of "health reform"): one still notes that insensitivity about the unborn is unwelcome, whether from academics or anyone else. Amicus hopes a sensitive and consistent legal solution to Plaintiffs' prayers is available. After all, the Court has recently given us a nuanced solution in another case.

XV. SOME MODERATE LESSONS FROM THE *LITTLE SISTERS* ORDER OF JANUARY 24

From the Court's Order in 13A691 (Jan. 24, 2014), *Little Sisters of the Poor*, *supra* at 4, some on Plaintiffs' side may draw the automatic conclusion that this is a good omen and that Plaintiffs must therefore get all relief desired. Those on the other side may call the order a mere temporary nuisance. Both may be wrong, judging by the order's text, in pertinent part:

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[21] http://blogs.cbn.com/thebrodyfile/archive/2008/03/31/obama-says-he-doesnt-want-his-daughters-punished-with-a.aspx.

> If the employer applicants inform [HHS] in writing that they are non-profit organizations that hold themselves out as religious and have religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicants the challenged provisions[. A]pplicants need not use the form prescribed by the Government and need not send copies to third-party administrators. The Court issues this order based on all of the circumstances of the case, and this order should not be construed as an expression of the Court's views on the merits.

Id.

This is something of a compromise, *see id.*, as various commentators have noted; after all, the Little Sisters still have to send in *some* written information, which, someone could argue, is *itself* a "State-imposed requirement" and a "trigger" for the Government distributing contraceptives, and thus immoral. (Amicus is not arguing for that, simply saying that someone could.)

But it is also clearly a victory for the Little Sisters, as, *see id.*, they do not have to fill in the particular form that was officially designated as a "trigger" for contraceptive distribution. At least, the quantum of perceived expressive harm for the Sisters has been lowered, call it "symbolic" victory or not.

Some lessons to be drawn here include the value of creative solutions and moderation. The Court avoided an extreme decision for either side. It may be good if this happens again.

(The January 27, 2014 pro-Government amicus brief in 13-354 of the Freedom from Religion Foundation et al. recommends, *see id. passim*, the *overturning of RFRA*. Amicus feels this sort of immoderate proposal is a guide as to the spirit the Court should *not* have in these cases.)

XVI. IF THERE IS A FINE, IT SHOULD BE MINIMAL, CONSIDERING CIRCUMSTANCES

After all this, the Court may still disagree with Plaintiffs and believe there should still be a fine/penalty for noncompliance with the Mandate. In that event, Amicus recommends that there be no more than a nominal fine, even a $1 essentially-symbolic fine.

This is not to show favoritism to corporations or to flout the law, but because Plaintiffs have shown such revulsion to providing abortifacients, and because there are so many other ways to provide people abortifacients. Thus, due process and fairness would militate that a fine be as low as reasonably possible. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (due process may limit amount of damages paid).

This fine may interrelate with the equity factors discussed in section VI, *supra*. For example, if the Court were to rule that the fine will be the same as, or can be no greater, than the total amount that all employees of a Mandate-exempted company spend, out-of-pocket, or with a Government loan, for contraceptives, that might seem fair to some. Or alternately, that the fine can be no greater than the amount of employees' wages that would have been spent to pay insurers for contraceptive coverage, coverage that is denied to those employees.

CONCLUSION

Amicus respectfully asks the Court to uphold the court of appeals' judgment in *Hobby Lobby*, and to reverse the court of appeals' judgment in *Conestoga*, considering whatever issues or equities need to be considered along the way; and humbly thanks the Court for its time and consideration.

January 28, 2014 Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS,

v.

HOBBY LOBBY STORES, INC., ET AL., RESPONDENTS.

CONESTOGA WOOD SPECIALTIES CORP, ET AL., PETITIONERS,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., RESPONDENTS.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF THE HON. DANIEL H. BRANCH AS AMICUS CURIAE SUPPORTING RESPONDENTS IN CASE NO. 13-354 AND PETITIONERS IN CASE NO. 13-356

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INTEREST OF AMICUS CURIAE[1]

As a member of the House of Representatives for the State of Texas, it is my solemn responsibility to preserve and protect the constitutional rights of the citizens of Texas, including their right to freely exercise their sincere religious beliefs, as protected by the First Amendment to the United States Constitution.

In that role, I have written and fought for the passage of legislation recognizing the fundamental role that religion plays in the daily lives of Texans—and then worked with the Texas Attorney General's office to ensure that those laws were upheld in the courts. *See, e.g.*, TEX. EDUC. CODE § 25.082(d) ("each school district shall provide for the observance of one minute of silence . . . During the one-minute period, each student may . . . pray . . .); *Croft v. Perry*, 624 F.3d 157 (5th Cir. 2010) (upholding moment of silence law).

I submit this amicus brief today to prevent the federal government from forcing employers, including many employers in Texas, to violate their heartfelt religious convictions.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the petitioners in both cases, and the respondents in Case No. 13-356, has filed a letter pursuant to Supreme Court Rule 37.3(a) reflecting consent to the filing of amicus curiae briefs in support of either party. Counsel of record for the respondents in Case No. 13-354 has individually consented to the filing of this amicus brief.

SUMMARY OF THE ARGUMENT

The Patient Protection and Affordable Care Act of 2010 ("ACA") has already upended the limits on federal power set forth in the United States Constitution and intruded on the private lives of all Americans. *See Nat. Fedn. of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2642-77 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

But this current presidential administration has chosen to go even further. It has now promulgated administrative regulations that require, among other things, certain employers to provide contraceptive coverage to their employees, even when doing so would violate the employers' sincere religious beliefs.

The HHS Mandate is plainly a violation of their First Amendment right to freely exercise their religious beliefs, as well as a substantial burden on religious exercise, in violation of the Religious Freedom Restoration Act ("RFRA")

As an initial matter, it is critical that the religious beliefs of the challengers to the administration's mandate—and, indeed, the beliefs of all conscientious objectors to this administration's mandate—goes unquestioned. It is simply not the role of the courts to second-guess sincerely held religious doctrine. And yet that precisely is what courts in these two cases have repeatedly done, and that approach must be soundly rejected.

Once the precise nature of the religious objections to the HHS Mandate is understood, the illegality of the mandate becomes readily apparent. The mandate commands employers to engage in practices that run directly contrary to their religious convictions, or suffer ruinous penalties. That is plainly a substantial burden on religious exercise, in violation of RFRA.

Moreover, the HHS Mandate is *not* a rule of general applicability under the First Amendment, because, among other things, this Administration has excepted a number of other entities from its dictates for secular purposes—but refuses to do the same for those with sincere religious objections to the mandate.

Thus, the *only* way for the HHS Mandate to survive is if the Administration can justify it under strict scrutiny—which it cannot. Indeed, the mandate fails every single step of the strict scrutiny analysis: it does not serve a compelling interest; it does not advance the non-compelling interest the Administration has identified; and it is not narrowly tailored to serve that non-compelling interest.

The HHS Mandate is unconstitutional and illegal and must be struck down.

ARGUMENT

I. It Is Not The Role Of The Courts To Second-Guess The Sincerely Held Religious Beliefs Of Individuals Or Institutions.

Both the First Amendment and RFRA protect the right to freely exercise one's religious beliefs, against all manner of interference by the government—both explicit and subtle. These cases display both of these forms of government intrusion on religious liberty.

To begin with, the HHS Mandate coerces employers to either violate their own sincerely-held religious beliefs, or suffer significant financial penalties at the hands of the federal government.

Moreover, in upholding the HHS Mandate despite this direct intrusion on religious belief, the district courts in these cases engaged themselves in a particularly pernicious form of religious oppression: Both courts purported to decide for the employers what they believe as a matter of faith, in the course of deciding whether or not the government had in fact trampled upon those beliefs.

In doing so, the district court violated this Court's repeated admonitions that it is emphatically *not* the role of the courts to second-guess the accuracy of an individual or institution's conviction that certain activities or beliefs are central to or required by their particular religious creed:

> [I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.

Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 887 (1990) (quotations and citations omitted). *See also Hobbie v. Unemployment Appeals Comm.*, 480 U.S. 136, 144 n. 9 (1987) ("In applying the Free Exercise Clause, courts may not inquire into the truth, validity, or reasonableness of a claimant's religious beliefs.").

It is difficult to imagine a more plain command: do not question sincerely held religious beliefs. And yet it is a command that the district courts in both of these cases ignored.

For example, consider how the Eastern District of

Pennsylvania attempted to characterize the religious beliefs animating the plaintiffs' objections in the *Conestoga Wood Specialties Corp.* case—and then, having moved the goalposts, dismissed any effect the HHS Mandate would have on the court's newly formulated interpretation of the plaintiffs' religious beliefs:

> **[T]he core of the Hahns' religious objection is the effect of particular contraceptives on a fertilized egg.** Given that focus, it is worth emphasizing that the ultimate and deeply private choice to use an abortifacient contraceptive rests not with the Hahns, but with Conestoga's employees. The fact that Conestoga's employees are free to look outside of their insurance coverage and pay for and use any contraception, including abortifacients, through the salary they receive from Conestoga, amply illustrates this point.
>
> We also find that any burden imposed by the regulations is too attenuated to be considered substantial. A series of events must first occur before the actual use of an abortifacient would come into play. These events include: the payment for insurance to a group health insurance plan that will cover contraceptive services (and a wide range of other health care services); the abortifacients must be made available to Conestoga employees through a pharmacy or other healthcare facility; and a decision must be made by a Conestoga employee and her doctor, who may or may not choose to

> avail themselves to these services.

Conestoga Wood Specialities Corp. v. Sebelius, 917 F. Supp. 2d 394, 414-415 (E.D. Pa. 2013) (emphasis added).

The Western District of Oklahoma made a similar attempt to recharacterize the precise nature of the plaintiffs' religious beliefs before rejecting their challenge to the mandate:

> [T]he particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [Hobby Lobby's] plan, subsidize someone else's participation in an activity that is condemned by plaintiff's religion.

Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012) (quotations and citation omitted).

As those passages reflect, the district courts essentially held that the plaintiffs—regardless of what they were telling the courts—should be deemed to in fact be challenging the HHS Mandate on the grounds that their "core" religious beliefs prohibited nothing more than the usage of particular contraceptives by any individual.

But not only was that beyond the power of the courts to determine, it was utterly incorrect. Both courts fundamentally misunderstood the religious principles that have animated many of the challenges to the HHS Mandate, including the ones at issue in these two cases.

Objectors to the HHS Mandate are not merely exercising some generalized objection to the usage of certain contraceptives—such that courts could explain away this objection by pointing to the alleged "attenuated circumstances" leading to the actual decision to use those contraceptive products by someone else.

Rather, the religious convictions of the challengers to the HHS Mandate actually prohibit them from being involved in the coverage of such contraceptives—that is to say, just facilitating (let alone paying for) that type of coverage is itself a violation of their core religious beliefs. *See, e.g.*, *Korte* v. *Sebelius*, 528 Fed. Appx. 583, 587 (7th Cir. 2012) ("The religious liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services.") (emphasis in original).

Once the religious objections to the HHS Mandate in these cases are accurately understood—and not distorted in service of the Administration's objectives—the analysis employed by both district courts quickly fails.

Moreover, these cases illustrate precisely why courts should not be in the business of parsing private religious doctrine in the first place. *See, e.g.*, *Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009) ("The judiciary is ill-suited to opine on theological matters, and should avoid doing so.") (citing *Smith*, 494 U.S. at 887).

The sincere belief that compliance with the HHS Mandate is contrary to one's religious practice should go unquestioned—and, more to the point, should not be rewritten by the courts. Instead, the question a court should ask is simple: Do the litigants sincerely believe in their stated religious doctrines, no matter what those doctrines may be? Here, the answer to that question is simple: yes.

But the district courts' actions in these two cases demonstrate, once again, the need for this Court to make clear that courts may not distort or rewrite the content of one's religious beliefs. The robust protection of religious liberty under the First Amendment and RFRA requires nothing less.

II. The HHS Mandate Is Subject To Strict Scrutiny Under The First Amendment Because It Is Not A Rule Of General Applicability.

Under the First Amendment, the government may not prohibit the free exercise of religion. U.S. Const. amend. I. Consequently, courts have held that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

That is precisely the case here. As others have detailed, the ACA itself already provides for numerous secular exemptions from the HHA Mandate mandate—*e.g.*, grandfathered plans, small businesses—while refusing to similarly exempt employers whose sincere religious beliefs are violated by conforming to the HHS Mandate. *See, e.g.*, Brief of Petitioners, at 43-48, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (U.S.).

That is the very definition of selective application—not neutrality or general applicability.

See, e.g., Church of the Lukumi Babalu Aye, 508 U.S. at 537 ("in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason" (quotations and citation omitted)).

III. The HHS Mandate Is Subject To Strict Scrutiny Under RFRA Because It Creates A Substantial Burden On Religious Exercise.

RFRA ensures that courts apply strict scrutiny to laws that substantially burden religion, no matter what the intention behind those laws. After all, "laws 'neutral' towards religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2). Thus, even if this burden on religious liberty was an unintended consequence of the HHS Mandate, the Administration is required to come forward with a compelling interest justifying their actions. *See, e.g., Sherbert v. Verner*, 374 U.S. 398, 403 (1962).

And make no mistake: the burden placed on the religious exercise of employers is substantial. The HHS mandate forces employers to ignore central tenets of their faith—refraining from facilitating or paying for health care coverage that includes certain contraceptive items—or face staggering penalties. That is a textbook substantial burden. *See, e.g., id.* at 404; *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972). *See also* Brief of Petitioners, at 32-43, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (U.S.) (detailing the substantial burden the HHS mandate imposes on the religious exercise of employers).

Indeed, the monetary penalty for exercising one's religious convictions and refusing to pay for insurance that offers contraceptive coverage "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." *Sherbert*, 374 U.S. at 404.

IV. The Administration Cannot Satisfy Strict Scrutiny Because The HHS Mandate Fails To Serve A Compelling Interest, And Is Not Narrowly Tailored To Serve The Interest Claimed By The Administration.

Strict scrutiny is, without a doubt, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). After all, the rule commands that a law "is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye*, 508 U.S. at 533 (1993).

It is no surprise, then, that the government cannot meet this burden. Not only does the contraception mandate fail to serve a *compelling* interest, it does not even serve the interests that the government proffers in its defense, nor is it narrowly tailored to do so. *See* Brief of Petitioners, *Conestoga Wood Specialties Corp. v. Sebelius*, at 48-66, No. 13-356 (U.S.)

* * *

This Administration has chosen to enforce a mandate that serves no compelling purpose, but nonetheless forces countless individuals and institutions to choose between violating their sincerely held religious beliefs or face draconian sanctions. That is plainly a violation of the First Amendment and RFRA.

CONCLUSION

The decision of the U.S. Court of Appeals for the Third Circuit should be reversed and the decision of the U.S. Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

FILED
[illegible]
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Nos. 13-354 & 13-356

In The Supreme Court of the United States

◆

KATHLEEN SEBELIUS, ET AL.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,

Respondents.

◆

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,

Petitioners,

v.

KATHLEEN SEBELIUS, ET AL.,

Respondents.

◆

On Writs Of Certiorari To The United States Courts Of Appeals For The Tenth And Third Circuits

◆

BRIEF OF THE BREAST CANCER PREVENTION INSTITUTE, POLYCARP RESEARCH INSTITUTE, COALITION ON ABORTION BREAST CANCER, 286 MEMBERS OF LEGATUS AND CATHOLICVOTE AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY, ET AL., AND CONESTOGA, ET AL.

◆

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QUESTION PRESENTED

Whether the HHS Mandate that violates the free exercise rights of individuals, business owners and their companies fails to "further" the asserted compelling interest in promoting women's "preventive" healthcare when the Government selectively ignored widely-accepted research showing that certain contraceptive drugs significantly increase risks of breast, cervical and liver cancer, as well as research showing significantly increased risks of other serious diseases, including HIV, stroke and heart attack.

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INTEREST OF *AMICI CURIAE*[1]

The research and health advocacy organizations represented as *Amici Curiae* herein have an interest in bringing this Court's attention to the fact that, in promulgating the HHS Mandate,[2] the Government selectively ignored and wholly disregarded a large body of relevant, widely available, scientifically sound, scholarly research. The research surveyed for this Court shows that some of the contraceptive drugs have been classified as carcinogens, and that each of the contraceptive drugs and devices have been shown to significantly increase risks of other serious health conditions, including HIV, stroke and heart attack. Recently, the majority opinion in the D.C. Circuit *Gilardi* case took note of *Amici*'s premise, stating that the scientific evidence "may actually undermine the government's cause."[3]

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[1] Counsel for all parties have consented to the filing of this brief. Their consent letters are on file with the Clerk. No counsel for any party authored any part of this brief, nor contributed monetarily to the brief's preparation or submission.

[2] *Certain Preventive Services under the Affordable Care Act*, 77 Fed. Reg. 8725 (February 15, 2012) (hereinafter "HHS Mandate"). This mandate applies not only to plans purchased in the subsidized Exchanges, but also to all employer group and individual plans by virtue of the provision applying to all "issuers." *Id.*

[3] As stated by the majority opinion in *Gilardi v. United States Dep't of Health & Human Servs.*, 733 F.3d 1208, 1221 (D.C. Cir. 2013), petition for cert. pending, No. 13-567 (filed Nov. 5, 2013) (emphasis added):

(Continued on following page)

The 286 Legatus members are Catholic business executives who do not qualify for the Government's exemption for "religious employers" despite their religious and moral duty[4] to oppose the egregious violations of conscience and free exercise rights imposed pursuant to the Affordable Care Act. Both the members of Legatus and *Amici* CatholicVote have an interest in showing that the HHS Mandate's burdens on their religious beliefs cannot be justified under the Religious Freedom and Restoration Act ("RFRA") as being in "furtherance of a compelling governmental interest" – especially when the asserted interest in providing preventive health services to women is

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> Equally unconvincing is the government's assertion that the mandate averts 'negative health consequences for both the woman and the developing fetus.' From the outset, we note **the science is debatable and may actually undermine the government's cause**. For the potential mother, as one amicus notes, the World Health Organization classifies certain oral contraceptives as carcinogens, marked by an increased risk for breast, cervical, and liver cancers. Br. of the Breast Cancer Prevention Institute, at 8-9.

[4] As practicing Catholics, *Amici* object to the mandated drugs that are capable of ending the life of a human being at the embryonic stage of development based on the teaching reflected in an encyclical by Blessed Pope John Paul II: "Abortion [is a] crime[ ] which no human law can claim to legitimize. There is no obligation in conscience to obey such laws; instead there is a grave and clear obligation to oppose them by conscientious objection." *Evangelium Vitae*, 73 (1995). The link between morality, the duty of parents, and coerced government collaboration to free contraceptive and abortifacient drugs that facilitate risky uncommitted sexual behavior is addressed *infra*, n.58.

undermined by the significant health dangers of the mandated drugs.

Breast Cancer Prevention Institute ("BCPI") is a non-profit corporation that educates healthcare professionals and the general public through research publications, lectures, and internet resources about ways to reduce the surge in breast cancer incidence attributable to avoidable risks. BCPI is directed by Angela Lanfranchi, M.D., F.A.C.S., a breast surgeon and graduate of the Georgetown School of Medicine (M.D. 1975).

Polycarp Research Institute is a non-profit organization dedicated to the promotion and dissemination of high-quality research designed to enhance the physical and psychological condition of mankind consistent with a natural law ethic. It is directed by Chris Kahlenborn, M.D., lead author of the October 2006 *Mayo Clinic Proceedings* article entitled, Oral Contraceptive Use as a Risk Factor for Premenopausal Breast Cancer: A Meta-analysis.

Coalition on Abortion/Breast Cancer is an international women's organization whose purpose is to protect the health and save the lives of women by educating and providing information on underreported risk factors for breast cancer, such as abortion and hormonal contraceptives.

286 Members of Legatus, whose names are listed in the Appendix, file in their individual capacity. With over 70 chapters across the United States, Legatus is an organization of Catholic business leaders. *Amici* Legatus members joining this brief are CEOs, presidents, managing partners, business owners, and spouses who participate as separate members. Legatus members undertake a mission "to study, live and spread the Catholic faith in their business, professional and personal lives."

CatholicVote.org is a movement of lay Catholics and people of goodwill whose seven hundred thousand members and supporters believe that important questions of public policy should be resolved via the democratic process and public health policy must serve the true good of the human person properly understood not ideological goals. As explained more fully herein. CatholicVote.org maintains that the HHS Mandate satisfies neither of these criteria.

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SUMMARY OF ARGUMENT

The HHS Mandate substantially burdens the sincerely-held religious beliefs of *Amici* as well as the parties before this Court because it forces them to purchase health plans that include contraceptive drugs and devices, some of which are capable of ending the life of a human being at the embryonic stage of development. Under the Religious Freedom Restoration Act, the HHS Mandate can survive only if it is "in furtherance of a compelling governmental interest"[5] – which the Government asserts here is its

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[5] The Religious Freedom Restoration Act ("RFRA") prohibits the federal Government from substantially burdening a

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interest in expanding access to "preventive" healthcare to promote women's health.

Amici demonstrate that the HHS Mandate fails the "furtherance" test of any purported interest in preventive medicine because it *increases* risk of cancer and other serious disease instead of decreasing it.[6]

This brief is presented to the Court to highlight that the Government, in promulgating the HHS Mandate, relied on a biased and incomplete Institute of Medicine report that selectively disregarded a large body of relevant, widely available, scientifically sound research. *Amici* present a partial survey of this robust body of relevant evidence showing that the

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person's exercise of religion, except when the Government can, among other things "demonstrat[e] that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

[6] Medical and science advisors who assisted in the survey of studies presented in this brief include **John M. Thorp, Jr., M.D.**, women's health researcher, professor, and ObGyn director of the UNC-Chapel Hill Women's Primary Healthcare; **Mary Davenport, M.D.**, obstetrician/gynecologist and president of AAPLOG; **Angela Lanfranchi, M.D., F.A.C.S.**, breast surgical oncologist, and co-founder of the Breast Cancer Prevention Institute; **Maureen L. Condic, Ph.D.**, research scientist at the University of Utah; and **Joel Brind, Ph.D.**, scientist and professor at Baruch College in the City University of New York system. All universities are listed for purposes of identification only; this brief in no way represents the views of the named universities, nor of any of its employees.

mandated contraceptives,[7] which are in fact steroids, have biological properties that significantly increase women's risks of breast, cervical, and liver cancer, stroke, and a host of other diseases, including the acquisition and transmission of human immunodeficiency virus (HIV).

These increased risks have been recognized by reputable national and international medical authorities, including the research arm of the World Health Organization which has classified combined oral contraceptives as "Group 1: Carcinogenic to Humans." *See* n.18, *infra*. Further, the majority opinion in the D.C. Circuit *Gilardi* case expressly cited *Amici*'s brief, noting that despite FDA-approval (discussed *infra*, nn.23-24), the scientific evidence "may actually undermine the government's cause."[8]

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[7] The term "contraceptive" as used in this brief reflects terminology used by the Government in the HHS Mandate. *Amici*, however, acknowledge the religious objection by Hobby Lobby, Conestoga and its owners to the capacity of some of the so-called "contraceptive" drugs and devices to terminate the life of a human being at the embryonic stage of development, and thus act as an abortifacient. *See, e.g.*, Miech, R., *Immunopharmacology of ulipristal as an emergency contraceptive*, 3 Intl. Journal of Women's Health 391 (2011) ("When unprotected intercourse and the administration of ulipristal occur at or within 24 hours of ovulation, then ulipristal has an abortifacient action."); *see also*, Rebecca Peck, M.D., and Rev. Juan R. Vélez, M.D., *The Postovulatory Mechanism of Action of Plan B: A Review of the Scientific Literature*, National Catholic Bioethics Quarterly 1-40 (Winter 2013).

[8] *Gilardi*, 733 F.3d at 1221, *supra* n.3.

Yet the Government turned a blind eye to evidence regarding cancer and other serious health risks, relying exclusively on the flawed 2011 Institute of Medicine report that touted only its possible benefits (as discussed in Section A).[9]

Section I sets forth the background of how the Department of Health and Human Services justified including the objectionable drugs in the HHS Mandate as necessary for women's "preventive services." Section A then sets forth the ignored evidence regarding the significant health dangers of oral contraceptive pills, and Section B sets forth the ignored evidence regarding health dangers of "long-acting contraceptives," such as injections, implants and IUDs. Section C provides the Court with ignored data showing that the incidence of the cancers that combined oral contraceptives may *cause* far exceed the incidence of cancers that they may *prevent*, as well as presenting the ignored evidence of the alarming increased risks to teenage girls.

Amici bring this evidence to the Court's attention to demonstrate how the HHS Mandate coerces religious objectors to collaborate in the provision of drugs that that not only violate their consciences, but that also increase the risk that women will suffer from cancer and other serious diseases. Consequently, *Amici* respectfully request that this Court find that the HHS Mandate does not – and cannot – "further" the Government's asserted compelling interest in promoting the health of women and children. Therefore, the HHS Mandate must fall in light of the free exercise rights of the parties before this Court.

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[9] *Id.* (The D.C. Circuit's majority opinion stated that "the government has neither acknowledged nor resolved these contradictory claims" of the evidence of increases in risk of breast, cervical and liver cancers with other research touting benefits.).

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ARGUMENT

I. Because the Government Selectively Ignored Widely Recognized Research Showing that the HHS Mandate's Contraceptive Drugs and Devices Significantly Increase Risks of Cancer and Other Serious Disease, the Mandate Cannot Meet the Religious Freedom and Restoration Act Requirement of Being in "Furtherance" of the Purported Compelling Interest in Promoting Women's Health

On August 1, 2011, pursuant to the Affordable Care Act,[10] the Government agency known as HRSA (Health Resources and Services Administration) adopted in full the guidelines[11] recommended by a report of the non-profit, non-governmental organization known as the Institute of Medicine (IOM).[12]

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[10] *The Patient Protection and Affordable Care Act*, Pub. L. No. 111-148, 124 Stat. 119 (2010) requires all group and individual health plans to include coverage for certain preventive services without cost-sharing, including "for women, such additional preventive care and screenings . . . as provided in comprehensive guidelines supported by [the Health Resources and Services Administration ('HRSA')]." 42 U.S.C. § 300gg-13.

After a mere nine pages of one-sided assertions and other methodological flaws,[13] the 2011 IOM

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[11] Health Resources and Services Administration (HRSA), *Women's Preventive Services: Required Health Plan Coverage Guidelines*, *available at* http://www.hrsa.gov/womensguidelines/ (all Internet sites last visited January 22, 2014).

[12] Inst. of Med., *Clinical Preventive Services For Women: Closing the Gaps* (2011) ("2011 IOM Report"), *available at* http://www.nap.edu/catalog.php?record_id=13181. In developing its guidelines, IOM invited a select number of groups to make presentations on the preventive care that should be mandated by all health plans. They included groups that vigorously advocate for abortion, contraceptives and abortifacient drugs including the Guttmacher Institute, the National Women's Law Center, and Planned Parenthood Federation of America. No groups that oppose government-mandated coverage of contraception, sterilization, abortion, and related education and counseling were among the invited presenters. *See id.* at 217-21.

[13] For a comprehensive survey of the disproven ideological assumptions and other methodological flaws of the 2011 IOM Report, *see generally* Helen M. Alvare, *No Compelling Interest: The 'Birth Control' Mandate & Religious Freedom*, 58 VILLANOVA L. REV. 379 (2013); *see also* Karen A. Jordan, *The Contraceptive Mandate: Compelling Interest or Ideology* (December 11, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2366466; *Dissenting Opinion of Anthony Lo Sasso*, 2011 IOM Report at 231-33 ("The view of this dissent is that the committee process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee's composition. . . This dissent views the evidence evaluation process as a fatal flaw of the Report particularly in light of the importance

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Report recommended that "preventive services" for women include all FDA-approved contraceptive methods, sterilization procedures, and patient education and counseling. FDA-approved contraceptive methods include diaphragms, oral contraceptive pills, emergency contraceptives, and intrauterine devices.[14] Notably, the IOM Report completely ignored the highly relevant and widely available scientific research establishing significant *increased* health risks of hormonal contraceptives, as set forth below. Consequently, it did not even attempt to establish that the putative health benefits of hormonal contraceptives outweighed the significantly increased health risks.

In its HRSA publication, the Government expressly and exclusively relied on the biased and unreliable IOM Report as the basis for including contraceptive drugs and devices in its definition of women's "preventive" health services.[15] That publication indicated the Government's asserted interest in "women's health and well-being" by expanding access to "preventive services that have *strong scientific evidence of their health benefits*."[16]

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of the recommendations for public policy and the number of individuals, both men and women, that will be affected.").

[14] 2011 IOM Report, at 102-10.

[15] HRSA, *Women's Preventive Services: Required Health Plan Coverage Guidelines*, *supra* n.11.

[16] *Id.*

Yet, the Government's reference to "strong scientific evidence" of health benefits is an empty assertion. In truth, the contraceptive mandate requires coverage of "synthetic, anabolic, carcinogenic, non-biodegradable sex steroid drugs" that endanger women's health, as well as environmental public health.[17]

Surveyed below are citations to a sampling of the robust body of peer-reviewed research studies that the Government and the IOM Report on which it relied completely ignored. This evidence establishes that contraceptive steroids significantly increase a woman's risk of heart attack, blood clots, stroke, breast cancer, cervical cancer, liver tumors, sexually transmitted infections and the contracting and transmission of human immunodeficiency virus (HIV), along with a host of other diseases. This evidence is recognized by national and international health agencies, including the International Agency for Research on Cancer ("IARC") that is part of the World Health Organization. In fact, after a worldwide research review whose results were published in 2005 and more formally in 2007, the IARC recognized combined oral contraceptives as "carcinogenic to humans," classified not just as "possible" carcinogens (Group 2B), and not just as "probable" carcinogens (Group 2A), but as carcinogens, period (Group 1: carcinogenic to humans).[18]

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[17] In addition to endangering the women who ingest them, contraceptive steroids, which are not biodegradable, also place the environment and society at large at risk once released into waste water after excretion though urine. The effects of this contamination have been increasingly studied in recent years, but they are largely unknown. Joel Brind, Ph.D., *Consuming Secondhand Steroids: The Contraceptive Pollution of Nature*, 34 Ethics & Medics 5 (May 2009).

The survey below documents significantly increased risks (sometimes double, triple and higher). Even when the initial risk is small, the impact when applied to the tens of millions of women who will be incentivized to ingest these carcinogens based on the "no-cost" requirements of the HHS Mandate will as a matter of logic result in significantly adverse impacts on women's health – contrary to the Mandate's purported compelling interest in improving women's "preventive" healthcare.

In fact. many of the below surveyed studies that were ignored by the Government in implementing the HHS Mandate were previously funded by the Government's own National Institutes of Health, and recognized on the fact sheets of the National Cancer

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[18] In 2005 (and later formally published in 2007), combined oral contraceptives were classified as "Group 1: Carcinogenic to Humans" for breast, cervical and liver cancers by the World Health Organization's International Agency on Research of Cancer (IARC). *IARC Monographs on the Evaluation of Carcinogenic Risks to Humans: Combined Estrogen-Progestogen Contraceptives and Combined Estrogen-Progestogen Menopausal Therapy* 91:174-84 (2007), http://monographs.iarc.fr/ENG/Monographs/vol91/mono91.pdf (IARC quotation *infra* nn.30 and 55). *See also* Kathleen T. Ruddy, M.D., *World Health Organization Warns: Birth Control Pills Cause Breast Cancer* (June 25, 2011), http://breastcancerbydrruddy.com/?p=2808.

Institute. And most ironically, the Department of Justice in the *Hobby Lobby* case before this Court now acknowledges in its own brief that hormones used in certain contraceptives are "associated with side effects such as high blood pressure, blood clots, heart attacks, or strokes." Br. of the United States (*Hobby Lobby*), at 48 (arguing why the abortifacient non-hormonal copper IUD must be included as a mandated option despite Hobby Lobby's religious objection).

Yet this medical evidence remained wholly unaddressed by the incomplete and poorly sourced 2011 Institute of Medicine (IOM) report, which was relied upon exclusively by the Government in finalizing the HHS "Preventive Services" Mandate. *See* HRSA, *Women's Preventive Services: Required Health Plan Coverage Guidelines*, *supra* n.11.

Because of the large body of evidence regarding serious health risks, along with the fact that fertility and pregnancy are not disease states, the mandate of hormonal contraceptives "fail[s] the most important test of preventive medicine: they increase risk of disease instead of decreasing it."[19] Therefore, the Government simply cannot demonstrate that application of the HHS Mandate to objecting employers "is in furtherance of a compelling governmental interest" as required by RFRA.[20]

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[19] Rebecca Peck, M.D., C.C.D. and Charles W. Norris, M.D., *Significant Risks of Oral Contraceptives (OCPs)*, 79(1) The Linacre Quarterly 41, 42 (February 2012).

While the Government's interest in "preventive services" for "women's health and well-being" may be valid, its act of coercing objecting employers to cover drugs that significantly increase risks to women's health certainly fails to further that interest.[21] As explained by this Court, "We do not doubt the validity of these interests, any more than we doubt the general interest in promoting public health and safety . . . but under RFRA **invocation of such general interests, standing alone, is not enough**." *Gonzales v. O Centro Espirita Beneficiente*

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[20] In addition to the Government's not having met its burden under RFRA, the failure of the IOM Report to consider or even balance the putative benefits with the increased health risks reveals that the Mandate is "arbitrary and capricious" under the Administrative Procedures Act (APA). The judicial standard for review under the APA "arbitrary and capricious" standard provides, "An agency rule would be arbitrary and capricious if the agency . . **entirely failed to consider an important aspect of the problem**, . . . " *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added). Here, the HHS Mandate is arbitrary and capricious by virtue of the fact that the Government "entirely failed to consider" that the mandated drugs *increase* risk of disease rather than prevent disease.

[21] While the business owners in the matters before this Court object specifically to that part of the mandate requiring coverage for certain abortifacient drugs, ninety other cases have been filed to date, many of which object to all FDA-approved contraceptives. *See HHS Mandate Information Central*, The Becket Fund for Religious Liberty, http://www.becketfund.org/hhsinformationcentral/.

Uniao do Vegetal, 546 U.S. 418, 438 (2006) (emphasis added).

It is a violation of religious liberty for religious institutions or religiously observant employers to be coerced by the Government to provide no-cost coverage for drugs that not only violate their rights of conscience, but that also expose women and girls to serious and often life-threatening health risks, all in the name of promoting public health.

A. The IOM Report Selectively Included Only Research Showing Potential Benefits of Oral Contraceptive Pills, and Completely Failed to Even Recognize Research Showing the Pill's Increased Risks of Cancer and Other Serious Disease

Amici research organizations present below a survey of the large body of highly relevant peer-reviewed scientific research – completely absent from the IOM Report relied on by the government – that demonstrates the significantly increased health risks associated with the mandated drugs. Rather than address and balance the significantly increased risks of breast, cervical and liver cancers, or even the increased risks of HIV and other life-threatening diseases outlined below, the 2011 IOM Report selectively focused only on the benign "non-contraceptive benefits of hormonal contraception includ[ing] treatment of menstrual disorders, acne or hirsutism (excessive hairiness on women), and pelvic pain."[22] Where the IOM Report does address cancer risks, it selectively cites studies that show cancers that contraceptives may help prevent, but that occur with much lower incidence and mortality than the cancer risks it increases. *See* Section I.C., *infra*.

Amici recognize that while business owners and individuals should not be forced to provide coverage for drugs that they consider immoral, women in our pluralistic society remain free to face the attendant health risks that come with choosing to use hormonal contraceptives. While such drugs have been FDA-approved as effective for the intended use of avoiding pregnancy, it should be noted that more than a dozen drugs have been taken off the market since 1997 due to severe side effects, injuries or deaths.[23] In fact, FDA misconduct was recently documented in relation to the contraceptive known as "Yaz."[24] Thus, FDA

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[22] 2011 IOM at 107.

[23] PBS Frontline, *Dangerous Prescription* (November 2003), http://www.pbs.org/wgbh/pages/frontline/shows/prescription/.

[24] In 2012, the *Washington Monthly*, which conducted an investigation with the assistance of the *British Medical Journal*, said the FDA neglected in December 2011 to give a report prepared by former FDA commissioner Dr. David Kessler to the advisory committee responsible for reviewing the safety of products containing the hormone drospirenone, which Bayer uses in its oral contraceptives known as Yaz and Yazmin. As an expert witness in a lawsuit filed against Bayer on behalf of plaintiffs claiming to have been injured by those Bayer oral contraceptives, Dr. Kessler cited Bayer's internal corporate

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approval is not the final word on safety, nor was FDA approval dispositive in the HHS inquiry of whether a drug should be mandated as "preventive" healthcare. Indeed, media reports regularly document FDA scandals and controversies.

The following is a non-exhaustive survey of the completely ignored but highly relevant medical studies documenting the cancer risks and significantly increased health risks of other serious and life-threatening diseases:

1. **Higher risk of heart attack, stroke and cardiovascular complications.** Among women with no conventional risk factors for heart disease, those who take oral contraceptives have twice the risk of heart

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reports and accused it of concealing data showing blood clot risks among users of those drugs.

According to the *Washington Monthly*, "A series of studies published in *BMJ* have shown that users of pills containing drospirenone have an increased risk of blood clots, which can cause deep vein thrombosis, pulmonary embolism, stroke, heart attack and death. And thousands of women have filed a lawsuit against Bayer, saying they were injured by Yaz or Yasmin. . . . The FDA's decision not to reveal its advisors' relationships with the drugs' manufacturers and Bayer raises serious questions about the agency's treatment of potential conflicts of interest, a historically problematic area for the department." Lenzer J. and Epstein K., *The Yaz Men: Members of FDA panel reviewing the risks of popular Bayer contraceptive had industry ties*, Washington Monthly (January 9, 2012), http://www.washingtonmonthly.com/ten-miles-square/2012/01/the_yaz_men_members_of_fda_pan034651.php#.

attack.[25] Those with hypertension had five times the risk; those who smoked, 12 times the risk; those who had diabetes, 16 times the risk; those who had high cholesterol, 23 times the risk.[26] A meta-analysis of 16 studies found that women who used oral contraceptives had nearly three times the risk of ischemic stroke; for those with risk factors such as high blood pressure or migraine headaches, the risk was significantly higher.[27] Hormonal contraceptives also lead to significantly higher incidences of deep venous thrombosis[28] and pulmonary embolism.[29]

2. **Higher risk of breast cancer.** The World Health Organization's International Agency on Research of Cancer (IARC) 2007 report concludes that estrogen-progestin combination drugs (the Pill) are a Group 1 carcinogen

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[25] B.C. Tanis, et al., *Oral contraceptives and the risk of myocardial infarction*, 345 New England Journal of Medicine 1787 (2001).

[26] *Id.*

[27] L.A. Gillum, *Ischemic stroke risk with oral contraceptives*, 284 JAMA 72 (2000).

[28] A. van Hylckama Vlieg, et al., *Venous thrombotic risk of oral contraceptives, effects of oestrogen dose and progestogen type: results of the MEGA case-control study*, 339 BMJ 2921 (2009).

[29] O. Lindegaard, et al., *Risk of venous thromboembolism from use of oral contraceptives containing different progestogens and oestrogens. Danish cohort study 2001-9*, 343 BMJ 6423 (2011).

for breast, cervical, and liver cancers.[30] A 2006 meta-analysis published in the journal *Mayo Clinic Proceedings* showed a 44% increased risk of premenopausal breast cancer in women who took oral contraceptives before first full term pregnancy.[31] A 2009 study showed a 3.2-fold increased risk of triple negative breast cancer, the most difficult and deadly form of breast cancer to treat, in women taking oral contraceptives; and the same study showed an even more alarming 6.4-fold increased risk of that deadly form of breast cancer in teenagers who started taking oral contraceptives before age 18.[32] And it is important to note that although the risk of uterine and ovarian cancers appears lower for women taking contraceptives, there is four times more breast cancer in women than uterine and ovarian cancers combined.[33]

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[30] International Agency for Research on Cancer (IARC), 2007 Monograph 91 at 175, *supra* n.18:

> There is *sufficient evidence* in humans for the carcinogenicity of combined oral estrogen-progestogen contraceptives. This evaluation was made on the basis of increased risks for cancer of the breast among current and recent users only, for cancer of the cervix and for cancer of the liver in populations that are at low risk for hepatitis B viral infection.
>
> There is *evidence suggesting lack of carcinogenicity* in humans for combined oral estrogen-progestogen contraceptives in the endometrium, ovary and colorectum. There is convincing evidence in humans for their protective effect against carcinogenicity in the endometrium and ovary.

It is telling to note that while the underlying research supporting the protective effect was mentioned in the IOM Report, the underlying research supporting the increased risk for cancer of the breast, cervix and liver were never even mentioned.

[31] C. Kahlenborn, et al., *Oral contraceptive use as a risk factor for premenopausal breast cancer: A meta-analysis*, 81 Mayo Clinic Proc. 1290 (2006).

3. **Higher risk of cervical cancer.** The Government's own National Cancer Institute (NCI) recognized studies showing a threefold to fourfold increased risk of cervical cancer:

> In a 2002 report by the International Agency for Research on Cancer . . . data from eight studies were combined to assess the association between oral contraceptive use and cervical cancer risk among women infected with the human papillomavirus (HPV). Researchers found a nearly threefold increase in risk among women who had used oral contraceptives for 5 to 9 years compared with women who had never used oral contraceptives. Among women who had used oral contraceptives for 10 years or longer, the risk of cervical cancer was four times higher.[34]

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[32] J. Dolle, et al., *Risk factors for triple-negative breast cancer in women under the age of 45 years*, 18 Cancer Epidemiol. Biomarkers Prev. 1157 (2009).

[33] *See* Cancer Statistics by Cancer Type, Centers for Disease Control, *available at* http://www.cdc.gov/cancer/dcpc/data/types.htm (last visited September 20, 2012).

[34] National Cancer Institute: Oral Contraceptives and Cancer Risk (March 21, 2012), *citing* V. Moreno, et al., *Effect of oral contraceptives on risk of cervical cancer in women with human*

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4. **Higher risk of liver tumors/cancer.** As stated in the Government's own NCI Factsheet, "Oral contraceptive use is associated with an increase in the risk of benign liver tumors [that] have a high risk of bleeding or rupturing." Moreover, "[s]ome studies have found that women who take oral contraceptives for more than 5 years have an increased risk of [malignant liver tumors known as] hepatocellular carcinoma, but others have not."[35]

5. **Greater susceptibility to sexually transmitted infections.** Women taking oral contraceptives are twice as likely to be infected with the genital human papillomavirus (HPV) virus, leading to cervical cancer, as women not taking oral contraceptives.[36] While the studies on HIV risk and *oral* contraceptives show mixed results, one well-known study finds that women taking the pill are 60% more likely to be infected with the HIV virus than those who are not.[37] In addition to physiological changes caused by hormonal contraceptives leading to increased

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papillomavirus infection: the IARC multicentric case-control study, 359 Lancet 1085 (2002).

[35] *Id.*, *citing* C. La Vecchia and A. Tavani, *Female hormones and benign liver tumours*, 38 Digestive and Liver Disease 535 (2006).

[36] S. Franceschi, et al., *Genital warts and cervical neoplasia: an epidemiological study*, 48 Br. J. Cancer 621 (1983).

[37] C.C. Wang, et al., *Risk of HIV infection in oral contraceptive pill users: a meta-analysis*, 21 JAIDS 51 (1999).

susceptibility to sexually transmitted infections (STIs), recent studies indicate that increased access to emergency contraceptives leads to behavioral changes, i.e., increased risk-taking in sexual behavior, that not only cancels out any decrease in the rate of unplanned pregnancy among adolescents, but also drives up the rate of STIs.[38]

B. The IOM Report Failed to Acknowledge the Serious Health Risks of Long-Acting Contraceptives

As shown by studies and easily predicted by standard microeconomic theory, the "no-cost" element of the HHS Mandate will not only increase use of low-cost pills and emergency contraceptives, it will also increase incentives for women and adolescents to choose the previously cost-prohibitive "long-acting methods," such as injectable contraceptives, implants, and intrauterine devices (IUDs).[39]

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[38] *See* S. Girma, et al., *The impact of emergency birth control on teen pregnancy and STIs*, 30 Journal of Health Economics 373 (2011).

[39] *Id.* ("[A]s might be predicted by standard microeconomic theory, increased access to EBC [emergency birth control] induces at least some adolescents to increase their level of risk-taking sexual behaviour and that the reduction in pregnancies from greater use of EBC is being countered by additional pregnancies resulting from this behaviour change.").

According to *A Pocket Guide to Managing Contraception (MC)*,[40] methods of long-acting contraception include the following drugs and devices that pose the following increased risks:

(1) **ParaGard© Intrauterine Copper IUD:** The copper IUD can result in **uterine perforation** and other malpositioning that can result in **increased bleeding or pain**, and **injury or damage to the surrounding organs.**[41]

(2) **Mirena© levonorgestrel-releasing IUD:** Unlike ParaGard©, which contains no steroidal hormones, the Mirena© IUD releases levonorgestrel (LNG) into the uterine environment. In addition to risks of **uterine perforation**, which were the subject of a warning letter sent by FDA to the manufacturer Bayer, Mirena has been linked to **ovarian cysts**, a higher profile for **pelvic inflammatory disease** (PID), and irregular bleeding. Also, in the rare case in which a

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[40] N. Zieman, R.A. Hatcher, et al., *A Pocket Guide to Managing Contraception*, Tiger, GA: Bridging the Gap Foundation, 2010, at 37. "*Managing Contraception*" or *MC* is a condensed version of the primary medical textbook on contraception – R.A. Hatcher, et al., *Contraceptive Technology* (20th rev. ed.), Atlanta, GA: Ardent Media, Inc., 2011.

[41] K.P. Braaten, et al., *Malpositioned IUDs: When you should intervene (and when you should not)*, 24(8) OBG Management 39 (2012), *citing* B.R. Bernacerraf, et al., *Three-dimensional ultrasound detection of abnormally located intrauterine contraceptive devices which are a source of pelvic pain and abnormal bleeding*, 34(1) Ultrasound Obstet. Gynecol. 110 (2009).

woman conceives while using Mirena, a resultant loss of pregnancy and a **possible permanent loss of fertility** may result.[42]

Surprisingly, the Government's attorneys in its *Hobby Lobby* brief before this Court have belatedly admitted that the hormone-releasing IUDs are indeed "associated with side effects such as high blood pressure, blood clots, heart attacks, or strokes." Br. of the United States (*Hobby Lobby*), at 48. The Government's counsel made this statement in its brief to this Court to defend why it must include all abortifacient drugs and devices over the religious objections of Hobby Lobby. Yet, such health risks were never acknowledged or balanced in the 2011 IOM Report that claimed that all FDA-approved contraceptives were "safe." 2011 IOM Report at 104-05.

(3) **Implanon©:** This device is a plastic implant rod containing progestogen etonogestrel which is surgically inserted under the skin of the upper arm; it replaced Norplant© which is no longer marketed in the U.S., after over 50,000 women filed lawsuits – including 70 class actions – over severity of side effects.[43] In addition to **ectopic pregnancy** risks,

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[42] Mirena® Label, Warnings and Precautions; *see also* Uterine Perforation Risk from Mirena, *available at* http://www.womens-health.co.uk/uterine-perforation-risk-from-mirena.html.

[43] Shari Roan, *Norplant taken off market*, Chicago Tribune (August 14, 2012).

the manufacturer warning reports "serious thromboembolic events, including cases of **pulmonary emboli (some fatal)** and **strokes**, in patients using IMPLANON."[44]

(4) **Depo-Provera©:** This is an injectable progestogen intended to last up to three months. A 2012 study reveals that there are now five studies "conducted over a diverse group of countries" that report an increased risk of breast cancer whose upper range is **more than doubled** in women who used Depo-Provera for more than 12 months.[45] Moreover, in addition to this injection's **black box warning on loss of bone mineral density**, Depo-Provera use has been shown to result in a **doubled risk of acquiring and transmitting HIV**, as discussed below.

Disturbingly, the Mandate's "no-cost" coverage will increase use of Depo-Provera, which carries startling increased risks regarding the deadly HIV infection. In October 2011, the *New York Times* gave front-page coverage to the rigorous Heffron study, which was funded by the National Institutes of

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[44] Implanon© Warnings, *available at* http://www.implanon-usa.com/en/HCP/learn-about-it/get-the-facts/warnings/index.asp.

[45] C. Li, et al., *Effect of Depo-Medroxyprogesterone Acetate on Breast Cancer Risk among Women 20 to 44 Years of Age*, 72(8) Cancer Res. 2028 at nn.4-7 (2012) ("with the addition of the results reported here, there are now 5 studies conducted over a diverse group of countries that have observed that recent DMPA use is associated with a 1.5- to 2.3-fold increased risk of breast cancer.").

Health and the Bill & Melinda Gates Foundation.[46] That study had been published in a prestigious peer-reviewed medical journal after the study's presentation had raised alarm among public health advocates months earlier at an international AIDS conference. The Heffron study presented convincing findings that injectable contraceptives have "biological properties" that appear to "**double** the risk that women will become infected with H.I.V.," and further finding that "when it is used by H.I.V.-positive women, their male partners are **twice as likely to become infected** than if the women had used no contraception."[47]

The study focused on Depo-Provera, a drug covered by the HHS Mandate. Of particular note is a statement by the director of the women and foreign policy program at the Council on Foreign Relations: "*If it is now proven that* [*injectable*] *contraceptives are helping spread the AIDS epidemic, we have a major health crisis on our hands.*"[48] There has been no study to dispute the Heffron study, yet this dangerous drug is now mandated in health plans as women's "preventive services."

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[46] R. Heffron, et al., *Use of hormonal contraceptives and risk of HIV-1 transmission: a prospective cohort study*, 12 Lancet Infect. Dis. 19 (2012) (published online October 2011).

[47] Pam Belluck, *Contraceptive Used in Africa May Double Risk of H.I.V.*, N.Y. Times, October 3, 2011 (covering Heffron study, *supra*) (emphasis added).

[48] *Id.* (emphasis added).

C. The IOM Report Ignores the Fact that the Incidence of the Cancers that Combined Oral Contraceptives May Cause Far Exceed the Incidence of the Cancers that They May Prevent, and Also Ignores the Increased Risk to Teenage Girls.

The 2011 IOM Report fails to even recognize the existence of the large body of highly relevant, widely available, scientifically sound, scholarly research surveyed above evidencing a host of adverse health consequences and increased cancer risks resulting from the use of contraceptive drugs and devices. The only consequences acknowledged by the 2011 IOM Report are unnamed "side effects" (which it says are "generally considered minimal"[49]) and low death rates that can be directly linked to contraceptive use.[50] It completely ignores the range of health risks between those extremes, even though the Government itself acknowledges these risks on the National Cancer Institute websites, and indeed funds many of the serious health risk studies discussed above through the National Institutes of Health.[51]

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[49] 2011 IOM cites ACOG informational brochures for its benign judgment on the "side effects" of hormonal contraceptives (2011 IOM at 105, 135), neglecting to mention that these brochures additionally contain discussions of the "risks" of oral contraceptives, including, as outlined above, heart attacks, strokes, blood clots, and liver tumors.

[50] 2011 IOM at 105-06; As certainly known by the members of the Institute of Medicine, "causation" of death is notoriously difficult to establish, yet the IOM Report selectively fails to document the peer-reviewed research establishing statistically significant increased risks of deadly diseases.

In an amazing display of ideological bias, the only mention by the 2011 IOM Report regarding cancer risks are those that oral contraceptives may prevent – namely endometrial and ovarian cancer.[52] In other HHS Mandate challenges, the Government's *Amici* have pointed to a possible reduction in the risk of colon cancer. But as explained below, even if the disputed preventive effect of oral contraceptives on colon cancer risk is included, the incidence of the cancers that combined oral contraceptives may cause (breast, liver and cervix) far exceed the incidence of the cancers that oral contraceptives may prevent (colon, endometrium and ovaries) in the United States.

1. The IOM Report Selectively Ignored Studies Showing Increased Incidence of Deadly Cancers

The IOM Report relied on by the Government selectively ignored research showing increased risks of breast, cervical and liver cancer, and reported only on decreased risks of ovarian cancer. This biased report thus ignores the data showing that for the year

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[51] *See, e.g.*, Heffron, *supra*, which states: "Funding: US National Institutes of Health and the Bill & Melinda Gates Foundation."

[52] 2011 IOM at 107.

2013, the expected incidence of cancers of the breast, liver and cervix among American females will surpass the incidence of cancers of the colon, endometrium and ovarian by 193,050 cases.

The total number of invasive and *in situ* breast cancers are expected to reach 296,980 cases.[53] Cancers of the liver and cervix will reach 20,260 total cases. Together, the incidence of these cancers that are negatively impacted by the carcinogen of combined oral contraceptives will total 317,240 cases.

By contrast, the cancers that oral contraceptives may prevent (endometrial and ovarian) are expected to total 71,800. If the disputed protective effect of oral contraceptives on colon cancer risk is included, then the total number of expected cancers that oral contraceptives may reduce would climb to 124,190 cases.[54]

The Government's *Amici* in this case may follow the pattern in previous HHS Mandate cases by favorably quoting a 2005 report from the

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[53] The expected number of invasive breast cancers for American females is 232,340. The expected number of in situ (early) breast cancers is 64,640. American Cancer Society, *Cancer Facts and Figures 2013*, *available at* http://www.cancer.org/acs/groups/content/@epidemiologysurveilance/documents/document/acspc-036845.pdf (In situ breast cancers are reported in small print at the bottom of page 4 entitled, "Estimated number of new cancer cases and deaths by sex, US. 2013").

[54] *Id.* at 4.

UNDP/UNFPA/WHO/WorldBank.[55] They fail to note that this study pre-dates the 2006 *Mayo Clinic Proceedings* meta-analysis,[56] discussed below, as well as

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[55] UNDP/UNFPA/WHO/World Bank Special Programme of Research, Dev. & Research Training in Human Reprod. (HRP), *Carcinogenicity of Combined Hormonal Contraceptives and Combined Menopausal Treatment* 1 (2005) ("Several WHO committees work on creating evidence-based family planning guidelines and on keeping them up-to-date on a continuous basis. They regularly review the safety of COCs (combined oral contraceptives) and assess the balance of risks and benefits of COC use and they have determined that for most healthy women, the health benefits clearly exceed the health risks.").

This statement ignores an important warning issued one month earlier by the International Agency for Research on Cancer Working Group when it published the following in a 2005 issue of the journal, *Lancet Oncology*:

> Because use of combined contraceptives heightens the risk of some cancers and reduces that of others, it is possible that the overall net public-health outcome could be beneficial, **but a rigorous analysis is needed to show this**. Such an analysis is outside the scope of an IARC monograph meeting and would include quantitative estimates of the age-specific absolute risk at each cancer site, the availability and effectiveness of cancer screening, the availability, effectiveness, and side-effects of cancer treatments, and other health and societal effects, both beneficial and adverse. **Since these factors vary throughout the world, the risk-benefit analysis should be specific to each country and population.**

V. Cogliano, Y. Grosse, R. Baan, K. Straif, B. Secretan, F. El Ghissassi, *Carcinogenicity of combined oestrogen-progestogen contraceptives and menopausal treatment*, 6 Lancet Oncology 552-553 (2005) (emphasis added).

[56] C. Kahlenborn, F. Modugno, D.M. Potter, W.B. Severs, *Oral contraceptive use as a risk factor for premenopausal breast cancer:*

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two other significant studies from 2009 and 2010 that strongly link use of oral contraceptives with the aggressive, deadly triple-negative breast cancer.

The 2009 study by Dolle, et al. on women under age 45 reports that the risk of triple-negative breast cancer conferred by longer oral contraceptive duration (more than one year) and by more recent use was a statistically significant 4.2-fold increased risk. The authors wrote, "Triple-negative breast cancer constitutes a clinically challenging type of breast cancer that occurs more frequently in younger women (under age 50) and African-American women and is associated with significant aggressiveness as compared with other subtypes."[57]

The 2010 study by Ma, et al. reported a 2.9-fold increased risk for triple-negative tumors among *older* women (ages 45-64 years) who started using oral contraceptives before age 18.[58]

A Meta-Analysis, 81(10) Mayo Clinic Proceedings 1290-1302 (2006), *available at* http://www.ncbi.nlm.nih.gov/pubmed/17036554.

[57] J. Dolle, et al., *Risk factors for triple-negative breast cancer in women under the age of 45 years*. 18(4) Cancer Epidemiol. Biomarkers Prev. 1157-1166 (2009).

[58] H. Ma, et al., *Use of four biomarkers to evaluate the risk of breast cancer subtypes in the Women's Contraceptive and Reproductive Experiences Study*. 70(2) Cancer Research 575-587 (2010), *available at* http://cancerres.aacrjournals.org/content/70/2/575.long.

2. The IOM Report Ignored the Increased Risks to Teenagers

As discussed more fully below, the worst time in a woman's life to be exposed to a carcinogen is during the "susceptibility window" of the teenager and young adult years. Yet, the HHS Mandate creates incentives for the use of carcinogenic contraceptives by the teenage children of *Amici* and the business owners before the Court because the Government mandates that such drugs be provided "without cost-sharing" for enrollees and dependents who are "women of reproductive capacity."[59] The Mandate thus endangers *Amici*'s teen-aged daughters both physically and morally.[60]

Not only did the 2011 IOM Report fail to cite or balance the alarming results of the 2009 Dolle study showing a 4.2-fold increased risk of triple-negative breast cancer, but it also failed to reveal that the same 2009 study showed an even more alarming

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[59] 77 Fed. Reg. 8725.

[60] Because sterilization, contraception and abortifacient drugs must be provided without cost-sharing to enrollees and their female dependents who have "reproductive capacity," the HHS Mandate provides free access to *Amici*'s minor daughters who have reached the stage of menstruation. Studies show that free access to even emergency contraceptives increases risky and uncommitted sexual behavior, *see generally* S. Girma, et al. *supra* n.39, thus undermining the Catholic moral duty of a parent to guide their children concerning the right ordering of human sexuality. *See, e.g.*, Catechism of the Catholic Church, ¶¶ 2331-2391, http://old.usccb.org/catechism/text/pt3sect2chpt2art6.shtml.

6.4-fold increased risk of the deadly triple-negative breast cancer in teenagers who started taking oral contraceptives before age eighteen.[61]

The IOM Report also fails to account for the fact that teenagers are the least likely group to be aware of the health risks associated with use of hormonal steroids such as oral contraceptives and Depo-Provera, and the least likely to know the medical history of extended family members. The most cancer-susceptible time in a woman's life takes place between the onset of menstruation and first full term pregnancy (known as the "susceptibility window").[62] That is the period when the breasts are growing and nearly all of the breast lobules consist of immature, cancer-susceptible Type 1 and 2 lobules where 95% of all cancers are known to start.

However, by the end of a first full term pregnancy, 85% of the breast lobules are fully mature and permanently cancer-resistant. Genetic changes that take place in the breast lobules during a full term pregnancy provide lifelong protection against breast cancer.[63] [64] [65] [66] [67]

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[61] J. Dolle, et al., *supra* n.57, at 1162.

[62] J. Russo and H. Russo, "Development of the Human Mammary Gland," in *The Mammary Gland*, eds. M. Neville and C. Daniel (New York: Plenum Publishing Corporation, 1987).

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[63] J. Russo, G.A. Balogh, I.H. Russo, and the Fox Chase Cancer Center Hospital Network Participants, *Full-Term Pregnancy Induces a Specific Genomic Signature in the Human Breast*, 17(1) Cancer Epidemiology, Biomarkers and Prevention 51-66 (January 2008).

[64] I. Verlinden, N. Güngör, K. Wouters, J. Janssens, J. Raus, and L. Michiels, *Parity-Induced Changes in Global Gene Expression in the Human Mammary Gland*, 14 European Journal of Cancer Prevention 129-137 (2005).

[65] Medical texts and medical authorities agree that delayed first full term pregnancy is a risk factor for breast cancer. Every one year delay of a first full term pregnancy increases the risk of premenopausal breast cancer by 5% and postmenopausal breast cancer by 3%. *See, e.g.*, Françoise Clavel-Chapelon and Mariette Gerber, *Reproductive Factors and Breast Cancer Risk*, 72(2) Breast Cancer Research and Treatment 107-115 (2002).

[66] In a landmark study, Harvard and other international scientists reported that women who had a first full-term pregnancy at age 35 in comparison with those who had a first full-term pregnancy at age 17 had a three-fold greater risk of breast cancer. MacMahon. B., Cole P., Lin T.M., Lowe C.R., Mirra A.P., Ravnihar B., Salber E.J., Valaoras V.G., Yuasa S., *Age at First Birth and Breast Cancer Risk*, 43 Bull. World Health Org. 209-221 (1970).

[67] "Indeed, if women had larger family sizes and longer lifetime durations of breastfeeding that were typical of developing countries until recently, the cumulative incidence of breast cancer in developed countries is estimated to be reduced by more than half (from 6.3 to 2.7 per 100 women) by age 70 years." V. Beral, et al., *Breast cancer and breastfeeding: collaborative reanalysis of individual data from 47 epidemiological studies in 30 countries, including 50,302 women with breast cancer and 96.973 women without the disease*, 360 Lancet 187-195 (2002).

Indeed, a 2006 meta-analysis of studies on oral contraceptives and breast cancer risk published in the journal *Mayo Clinic Proceedings* reported that "[t]he association between [oral contraceptive] use and breast cancer risk was greatest for parous women who used OCs [oral contraceptives] 4 or more years before FFTP [first full term pregnancy]."[68] The authors reported a statistically significant 52% risk elevation for this group.

The authors also found a statistically significant 44% increased risk of pre-menopausal breast cancer among women who started using oral contraceptives before first full term pregnancy. They explained the biological rationale as follows:

> The results of prior studies and of ours are consistent with the hypothesis that OCs (oral contraceptives) can be carcinogenic, especially when used before FFTP (first full term pregnancy). The nulliparous (non-childbearing) breast is composed of undifferentiated structures, and it is only during a full-term pregnancy that the breast attains its maximum development. This development occurs in 2 distinct phases, an early growth phase and a late phase of lobular differentiation. The undifferentiated breast structures found in the nulliparous breast may be more susceptible to carcinogens than the more differentiated

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[68] C. Kahlenborn, et al. *Oral contraceptive use as a risk factor for premenopausal breast cancer: A meta-analysis*, 81(10) Mayo Clinic Proceedings, *supra* n.31 and n.56.

structures found in the fully developed breast. For example, in Hiroshima and Nagasaki, Japan, nulliparous women who were exposed to radiation from the atomic bomb developed breast cancer far more frequently than women who had already borne children at the time of exposure.[69]

◆

CONCLUSION

In sum, the Government cannot meet the RFRA requirement that the coercive HHS Mandate be in "furtherance" of its asserted compelling interest in promoting women's preventive healthcare. It has completely ignored the mandated drugs' many serious health risks, as well as the established ties between hormonal contraceptives and the cancer epidemic among young healthy women to whom carcinogenic drugs are given for reasons as benign as acne prevention, or, more frequently, to suppress fertility – which is not a disease state.

For the foregoing reasons, *Amici* request that this Court affirm the decision of the Tenth Circuit granting injunctive relief to Respondent Hobby Lobby and reverse the Third Circuit's denial of injunctive relief and remand with instructions to enter an injunction as requested by Petitioner Conestoga Wood Specialties.

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[69] *Id.* at 1297.

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

Nos. 13-354 & 13-356

Supreme Court, U.S.
FILED
JAN 2 8 2014
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IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, Secretary of Health and
Human Services, *et al.*,
Petitioners,

—v.—

HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,

—v.—

KATHLEEN SEBELIUS, Secretary of Health and
Human Services, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURTS OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF THE GOVERNMENT

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QUESTION PRESENTED

Are for-profit business corporations owned by religious shareholders entitled to a religiously-based exemption from employee health insurance obligations imposed by the Affordable Care Act on employers of 50 or more persons?

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INTEREST OF *AMICUS CURIAE*

The Brennan Center for Justice at NYU School of Law is a not-for-profit, non-partisan public policy and law institute that focuses on issues of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. The Brennan Center seeks to draw on the abilities of scholars and practitioners to forge solutions to social and political issues that lie at the core of Justice Brennan's constitutional jurisprudence.

The consolidated cases before the Court pose important questions concerning the interpretation of the Free Exercise Clause and its interrelationship with the Establishment Clause. In the hope that it will be of assistance in analyzing the complex issues before the Court, the Brennan Center respectfully submits the annexed brief *amicus curiae*.[1]

---

[1] The parties in 13-356 have filed blanket letters of consent to *amicus* briefs in support of either party or neither party. Petitioners in 13-354 have also filed a blanket letter of consent. A letter of consent to the filing of this *amicus* brief from Respondents in 13-354 has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the preparation or the submission of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

SUMMARY OF ARGUMENT

1. For-profit business corporations are legal abstractions incapable of experiencing or exercising the intensely personal emotions associated with religious worship. Accordingly, they are not entitled to a religious exemption under the Free Exercise Clause from a congressionally-imposed duty to provide their employees with economic benefits.

2. Respect for the important legal construct of "corporate separateness" precludes religious shareholders of for-profit business corporations from selectively ignoring corporate separateness for religious purposes, while simultaneously deriving substantial benefits from corporate separateness in economic and regulatory settings.

3. Even if for-profit business corporations were entitled to assert claims to religious exemption under the Free Exercise Clause, this Court has never recognized a religious exemption from an otherwise valid legal duty when its exercise would impose substantial burdens on third parties.

4. Enforcement of a right to a religious exemption that imposes substantial burdens on non-believers would violate the Establishment Clause.

ARGUMENT

I.

A FOR-PROFIT BUSINESS CORPORATION IS INCAPABLE OF "FREELY EXERCISING" RELIGION WITHIN THE MEANING OF THE FIRST AMENDMENT

The challengers[2] in these consolidated cases argue that for-profit business corporations owned by religious shareholders are constitutionally entitled to a religiously-based exemption from an otherwise valid duty imposed by the Affordable Care Act to provide certain insurance benefits to their employees. The challengers seek to establish a one-way legal regime that: (1) insulates for-profit shareholders from economic liability and government regulatory power by insisting upon the separate legal existence of a corporation; but (2) ignores a corporation's separate legal existence when religious shareholders wish to merge themselves with the corporation for personal reasons.

Challengers seek to justify such a one-way corporate legal mirror on constitutional and statutory grounds.[3] They support their demand for constitutional relief:

---

[2] *Amicus* refers to the individual and corporate petitioners in *Conestoga Wood Specialties Corp.* and the individual and corporate respondents in *Hobby Lobby Stores, Inc.* as "the challengers," reflecting their common objection to the failure of the Affordable Care Act to afford them a religiously-based exemption from certain legal duties of a for-profit business corporation employing 50 or more persons.

(1) by analogy to the ability of for-profit business corporations to invoke free speech protection under *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *Citizens United v. FEC*, 558 U.S. 310 (2010);

(2) as a logical consequence of the decision in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), to permit a non-profit "grassroots" corporation to assert the free speech rights of the individuals who constitute the non-profit entity; and

---

[3] Challengers assert protection under the Religious Freedom Restoration Act ("RFRA"), arguing that the term "person" in RFRA, by reference to the Dictionary Act, authorizes for-profit corporations to seek "strict scrutiny" protection for their religious observances. However, while the Dictionary Act presumptively equates "persons" with "corporations," it does so only "unless the context indicates otherwise." 1 U.S.C. § 1. Here, where the "context" involves a question of religious observance, the "context" precludes equating "persons" with "corporations" unless and until it is known whether for-profit corporations are legally capable of asserting claims to religious freedom. See *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201-09 (1993) (declining to treat association of prisoners as a "person" under the Dictionary Act, because the "context" required performance of acts requiring human characteristics). Whether "the context indicates otherwise" thus turns on whether a corporation is capable of asserting a claim of religious conscience. In short, the challengers' argument under RFRA begs the essential question raised by this litigation.

(3) with a claim that statutory exemptions in the Affordable Care Act for non-profit religious organizations, coupled with a transitional exemption for certain pre-existing grandfathered insurance plans, and a decision to confine the statute's obligations to employers with 50 or more employees, render it unconstitutional to enforce the statute against for-profit business corporations employing 50 or more employees owned by religious shareholders.

None of the arguments in favor of recognizing corporate free exercise of religion is persuasive.

A.

The Rationale Underlying this Court's Recognition of Corporate Free Speech Protection Cannot Be Extended to Support Corporate Free Exercise Claims

In support of their argument that for-profit business corporations may assert First Amendment claims sounding in the free exercise of religion, the challengers seek to draw an analogy to this Court's decisions recognizing the ability of business corporations to assert constitutional rights, especially First Amendment claims sounding in the free speech and free press clauses. *Bellotti*, 435 U.S. 765; *Citizens United*, 558 U.S. 310; *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (striking down ban on pharmacists advertising drug prices); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (requiring proof of actual malice to hold a newspaper liable for libel of a public official).

The bulk of the Court's cases recognizing the ability of corporations to assert constitutional claims provide no support for the challengers' proposed analogy, because they protect economic rather than dignitary interests. The triumph of the business corporation in the United States and Great Britain during the 19th Century is one of the great success stories of economic history. Since the very purpose of recognizing a business corporation as a separate legal entity with unlimited life, limited liability, entity-shielding, and negotiability of ownership was to provide an efficient means of aggregating and exploiting investment capital, it made perfect sense to insulate the pool of capital invested in corporate form from improper government regulation by permitting corporations to raise Due Process, Takings, and Equal Protection claims against improper government regulation. *See, e.g.*, *Cnty. of Santa Clara v. S. Pac. R.R.*, 118 U.S. 394, 396, 409-10 (1886) (Equal Protection); *Stone v. Farmers' Loan & Trust Co.* (*Railroad Commission Cases*), 116 U.S. 307, 331 (1886) (Takings); *Smyth v. Ames*, 169 U.S. 466, 526 (1898) (Due Process), *overruled on other grounds by Fed. Power Comm'n v. Natural Gas Pipeline Co. of Am.*, 315 U.S. 575 (1942).[4]

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[4] *See generally* Henry Hansmann et al., *Law and the Rise of the Firm*, 119 Harv. L. Rev. 1333 (2006); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 Colum. L. Rev. 1416 (1989); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 Geo. L.J. 1593 (1988).

Such a functionally defensible application of constitutional law to corporations as distinct legal entities does not, however, justify expanding corporate constitutional protection into non-economic areas where constitutional rights flow, not from concern with economic efficiency, but from respect for human dignity. Recognizing the distinction, this Court has refused to afford corporations constitutional protection under the self-incrimination clause of the Fifth Amendment, precisely because the privilege against self-incrimination is rooted, not in efficiency, but rather in respect for human dignity. *Hale v. Henkel*, 201 U.S. 43, 75 (1906) (declining to recognize corporate privilege against self-incrimination); *Wilson v. United States*, 221 U.S. 361, 380-86 (1911) (same); *United States v. White*, 322 U.S. 694, 698-704 (1944) (declining to recognize unincorporated labor union privilege against self-incrimination); *Braswell v. United States*, 487 U.S. 99, 105, 116, 117-18 (1988) (reaffirming *Hale v. Henkel* and applying it to a single shareholder corporation).

The privilege against self-incrimination initially evolved as a protection of religious conscience, shielding individuals from being subjected to a "test oath" that would force them to choose between adherence to their religious beliefs and avoidance of serious criminal sanctions including death. *See* Leonard Levy, The Origins of the Fifth Amendment 1-5 (1968). Thus, a corporate entity that, under *Hale* and *Braswell*, lacks the attributes of human dignity needed to assert the privilege against self-incrimination, cannot possibly be thought to possess the dignitary right to freely exercise religion.

The challengers argue, despite *Hale*, that since business corporations may assert First Amendment dignitary interests sounding in the free speech clause, *Bellotti*, 435 U.S. 765; *Citizens United*, 558 U.S. 310, they necessarily must be entitled to assert First Amendment claims sounding in freedom of religion. But such an argument ignores this Court's unbroken rationale for permitting corporations to assert free speech rights. None of the Court's decisions addressing corporate political spending endowed corporations with the dignitary status needed to anchor a free speech right. Instead, the Court has been careful to locate the source of the First Amendment right in third-party hearers, because "[p]olitical speech is indispensable to decisionmaking in a democracy." *Citizens United*, 558 U.S. at 349, 354 (citations omitted); *Bellotti*, 435 U.S. at 783; *Va. State Bd. of Pharmacy*, 425 U.S. at 756.[5]

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[5] In *N.Y. Times Co. v. Sullivan* and its progeny, the corporation's free speech rights arose under the Free Press Clause, with its intimate connection with the interests of hearers. *See N.Y. Times Co. v. Sullivan*, 376 U.S. at 269-70. The Court's commercial speech jurisprudence is overtly hearer-centered, both in inception and application. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366-67 (2002); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980).

Bellotti first established the legal framework for analyzing speech interests in the context of corporate political spending, instructing courts to ask not whether corporations themselves have First Amendment rights, but rather whether the First Amendment was meant to protect the delivery of the speech in question to others. 435 U.S. at 775-77. The *Bellotti* Court focused on the value of the speech in question to the voting public, not on any corporation's right to express itself. The Court acted "to prohibit government from limiting the stock of information from which members of the public may draw." *Id.* at 783.

Citizens United followed suit, purporting to protect against "the loss for democratic processes resulting from the restrictions upon free and full public discussion." 558 U.S. at 344 (citation omitted). The *Citizens United* Court drew this democratic-process rationale from the Federalist Papers, concluding that "[f]actions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false." *Id.* at 355 (citation omitted). In overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the Court opined that *Austin*'s holding "interfere[d] with the 'open marketplace' of ideas protected by the First Amendment." 558 U.S. at 354 (citation omitted).[6]

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[6] *See also* Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 Harv. L. Rev. 143, 158 (2010) (stating that the *Citizens United* opinion "views free speech as a system

Unlike cases involving individual free speech rights, neither *Citizens United* nor *Bellotti* discussed the "individual dignity and choice" that underlies the personal right to self-expression. *Cohen v. California*, 403 U.S. 15, 24 (1971). Rather, the Court's corporate political speech decisions focused squarely on the First Amendment interests of the hearer.

It is impossible to transfer such a hearer-centered rationale to the intensely personal world of religious conscience. As with the privilege against self-incrimination, constitutional protection of religious conscience is rooted in the heart, mind, and soul of the believer, not in some third party who is allegedly benefitted by the believer's religious observance. Thus, even if this Court was correct in effectively expanding *Lamont v. Postmaster General*, 381 U.S. 301, 306-07 (1965)—which permitted hearers to assert an independent First Amendment right to know—to settings where corporations rely derivatively on a hearer's right to know information that is assumed to be of use to a hearer, and unavailable without the corporate speaker,[7] such a

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involving the free flow of information rather than as a set of rights possessed by individual speakers").

[7] In *Bellotti*, in the context of a referendum without opposing candidates, this Court justified permitting a business corporation to borrow the First Amendment rights of hearers by speculating that potential voters likely would not receive a full spectrum of information without corporate participation. *Amicus*'s reliance on the reasoning of *Citizens United* and its dictum applying *Bellotti* to contested elections, for purposes of

rationale cannot support a corporate free exercise claim. When the Court protects religious conscience (or the privilege against self-incrimination), there are no third parties upon whose rights the corporation can rely. In the absence of such a third-party anchor, for-profit business corporations, as soulless legal abstractions, simply lack the dignitary status needed to assert rights to religious toleration rooted in respect for human dignity.

B.

The Statutory Exemption of Non-Profit Religious Corporations, Small Businesses, and "Grandfathered" Plans from the Requirements in Question Does Not Render the Requirements Unconstitutional as to the Challengers

All corporations are not created equal and endowed by their Creator with certain inalienable rights. The statutory exemption from the challenged requirements for non-profit religious corporations merely tracks the special associational interests this Court has long accorded non-profit corporations formed to pursue religious or social purposes. The Court has recognized that the non-profit corporate form often functions as nothing more than a useful device to facilitate the ability of individual members to associate together to advance commonly-held

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distinguishing the instant challenge, does not amount to an endorsement of that untested assumption.

political or social ideals.[8] In such settings, the Court has recognized that the First Amendment rights of individuals who have joined together in political or social association may be asserted in the name of the non-profit corporation.[9]

In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 241-42 (1986), for example, this Court permitted a grassroots non-profit corporation to assert the First Amendment rights of its members. In *Citizens United*, this Court exempted a non-profit corporation formed to advance political ideas from the reach of the McCain-Feingold Act. 558 U.S. at 393-94 (Stevens, J., concurring in part and dissenting in part) ("Even more misguided is the notion that the Court must rewrite the law relating to campaign expenditures by *for-profit* corporations and unions to decide this case."); *see also FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 480-81 (2007) (upholding right of non-profit corporation to disseminate issue ads); *Citizens Against Rent*

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[8] Historically, different categories of corporations have been accorded different legal attributes, depending upon their social function. *See generally* John Dewey, *The Historic Background of Corporate Legal Personality*, 35 Yale L.J. 655 (1926). Dewey suggests that the divergence between the treatment of for-profit business and non-profit, eleemosynary corporations may date from Pope Innocent IV's (1243-1254) conception of ecclesiastical corporations. *Id.* at 665-69.

[9] Unlike for shareholders of a for-profit business corporation, the principal benefit to members of such non-profit ideological or religious corporations is increased efficacy in the advancement of their ideals.

Control v. City of Berkeley, 454 U.S. 290, 300 (1981) (invalidating contribution limit imposed on unincorporated association opposing ballot measure); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 463-66 (1958) (upholding out-of-state non-profit corporation's right to resist demand for membership lists).

In this case, Congress has responded to such a constitutional tradition by exempting non-profit religious corporations from the insurance requirements at issue, viewing certain non-profit religious institutions as proxies for individuals associated together for religious purposes. But the decision to treat non-profit corporations as associations of individuals who have banded together to advance political or social ideals neither requires, nor justifies, identical treatment of the shareholders of for-profit business corporations.

In order to enable the economic efficiencies promised by the for-profit business corporation, this Court has deemed it necessary to erect and maintain a wall of legal separation between the corporation and its shareholders. For example, in *Daimler AG v. Bauman*, __ U.S. __, No. 11-965, 2014 WL 113486, at *4, *10 (Jan. 14, 2014), this Court declined to recognize general jurisdiction over a wholly-owned corporate subsidiary as the equivalent of general jurisdiction over the corporate parent.[10] It matters little whether the for-profit business corporation is a large, multi-shareholder entity or a closely-held family corporation. In both settings, shareholders reap significant economic and regulatory benefits from the legal abstraction of separate corporate status, such as unlimited corporate life; limited liability; entity-shielding; negotiability of ownership; and the power to avoid regulation by a particular sovereign. Having derived substantial economic benefits by treating business corporations as freestanding legal constructs, religious shareholders such as the challengers may not elect to ignore the legal construct when it suits their personal preference. They cannot have it both ways.

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[10] The *Bauman* Court left open the prospect that specific jurisdiction could be imposed by treating a wholly-owned subsidiary as the agent of the parent for the purpose of claims

The challengers further argue that the combined effect of exempting non-profit religious corporations, small businesses with fewer than 50 employees, and "grandfathered" plans already in place when the law went into effect (as long as they remain unchanged), demonstrates that it is unnecessary to burden for-profit corporations with 50 or more employees with a duty to engage in activity deemed immoral by religious shareholders.

The short answer to this argument is that, it wrongly presupposes that for-profit business corporations (or their religious shareholders) are entitled to invoke the highly protective jurisprudence of free exercise strict scrutiny on behalf of the corporation. In the absence of such an antecedent

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related to the forum. *See id.* at *10. But the Court never even considered ignoring the principle of corporate separateness.

finding by this Court, the corporate challengers are entitled to the far less searching "rational basis" protection of the implied Equal Protection provisions of the Fifth Amendment. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487-89 (1955); *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). The challengers do not seriously dispute that Congress acted rationally to exempt small businesses as a matter of economic necessity, and to authorize transitional "grandfather clause" exemptions as a matter of administrative necessity.

II.

THE FREE EXERCISE CLAUSE DOES NOT ENCOMPASS A CONSTITUTIONAL RIGHT TO SHIFT THE SUBSTANTIAL COSTS OF RELIGIOUS OBSERVANCE TO THIRD PARTIES

On a more profound level, the challengers are not entitled to a religiously-based exemption even if they possess the legal capacity to demand one. This Court has never granted a believer a religiously-based exemption from an otherwise valid legal duty when the grant of such an exemption would impose significant costs on third parties.

A.

The Free Exercise Clause Does Not Entitle a Believer to Impose Substantial Costs on Third Parties

Zechariah Chafee once observed that the right to swing your fist ends at the other fellow's nose. Zechariah Chafee, Jr., *Free Speech in War Time*, 32 Harv. L. Rev. 932, 957 (1919). Nowhere is this aphorism truer than in this Court's free exercise jurisprudence.

Where recognition of a religiously-based exemption from an otherwise valid legal duty would not impose substantial costs on third parties, this Court has forged a proud heritage of constitutionally-mandated religious tolerance. *See W. Va. State Bd.*

of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (recognizing religiously-based exemption from duty to salute the flag);[11] *Sherbert v. Verner*, 374 U.S. 398, 408-09 (1963) (recognizing religiously-based exemption from conditions for receipt of unemployment compensation in the absence of proof of substantial third-party costs); *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 719-20 (1983) (same); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 146 (1987) (same).

Where, however, as here, judicial enforcement of a religiously-based exemption would impose substantial costs on third parties, this Court has uniformly denied a free exercise claim. For instance, in denying a free exercise exemption sought by Jehovah's Witnesses from a child labor law, the Court explained that "[t]he right to practice religion freely does not include liberty to expose the . . child to . . . ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). More recently the Court denied a free exercise exception from tax exemption rules, because to grant it would have endangered the public fisc: "[E]ven a substantial burden [on religious exercise] would be justified by the broad public interest in maintaining a sound tax system."

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[11] *Barnette* is, of course, an important free speech case as well, recognizing that the demands of secular conscience may be as compelling as the commands of religious conscience. *See also United States v. Seeger*, 380 U.S. 163, 176 (1965) (upholding conscientious objectors' exception from draft based on secular conscience); *Welsh v. United States*, 398 U.S. 333, 339-40 (1970) (same).

Hernandez v. Comm'r, 490 U.S. 680, 699-700 (1989) (citation omitted); *see also Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (denying religiously-based exemption from ban on bigamy); *Hamilton v. Regents of the Univ. of Cal.*, 293 U.S. 245, 265 (1934) (denying religiously-based exemption from military obligations); *United States v. Macintosh*, 283 U.S. 605, 623-24 (1931) (same), *overruled on other grounds by Girouard v. United States*, 328 U.S. 61, 63 (1946); *Gillette v. United States*, 401 U.S. 437, 461-63 (1971) (same); *United States v. Lee*, 455 U.S. 252, 260-61 (1982) (denying religiously-based exemption from payment of Social Security taxes); *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-04 (1983) (denying religiously-based exemption from anti-discrimination norms); *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985) (denying religiously-based exemption from minimum wage and recordkeeping rules imposed by Fair Labor Standards Act); *Jimmy Swaggart Ministries v. Bd. of Equalization,* 493 U.S. 378, 389-92 (1990) (denying religiously-based exemption from payment of sales taxes).[12]

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[12] In *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872, 890 (1990), the Court declined to grant a religiously-based exemption from drug laws for the use of peyote in Native American religious ceremonies. The majority reasoned that it was unnecessary to conduct a meaningful inquiry into third-party costs because the interference with religious observance was not "intentional." One could make a similar argument here. *Amicus* believes, however, that *Smith* was an unfortunate departure from the Court's traditional protection of religious freedom absent knowledge of a significant third-party cost. In *Gonzales v. O Centro Espirita*

Our commitment to religious freedom does not stop, however, with judicially enforceable constitutional rights. Where judicial enforcement of a claimed constitutionally-mandated free exercise *right* is barred because it would shift burdens to third parties, this Court has recognized a limited legislative power to advance free exercise *values*. It has upheld legislative efforts to *accommodate* the demands of religious conscience by balancing relatively insignificant costs to third parties against the demands of religious conscience. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339-40 (1987) (upholding statutory right of non-profit religious group to limit employment to church members); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, __ U.S. __, 132 S. Ct. 694, 706 (2012) (upholding "ministerial exemption" from Title VII in order to preserve the free exercise values of members of congregation); *see also Seeger*, 380 U.S. at 176 (upholding conscientious objectors' exception from draft based on secular conscience); *Welsh*, 398 U.S. at 339-40 (same). But when a so-called accommodation statute actually compelled third parties to bear substantial economic and social costs generated by religious exemptions, this Court

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Beneficente Uniao Do Vegetal, 546 U.S. 418, 423 (2006), the Court granted an exemption in a virtually identical setting under RFRA because of the lack of a demonstrated third-party cost. Unlike in *Smith* or *O Centro Espirita*, in the consolidated cases currently before the Court, grant of a religious exemption unquestionably would impose very substantial third-party costs.

has invalidated the statute as an establishment of religion. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985) (invalidating law mandating time-off for religious Sabbath, because law required co-workers to work on weekend); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84-85 (1977) (construing Title VII to require religious accommodation only where substantial costs are not imposed on owner or co-workers).

Thus, under this Court's settled free exercise jurisprudence, not only would a judicially-mandated religious exemption from the obligations of the Affordable Care Act be completely unprecedented—because it would impose substantial economic burdens on competitors and employees—but it might well violate the Establishment Clause by forcing third parties to bear the substantial economic costs of the challengers' religious observance.

B.

Free Exercise "Strict Scrutiny" is Designed to Test Whether the Grant of a Religiously-Based Exemption Would Shift Unacceptable Costs to Third Parties

Strict judicial scrutiny under the Free Exercise Clause requires the government to demonstrate a "compelling state interest" that is advanced by "the least restrictive means" in order to justify the denial of a demand for a religiously-based exemption from an otherwise valid legal duty.[13] *Thomas*, 450 U.S. at 718; *see also Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972). In a free exercise setting, application of the strict scrutiny formula has always turned on whether grant of a religious exemption would shift a substantial burden to others. While this Court formally applied the elements of strict scrutiny in a free exercise setting for the first time in *Sherbert v. Verner*, 374 U.S. at 406-07, to search for third-party costs, it had applied the substance of the inquiry for nearly a century. In case after case, the Court denied free exercise exemptions where substantial costs imposed by a particular religious observance would be borne by third parties, but granted religious exemptions when *no* substantial cost would be borne by a third party. For example in *Reynolds*, 98 U.S. 145, the Court denied the request of a Mormon for a religiously-based exemption from territorial laws criminalizing bigamous marriage. The Court reasoned that society had an important interest in protecting vulnerable women forced into plural marriage, and that the grant of a religious exemption would force women and children to bear the costs of the husband's religious observance. 98 U.S. at 164-68. In *Hamilton*, 293 U.S. at 265, and *Macintosh*, 283 U.S. at 623-26, the Court rejected demands for constitutionally-mandated religious exemptions from democratically-defined military obligations.[14] The two cases were reaffirmed subsequent to *Sherbert* in *Gillette*, which rejected a free exercise claim to decline to serve in an "unjust war" because to grant it would force third parties to bear the burden of serving instead. 401 U.S. at 461-63.

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[13] Strict judicial scrutiny is also applied by this Court in certain equal protection contexts involving discrete and insular minorities and the selective apportionment of "fundamental rights," as well as free speech settings involving efforts to censor "pure" speech. *See, e.g.*, *Johnson v. California*, 543 U.S. 499, 505 (2005) (applying strict scrutiny to racial classification); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (applying strict scrutiny to regulation of content of speech); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) (applying strict scrutiny to voting restriction).

On the other hand, where granting a religiously-based exemption would impose *de minimis* or no costs on others, the pre-*Sherbert* Court recognized religiously-based claims to exemption. Memorably, in *Barnette*, the Court exempted a Jehovah's Witness child from compulsory flag salutes in school. 319 U.S. at 642. The difference between *Barnette* and the case that it overruled, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), was the *Barnette* Court's realization that exempting religious schoolchildren from compulsory flag salutes imposes little or no cost on anyone else. *Barnette*, 319 U.S. at 640-42.

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[14] *Hamilton* arose out of California's requirement that students attending Land Grant colleges enroll in military training courses. The Court analyzed the case under the "liberty" provision of the Due Process Clause because the Free Exercise Clause had not yet been clearly applied to the states. *Macintosh* involved a religiously-based reluctance to take the oath of naturalization promising to defend the nation by force of arms. The Court overruled *Macintosh* in *Girouard* after reinterpreting the relevant statute. 328 U.S. at 63.

In *Sherbert* itself, the birthplace of the current strict scrutiny formula, the idea of a "compelling" interest was deployed to require South Carolina to demonstrate that granting the religious exemption at issue would, in fact, impose substantial costs on others. When South Carolina failed to do so, the exemption was granted. 374 U.S. at 406-09.

In the years since *Sherbert,* free exercise strict scrutiny has operated to require government to identify a substantial third-party cost that would be imposed by granting a religiously-based exemption. Often, as in the aforementioned cases denying religious exemptions from bigamy laws, payment of Social Security taxes, anti-discrimination requirements, protective labor laws, military obligations, and child welfare duties, the third parties who would bear the costs of a religious exemption are readily identifiable. Occasionally, as in cases like *Goldman v. Weinberger*, 475 U.S. 503, 509-10 (1986) (denying a religious exemption from indoor military headgear regulations); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (denying religiously-based work exemptions in prison settings); and *Bowen v. Roy*, 476 U.S. 693, 709-12 (1986) (denying a religious exemption from the use of Social Security numbers as identifying criteria), the third-party costs are more difficult to associate with known individuals, and are expressed by the Court as risks to the efficient and safe administration of government programs affecting a wide array of unknown individuals. But whether the third parties who would bear the costs of a religious exemption are identifiable individuals or unknown victims of an administrative breakdown, government demonstrates a "compelling" interest in denying a religiously-based exemption by showing that granting the exemption would substantially risk imposing significant costs on third parties.

The second half of the strict scrutiny test, requiring that the challenged law represent the least restrictive means of achieving the government's goal, obliges the government to demonstrate that any infringement on religious exercise cannot be minimized without significant cost to third parties. *Thomas*, 450 U.S. at 718; *see also Yoder*, 406 U.S. at 214-15.

In this case, the government's denial of the challengers' demand for a religiously-based exemption clearly satisfies free exercise strict scrutiny. Granting a religiously-based exemption from the health insurance provisions of the Affordable Care Act would impose significant costs on at least two categories of third parties—non-religious competitors, who would be placed at an economic disadvantage by being forced to incur the full cost of employee health insurance; and the challengers' employees, who would be deprived of valuable employment benefits important for their health. In fact, the third-party costs that would be imposed by a religious exemption from the health insurance obligation imposed by the Affordable Care Act are analytically identical to the costs that justified denials of religious exemptions in *Lee*, 455

U.S. at 260-61 (denying religiously-based exemption from payment of Social Security taxes); *Bob Jones University*, 461 U.S. at 602-04 (denying religiously-based exemption from anti-discrimination norms); *Alamo Foundation*, 471 U.S. at 303 (denying religiously-based exemption from minimum wage and recordkeeping rules imposed by Fair Labor Standards Act); and *Jimmy Swaggart Ministries*, 493 U.S. at 389-92 (denying religiously-based exemption from payment of sales taxes).

Moreover, short of subsidizing the exemption with taxpayer funds (a technique that was rejected in *Lee*, *Alamo Foundation*, *Hernandez*, and *Jimmy Swaggart Ministries* and that would risk violating the Establishment Clause by requiring taxpayer support of religion) or forcing insurance companies or competing employers to bear additional costs, no less restrictive means exist to avoid asking third parties to bear the substantial cost of the religiously-based exemption that the challengers seek.

It is no answer to point to the relatively minor cost of granting a religiously-based exemption to a single challenger. Once such a for-profit corporate exemption is granted to one believer, it must be granted to all. Indeed, once granted for purely religious reasons, a similar exemption would be granted to employers with similarly intense non-theological conscientious scruples. *Seeger*, 380 U.S. at 176 (recognizing statutory conscientious exception from draft based on non-theological beliefs); *Welsh*, 398 U.S. at 339-40 (same).

C.

The Statutory Grant of Certain Exemptions Does Not Serve to Diminish the Government's Interest in the Challenged Requirements or Undercut Congress's Choice of Means

The challengers argue that if providing health insurance coverage really were "compelling," as that term is used in the strict scrutiny inquiry, Congress never would have limited coverage to employers with 50 or more employees; would not have exempted certain non-profit religious employers; and would not have temporarily exempted certain "grandfathered" pre-existing insurance plans. But such an argument misunderstands the meaning of the "compelling interest" concept as it is used in the free exercise strict scrutiny formulation.

It is not for this Court to decide whether assuring health insurance coverage for employees is truly a compelling government obligation. In a democracy, that decision is for the people through their elected representatives. As uniformly applied in this Court's free exercise jurisprudence to date, the government's "compelling interest" has not been tested by a case-by-case judicial inquest into the relative importance of a given government program, but by the need to prevent the imposition of substantial costs associated with a religious exemption on third parties. Since, in this case, substantial costs would unquestionably be borne by the challengers' competitors and employees, no doubt exists concerning the "compelling" nature of the government's interest in denying a religious exemption that would impose substantial costs on third parties.

Moreover, even if one were to accept the challengers' invitation to treat the existing exemptions as evidence that the government itself does not view health insurance coverage as truly "compelling," the argument fails because the exemptions support no such inference. The exemption for non-profit religious employers engaged in religious activities may well be required by the Free Exercise Clause. At a minimum, it reflects Congress's desire to accommodate the free exercise values of non-profit religious entities engaged in religious activities. It cannot be the law that if Congress grants such an accommodation to non-profit religious entities, it must also exempt for-profit business corporations owned by religious shareholders, or by shareholders motivated by similarly intense non-theological objections. Taken seriously, the challengers' argument would require the existing grant of religious exemptions from the reach of Title VII to be extended to for-profit business corporations owned by religious shareholders. *Corp. of the Presiding Bishop*, 483 U.S. at 339-40 (upholding statutory right of non-profit religious group to limit employment to church members); *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 132 S. Ct. at 706 (upholding "ministerial exemption" from Title VII in order to preserve the free exercise values of members of congregation); *see also Locke v. Davey*, 540 U.S. 712, 718-19 (2004) (denying religiously-based constitutional exemption from restriction on use of government scholarship funds, but acknowledging power to provide state law exemption).

The challengers' effort to parlay the grant of exemptions to certain non-profit religious entities into a general exemption for for-profit business corporations owned by religious shareholders misunderstands the tripartite nature of this Court's free exercise jurisprudence. Where the grant of a religiously-based exemption would impose substantial costs on third parties, this Court has uniformly refused to recognize a judicially-enforced constitutional right to a religious exemption. But where government regulation impinges on religious values, the Court has recognized a legislative (as opposed to judicial) power to accommodate the exercise of religious values by providing religious exemptions in particularly compelling circumstances when the cost to third parties is relatively minor. But even such a power is limited if it shifts onerous costs to third parties. *Estate of Thornton*, 472 U.S. at 709-10 (invalidating law mandating time off for religious Sabbath because law operated to require co-workers to work on weekend); *Trans World Airlines, Inc.*, 432 U.S. at 84-85 (construing Title VII to require religious accommodation only where substantial costs are not imposed on owner or co-workers). Ironically, therefore, if the challengers' claim is correct that the grant of limited exemptions to non-profit religious entities automatically entitles for-profit corporations owned by religious shareholders to a similar exemption, it would render it impossible for legislatures to provide limited exemptions designed to accommodate religious values without setting off an inexorable expansion of the exemption that would violate the Establishment Clause.

Nor can the challengers argue that the decision to provide a temporary exemption to pre-existing "grandfathered" health insurance plans demonstrates the non-compelling nature of health insurance coverage. The administratively sensible decision to phase in a massive program altering the health care structure of the nation by temporarily exempting certain pre-existing insurance plans during the transitional period proves no such thing. Nor does Congress's decision to limit the health insurance mandate to employers with 50 or more employees. A judgment about the ability of small businesses to bear the economic costs of a government program has little or nothing to do with its compelling nature. It speaks to economic necessity and tragic choices, not the importance of health insurance.

Finally, the challengers' suggestion that extending already existing exemptions to for-profit business corporations is the "least restrictive means" misunderstands the role of "least restrictive means" within this Court's free exercise jurisprudence. In a free exercise context, the "least restrictive means" element requires the government to demonstrate the absence of practicable alternatives that would avoid infringing on religious exercise without imposing significant costs on third parties. If such readily-available mechanisms exist, respect for principles of religious tolerance requires the government to utilize them as the "least restrictive means" of avoiding the imposition of unfair costs on third parties. But no such mechanisms exist in this case. Expanding existing exemptions to for-profit business corporations owned by religious shareholders would not avoid the imposition of unfair costs on third parties; it would exacerbate them. Either the employees would bear the additional costs of losing insurance coverage, or the costs of supplying the insurance would be shifted to insurance companies or to the public fisc.

Thus, as long as the existing administrative and economic exemptions are justified by substantial government interests, there is no constitutional duty under the Free Exercise Clause to extend them to for-profit business corporations. Taken seriously, the challengers' conceptualization of the infinitely expandable nature of exemptions under the Free Exercise Clause would cause the fact of limited exemptions from the Social Security taxes at issue in *Lee*, the fair labor standards at issue in *Alamo Foundation*, and the sales taxes at issue in *Jimmy Swaggart Ministries* to require reversal of those bedrock cases.

III.

CONGRESS REMAINS FREE TO SEEK TO ACCOMMODATE THE CHALLENGERS' RELIGIOUS VALUES

The challengers' inability to assert a persuasive free exercise claim for exemption ends this case, but it need not end the controversy. Under this Court's tripartite jurisprudence, Congress retains the power to seek to accommodate the challengers' sincere religious scruples as long as the accommodation does not impose unfair costs on third parties. The nation's treatment of conscientious exemptions from military service provides a roadmap.

Since the grant of religiously-based conscientious exemptions from military service would have imposed a direct cost on third parties forced to serve in place of the religious objectors, this Court has repeatedly refused to recognize a free exercise-based exemption from the draft. But, since World War I, the nation's commitment to respect for individual conscience has persuaded Congress to provide a statutory substitute that respects conscience, but requires conscientious objectors to perform alternative service designed to minimize the cost to third parties. Finally, to prevent the accommodation from violating the Establishment Clause, this Court has carefully construed the Selective Service Act to provide for exemptions on the basis of non-religious conscience as well, rendering the exemptions a neutral effort to respect conscience.

It is not beyond the ability of Congress to replicate the conscientious objection model in the context of the Affordable Care Act. Free exercise-based exemptions are barred because they would shift unfair costs to third parties. But a program that freed challengers from a conscientious dilemma, while minimizing the costs to third parties, remains possible. However, under the tripartite free exercise jurisprudence of this Court, the search for an accommodation that does not shift unfair costs to third parties is the province of Congress, not this Court.

CONCLUSION

For the foregoing reasons, the decision of the Tenth Circuit in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), should be reversed, and the decision of the Third Circuit in *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health and Human Services*, 724 F.3d 377 (3d Cir. 2013), should be affirmed.

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New York, New York

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BRIEF

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In the
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KATHLEEN SEBELIUS, *et al.*,
Petitioners,
v.
HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP, *et al.*,
Petitioners,
v.
KATHLEEN SEBELIUS, *et al.*,
Respondents.

On Writs of Certiorari to the U.S. Courts of Appeals for the Tenth and Third Circuits

BRIEF OF THE C12 GROUP, LLC, AS *AMICUS CURIAE* SUPPORTING THE NON-GOVERNMENTAL PARTIES

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INTEREST OF THE *AMICUS*[1]

The C12 Group, LLC, ("C12") is a North Carolina leadership-development company whose purpose is to counsel, train, and encourage Christian business leaders across North America who are seeking to run their businesses with excellence and in accordance with their Christian religious faith. Toward this end, the C12 Group facilitates monthly peer executive roundtable meetings that discuss strategies for running successful businesses and strategies for applying Christian principles to these businesses. Participants in these roundtables pay a fee to become "members" of C12 Group, and members attend both a monthly roundtable and a monthly one-on-one Christian counseling session focused on prayer, accountability, and encouragement.

Although C12 is legally organized as a for-profit business entity, it considers itself to be equally a business *and* a ministry—"a business with a heart of a ministry."[2] And one of the primary purposes of the company is to teach and encourage members to view their businesses the same way. Indeed, although the vast majority of C12's more than 1,300 members are the leaders of *for-profit* entities, they view their companies as their primary Christian ministries—just as the pastor of a church might view his church as his primary ministry.[3]

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[1] Counsel for all parties have consented to the filing of *amicus* briefs, and their consents are reflected on the docket. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

[2] Frequently Asked Questions, C12 Group, http://www.c12group.com/frequently-asked-questions/ (last visited Jan. 24, 2014).

Ninety-five percent of the C12 Group's clients lead or own family businesses with workforces ranging from ten to thousands. A relatively small number lead more broadly-held partnerships or public companies. C12's clients are generally Bible-believing, evangelical Christians who view their work as God's primary calling to ministry through their lives. They view themselves as tending to God's companies as stewards and ambassadors, and generally operate according to core principles informed by their Christian faith. The overwhelming majority of the C12 Group's members object to the same Department of Health and Human Services ("HHS")-required pharmaceuticals and devices as Hobby Lobby, and they view paying for these pharmaceuticals and devices as violating their Christian consciences.

C12 particularly objects to the dichotomy, proposed in the Solicitor General's brief, between for-profit and not-for-profit religious entities. C12 and its members reject this dualistic worldview and believe that for-profit companies can be every bit as much a religious ministry as non-profit companies.

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[3] Buck Jacobs, *A Light Shines Bright in Babylon: A Handbook for Christian Owners and CEOs* 1 (Don Barefoot, ed., 2013).

INTRODUCTION AND SUMMARY OF ARGUMENT

The key issue in this case is whether a for-profit entity qualifies as a "person" under the Religious Freedom Restoration Act ("RFRA"), which requires the federal government to satisfy strict scrutiny before imposing a substantial burden on "a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). The text of the statute plainly suggests that the answer is yes—the U.S. Code defines "person" to include corporations. 1 U.S.C. § 1. The Solicitor General has nevertheless asked this Court to hold that the statute protects "religious non-profits" but not for-profit entities. This argument is consistent with the government's argument in the district court, where the Justice Department suggested that Hobby Lobby was a "secular" corporation because it was organized as a for-profit, and argued that "secular" corporations are not covered by RFRA.

The key premise behind the Solicitor General's argument is that "[f]or-profit corporations are different from religious non-profits in that they use labor *to make a profit*, rather than to perpetuate a religious values-based mission." Gov't *Hobby Lobby* Br. 19 (citation and internal quotation omitted). The C12 Group files this brief to explain why it is wrong to view profit-seeking and religious purpose as mutually exclusive.

1. RFRA explicitly protects the rights of "a person" to freely exercise religion, and the Dictionary Act defines "person" to include corporations. That should end the analysis. The Solicitor General nevertheless suggests, based on RFRA's legislative history and this Court's pre-RFRA jurisprudence,

that Congress could not possibly have intended to grant free-exercise rights to for-profit corporations.[4] This argument is incorrect. As explained below, the first draft of RFRA explicitly limited RFRA to natural persons and religious entities—precisely as the Solicitor General asks the Court to do here. Congress, however, chose to delete this limitation and extend the protections of RFRA to every "person" as defined by the Dictionary Act. If Congress had intended to limit RFRA protections to religious corporations as suggested by the Solicitor General, it could have and would have done so.

The Solicitor General's argument is similarly inconsistent with this Court's constitutional jurisprudence more generally. As explained below, this Court has typically applied constitutional rights to corporations without distinguishing between for-profit and non-profit corporations. And while not all constitutional rights apply to corporations, the general rule is that corporations are entitled to constitutional protections unless those rights are "purely personal." In that case, the protection does not apply to for-profit *or* non-profit corporations. The government's proposal is not consistent with these principles.

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[4] The Solicitor General also appears to argue that, even if the word "person" in RFRA technically is defined to include for-profit corporations, those for-profit corporations are nevertheless excluded from RFRA because the Court's jurisprudence shows that for-profit corporations cannot, as a matter of core constitutional law, exercise religion. This argument is similar to the Solicitor General's argument that Congress could not possibly have intended to include for-profit corporations within the scope of RFRA, and it fails for the same reasons.

2. Putting aside the legislative history and the Court's prior jurisprudence, the government's argument simply doesn't make much sense. The government suggests that corporations deserve free-exercise rights only if they "perpetuate a religious values-based mission" and then assumes that for-profit entities cannot "perpetuate a religious values-based mission." Gov't *Hobby Lobby* Br. 19. This assumption is both factually and legally incorrect. In fact, C12's "for-profit" members view themselves as having a religious values-based mission even while leading profitable and growing enterprises that serve others well.

The distinction between for-profit and non-profit entities is largely a matter of state law and has nothing to do with whether an entity is capable of perpetuating a "religious" mission. The primary difference between a for-profit and a not-for-profit has to do with what the entity is permitted to do with its net income. While a non-profit must spend that net income to further its corporate purpose or reinvest the income in the organization, a for-profit entity may also distribute the net income to shareholders. Both for-profits and non-profits can and do engage in religious or charitable activities, and as explained below, the academic literature has recognized that for-profit charities can have advantages over non-profits. This recognition has led to the creation of new types of for-profit entities whose primary purpose is to enhance the public good rather than to maximize profits. Among these new entities are "benefit corporations"—which can now be formed in more than a dozen states—and low-profit limited liability companies ("LC3s").

But for-profit companies are not limited to charitable or philanthropic purposes. In many cases, for-profit companies are formed and operated for explicitly religious purposes. Indeed, as explained below, the C12 Group and its members believe that the life of a businessperson is a special religious calling and that God calls them to run their businesses in accordance with Biblical principles. For this reason, while C12 and its members view their businesses as separate and distinct from a church, they view the underlying purpose of both institutions as the same. Not surprisingly, therefore, C12 and its members perpetuate "a religious values-based mission" every bit as much as the not-for-profit religious corporations that the Solicitor General concedes are protected by RFRA.

3. The Solicitor General also maintains that the "fundamental tenets of American corporation law" prevent courts from imputing the views of individuals who own and control corporations to the corporations themselves. Gov't *Hobby Lobby* Br. 23. This is wrong both as a matter of logic and of law. The Court has long held that corporations' acts and intentions derive from their owners or agents—not only in areas like criminal law, but even specifically for free-exercise rights. And indeed, it could not be otherwise, as corporations' unique legal existence does not change that they are ultimately collectives of real human beings.

The experience of C12's members reflects the practical reality that for-profit corporations regularly take on the religious actions and intentions of the people who control and represent them. And importantly, these "for-profit" corporations regularly elect to follow religious dictates at the expense of maximizing their profit-making opportunities. To assert that this is not the exercise of religion is to advocate for a rule of law that not only contravenes well-settled precedent, but denies how the world actually operates.

ARGUMENT

I. THE GOVERNMENT'S PROPOSED DISTINCTION BETWEEN FOR-PROFIT AND NOT-FOR-PROFIT CORPORATIONS HAS NO BASIS IN THE STATUTE OR IN THIS COURT'S JURISPRUDENCE.

A. The Plain Text of RFRA Does Not Distinguish Between For-Profit and Not-For-Profit Entities.

The government's core argument in this case is that the Religious Freedom Restoration Act applies only to individuals and religious not-for-profit entities, and not to for-profit corporations. The Tenth Circuit correctly rejected this argument as inconsistent with the text of RFRA. RFRA prohibits the federal government from imposing a substantial burden on "a person's exercise of religion" unless the government can demonstrate that it meets the requirements of strict scrutiny. 42 U.S.C. § 2000bb-1(a). Because the statute does not explicitly define *person*, it implicitly incorporates the definition found in the Dictionary Act, which defines words in "any Act of Congress, unless the context indicates otherwise." 1 U.S.C. § 1. Under the Dictionary Act, a *person* includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" "unless the context indicates otherwise." *Id.* The Act does not purport to exclude for-profit corporations from this definition.

Because the definitions in the Dictionary Act apply "unless the context indicates otherwise," *id.*, one might expect the Solicitor General to argue that the context indicates otherwise. Notably, however, the Solicitor General does not do so, *see* Gov't *Hobby Lobby* Br. 22—and for good reason. For the purposes of the Dictionary Act, context has a "narrow" meaning. *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199 (1993). This Court has made clear that to determine whether the context of a statute "indicates otherwise," the Court should look only at "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Id.*; *accord Korte v. Sebelius*, 735 F.3d 654, 674 (7th Cir. 2013). "Review of other materials is not warranted." *Hubbard v. United States*, 514 U.S. 695, 701 (1995). Moreover, the Court should apply an alternate definition only when the ordinary definition "seems not to fit." *Rowland*, 506 U.S. at 200.

The Solicitor General does not and cannot point to any words in RFRA or any related statute suggesting that the normal definition of *person*—which includes for-profit corporations—"seems not to fit." Nothing in the text of RFRA or its surrounding statutes suggests that a for-profit corporation cannot or should not be able to exercise religion.

B. The Government's Proposed Distinction Between For-Profits and Not-for-Profits Is Inconsistent with RFRA's Legislative History and this Court's Constitutional Jurisprudence.

The government spends much of its brief discussing the legislative history of RFRA and the overall arc of this Court's First Amendment jurisprudence prior to *Employment Division Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Neither of these is statutory "context" that would permit this Court to deviate from the definition of *person* in 1 U.S.C. § 1. *Rowland*, 506 U.S. at 199. In any event, both of these interpretive tools actually undermine the government's case. As explained below, the legislative history suggests that Congress considered and *rejected* the narrow definition of *person* that the Solicitor General has advocated in his brief. Moreover, this Court has never distinguished for-profit and not-for-profit entities in determining whether a particular constitutional right applies to a corporation. Rather, as discussed below, the default rule is that rights guaranteed by the Constitution apply to individuals and corporations alike—regardless of the corporation's particular form under state law. The exception is constitutional rights that are "purely personal," which do not apply to corporations at all. The government cannot argue, however, that free-exercise rights are purely personal because it is well established that free-exercise rights apply to at least some corporations.

1. In Passing RFRA, Congress Rejected the Government's Narrow Definition of Person.

While failing to point to any statutory context, the Solicitor General relies on the legislative history of RFRA, suggesting that if Congress had intended for RFRA to apply to for-profit corporations, "there would surely have been some express mention of that intent in either the statutory text or in the legislative history." Gov't *Hobby Lobby* Br. 21. This is an odd argument because the government has not argued that RFRA is ambiguous, and it is generally inappropriate to consult the legislative history when the statutory text is unambiguous. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 186 (2004). It is equally odd because Congress made clear that it intended for RFRA to apply anytime "free exercise of religion is substantially burdened," 42 U.S.C. § 2000bb(b)(1), and did not purport to limit its application to a particular subset of persons.

In any event, the legislative history demonstrates that Congress actually rejected the definition of *person* that the government has asked this Court to adopt. The first draft of RFRA, which was introduced to the House of Representatives in July 1990, explicitly limited *person* in much the way the Solicitor General has proposed. That bill defined "person" to include "both natural persons and religious organizations, associations, or corporations." *See* H.R. 5377, 101st Cong. § 4(4) (2d Sess. 1990). Congress, however, ultimately decided to *delete* this narrow definition of *person* and adopted a version of RFRA that contained *no* definition of *person*.

This deletion is significant for at least three reasons. First, it shows that Congress knew how to define *person* in the limited way advocated by the Solicitor General. Second, it shows that Congress actually considered defining *person* in the limited way proposed by the Solicitor General. Finally, it shows that Congress opted not to do so, choosing instead to use the standard definition found at 1 U.S.C. § 1. This Court can and should presume that Congress was aware of the default definitions found in 1 U.S.C. § 1 and that by deleting the definition of *person* found in the original draft, Congress intended for the definition in 1 U.S.C. § 1 to apply. *Cf. Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) (presuming that "Congress is knowledgeable about existing law pertinent to the legislation it enacts").

C. The Government's Proposal Is Inconsistent with the Court's First Amendment Jurisprudence and with Constitutional Law Generally.

The Solicitor General also relies on this Court's jurisprudence prior to *Employment Division v. Smith* for the idea that Congress could not possibly have intended to protect free-exercise rights of corporations. The government argues that, because no pre-*Smith* case explicitly held that for-profit corporations (as opposed to non-profit corporations) enjoy free-exercise rights,[5] Congress could not have intended to protect these rights. Gov't *Hobby Lobby* Br. 16. The Solicitor General similarly maintains that the same body of law shows that for-profit corporations cannot (or at least do not), as a fundamental matter, exercise religion. *Id.* at 17. These arguments, however, get things backwards. As explained below, constitutional rights generally apply to corporations and individuals equally, and the government has not pointed out any case suggesting that for-profit corporations enjoy fewer constitutional rights than not-for-profit corporations. Thus, unless the Court had explicitly found that for-profit corporations cannot exercise religion, Congress would have had no reason to suspect that the Court might exclude for-profit corporations from the reach of RFRA. Nor should the precedent on the issue lead the Court to any conclusion other than that for-profit corporations can and do exercise religion.

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[5] Of course, the Court *has* expressly held that individuals as business owners have free-exercise rights. *See United States v. Lee*, 455 U.S. 252 (1982); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion).

1. Congress Expected Free-Exercise Rights to Apply to For-Profit Corporations Unless They Were Purely Personal.

Generally, constitutional rights apply to corporations. *See, e.g., Monell v. Dept. of Soc. Servs. of New York*, 436 U.S. 658, 687 (1978) ("by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis"). Corporations have First Amendment rights to political speech, *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 349, 354 (2010), and association, *Pacific Gas and Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 16 (1986). They are likewise accorded the Fourth Amendment right to be free from unreasonable searches and seizures, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978), as well as the Fifth Amendment rights against double jeopardy, *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 565, 575 (1977), and takings, *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931). Corporations also enjoy the Sixth Amendment right to counsel, *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979), as well as the Seventh Amendment right to a jury, *Ross v. Bernhard*, 396 U.S. 531, 532–33 (1970); *United States v. R.L. Polk & Co.*, 438 F.2d 377, 378-80 (6th Cir. 1971). The Court has also consistently held that "a corporation is a 'person' within the meaning of the equal protection and due process of law clauses." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936); *see also Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897) ("It is well settled that corporations are persons within the provisions of the fourteenth amendment of the constitution of the United States ... The rights and securities guarantied to persons by that instrument cannot be disregarded in respect to these artificial entities called 'corporations' any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations.").

The primary exception to this rule is for a class of constitutional rights that are "purely personal." As this Court explained in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978), corporations are denied constitutional rights only when the history of that right demonstrates it to be "purely personal" in nature. Applying this test, the *Belotti* Court accorded speech rights to corporations, but contrasted that to its decision in *United States v. White*, 322 U.S. 694, 698–99 (1944), which denied to corporations the Fifth Amendment right against self-incrimination. In *White*, the Court found that the rationale for the protection against self-incrimination was to stop prosecutors from using torture or other "reprehensible" means to exact evidence from the person they were prosecuting. *Id.* Since it is impossible for a prosecutor to use forms of physical or psychological compulsion on a corporation, the right was found to be "purely personal," and did not apply to a corporation. In the case of free exercise, *Belotti* thus teaches that the Court should begin by assuming that the right applies to corporations, and then examine whether the right is so "purely personal" that an exception applies.

2. As the Government Implicitly Concedes, Free-Exercise Rights Are Not Purely Personal.

Following this path, even a cursory examination reveals that free-exercise rights are far from "purely personal." As Judge Cowan pointed out in his dissent in *Conestoga Wood Specialties Corp. v. Secretary of United States Department of Health & Human Services*, 724 F.3d 377, 400 (3d Cir. 2013), individuals exercising religion have "from time immemorial sought strength in numbers," and this Court has many times accorded free-exercise rights to groups of people organized as corporations. *Id.* at 399. The text of the free-exercise clause was itself modified before ratification to protect the "exercise of religion" rather than just "rights of conscience," thus "encompass[ing] the corporate or institutional aspects of religious belief."[6] The modern legal corporate form indeed finds its seeds in Roman Catholic canon law, which first established the body of the church as a separate, fictional person.[7]

Even the government does not deny that religious rights can be exercised by a group of people associated in a corporation. Rather, the government seeks to rewrite the *Belotti* test to analyze *what type* of corporation can exercise religion. But the *Belotti* test is dichotomous: either all corporations are capable of acting on religion or none are. In no instance has the Court found that *some* corporations would enjoy a constitutional right while others would not, and there is no reason to think that Congress intended for it to do so in this case.

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[6] Michael W. McConnell, *The Origins & Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1490 (1990).

[7] *See* Francis Helminski, *Canon Law & Mystical Body: Religious Corporations in Minnesota*, 22 Hamline L. Rev. 689, 689 (1999) ("Churches are among the eldest of corporations."); Eric Enlow, *The Corporate Conception of the State & the Origins of Limited Constitutional Government*, 6 Wash. U. J. L. & Pol'y 1, 18 (2001) ("By the twelfth century, the Roman Catholic church was conceived in legal terms as a corporation by European civilians and canonists.").

II. THE GOVERNMENT'S PROPOSED DISTINCTION BETWEEN FOR-PROFIT AND NOT-FOR-PROFIT ENTITIES DOES NOT MAKE SENSE.

Although the government devotes much of its brief to describing the pre-*Smith* cases, its proposed distinction between for-profits and not-for-profits derives not from the cases but from its assumptions about the fundamental nature and purposes of for-profit companies. In the government's view, for-profit entities are fundamentally "different from religious non-profits" because their sole purpose is "simply to engage in commerce" and not to "perpetuate a religious values-based mission," as not-for-profits may do. Gov't *Hobby Lobby* Br. 19 (internal quotations omitted).

This statement is fundamentally wrong both as a matter of law and as a matter of fact. As a matter of law, a corporation's ability to perpetuate a "religious values-based mission" does not depend on whether the corporation is organized as a for-profit or not-for-profit under state law, nor does it depend on whether the corporation meets the requirements for tax exemption under Section 501(c)(3) of the Internal Revenue Code. As a factual matter, C12 and the companies owned and operated by its members (and those of several similar organizations across America) are compelling examples of for-profit corporations whose missions are substantially, or even primarily, religious. To deny these entities the protections of RFRA and the free-exercise clause would undermine RFRA's very purpose—to ensure that the government does not substantially burden any person's exercise of religion without satisfying strict scrutiny.

A. For-Profit Corporations May Be Formed and Operated for Charitable or Philanthropic Purposes.

The primary difference between a for-profit and a not-for-profit entity has to do with the entity's ability to distribute profits. A for-profit corporation may distribute its profits as dividends to shareholders or as bonuses to employees. The "defining feature" of a non-profit firm, however, "is that it cannot distribute net revenue to any affiliated persons or employees, a restriction known as the 'nondistribution constraint.'"[8]

Notably, however, the nondistribution constraint does not prohibit non-profits from seeking primarily to earn a profit, nor does anything about the non-profit form force a non-profit to engage in primarily charitable or religious ends. For that reason, for-profit firms frequently "compete in the same market as nonprofits," and it is common to see both for-profit and not-for-profit hospitals, daycare centers, and publishers—to give just a few examples.[9] This fact has led some courts to recognize "the increasing irrelevance of the distinction between nonprofit and for-profit" form "for purposes of discovering the element of charity in their operations." *See, e.g.*, *County Bd. of Equalization of Utah Cnty. v. Intermountain Health Care, Inc.*, 709 P.2d 265, 271

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[8] Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 Va. L. Rev. 2017, 2018 (2007).

[9] *Id.* at 2024.

(Utah 1985) (discussing irrelevance in the context of hospitals).

Moreover, as a practical matter, nothing about the non-profit form forces a non-profit entity to further primarily a religious, charitable, or community-benefit mission, nor does the non-profit form necessarily prevent a non-profit from being operated for the profit of some person or group. For example, although the Green Bay Packers are organized as a non-profit corporation, the team earned a record $54.3-million profit in fiscal year 2013[10] and pays many of its players multi-million-dollar salaries, just as for-profit National Football League teams do.[11] Similarly, while both for-profit and not-for-profit hospitals can truly benefit the community, courts have found that some non-profit hospitals amount to little more than "physicians' cooperative[s]" operated "primarily for the benefit of the participating physicians." *Intermountain Health Care, Inc.*, 709 P.2d at 271. When that happens, hospital physicians "enjoy power and high income through their direct or indirect control over the nonprofit hospitals to which they bring their patients ... This model has also been called the 'exploitation hypothesis' because the physician 'income maximizing' system is hidden behind the nonprofit façade of the hospital." *Id.* Similarly, others have argued that "many nonprofit hospitals operate as [mere] 'shelters' within which physicians operate profitable businesses, such as laboratories." *Id.*

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[10] Aaron Kuriloff, *NFL's Green Bay Packers Post Club-Record $54.3 Million Profit*, BLOOMBERG NEWS (Jul. 17, 2013, 12:01 AM) http://www.bloomberg.com/news/2013-07-16/nfl-s-green-bay-packers-post-club-record-54-3-million-profit.html.

[11] Green Bay Packers, FOX SPORTS, http://msn.foxsports.com/nfl/team/green-bay-packers/salary/67046?q=green-bay-packers (last visited Jan. 24, 2014).

At the same time, nothing about the for-profit form prevents a charitable or religious entity from organizing as a for-profit corporation. As the State of Oklahoma explained in its *amicus* brief in the Tenth Circuit, the Oklahoma General Corporation Act allows a for-profit corporation "to organize for 'any lawful purpose,' including religious purposes. The Act creates no distinction between those corporations who choose a lawful purpose that is religious in nature and those who choose a lawful purpose that is secular in nature." Brief of Oklahoma as *Amicus Curiae* in Support of Plaintiffs-Appellants and in Favor of Reversal at 2, *Hobby Lobby v. Sebelius,* No. 12-6294 (10th Cir. Feb. 19, 2013); *see also id.* at 5-7. Oklahoma law is not unique on this issue. *See, e.g.*, 8 Del. Code § 101(b) ("A corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes . . ."); *id.* § 122 ("Every corporation created under this chapter shall have power to: . . . (9) Make donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof.").

While the idea of incorporating a religious or charitable organization as a for-profit corporation may initially sound counterintuitive, the academic literature has identified a number of advantages that for-profit charities enjoy over their not-for-profit counterparts. These include the unrestricted ability to invest in for-profit businesses in pursuit of philanthropic goals, the ability to directly access the resources of a pre-existing for-profit entity, and the ability to engage in political activities that would be impermissible for at least a tax-exempt not-for-profit.[12] Some commentators have further suggested that organizing charitable organizations as for-profits would "improve the efficiency of services provided by nonprofit firms."[13]

While the pros and cons of for-profit charities can be debated, what is not debatable is the growing interest in using the for-profit philanthropic model. The most prominent example is Google, which has consolidated its philanthropic operations in a for-profit division known as "Google.org."[14] Although Google.org also works with Google's more traditional not-for-profit foundation—the Google Foundation—it was important for Google.org to be a for-profit organization because only the for-profit form gave

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[12] *See* Dana Brakman Reiser, *For-Profit Philanthropy*, 77 Fordham L. Rev. 2437, 2454-62 (2009) (discussing Google.org—Google's for-profit charitable arm).

[13] *See* Malani & Posner, *The Case for For-Profit Charities*, 93 Va. L. Rev. at 2022.

[14] *See* Reiser, *For-Profit Philanthropy*, 77 Fordham L. Rev. at 2438 (noting that "[t]he for-profit philanthropy structure distinguishes Google.org from the customary range of corporate philanthropic practice" and "also differentiates this model from philanthropy pursued in the traditional organizational form: a tax-exempt, nonprofit corporation."); Sheryl Sandberg, *About Google.org*, Google Official Blog (Oct. 11, 2005), http://googleblog.blogspot.com/2005/10/about-googleorg.html.

Google sufficient flexibility to pursue its intended philanthropic strategies.[15]

Many states have also recently passed laws allowing new hybrid corporate forms that explicitly combine aspects of for-profit and non-profit entities, reflecting the increased interest in facilitating the formation of profit-capable corporations that primarily serve charitable ends. These new corporate forms may not be strictly necessary for many socially minded companies. In closely held corporations like Hobby Lobby where all stakeholders agree on that purpose and are likely to continue to do so indefinitely, there is nothing to stop a garden-variety for-profit corporation from pursuing charitable or religious ends over profit. Similarly, in more widely held companies, where shareholder views and goals are more likely to fluctuate over time, an ordinary for-profit corporation can draft its bylaws to make clear that officers and directors are permitted to pursue a religious or charitable goal at the expense of profits.[16] Nevertheless, these new corporate forms fill an important practical gap: they allow would-be charitable entrepreneurs to achieve these goals without the expense of outside legal counsel and without feeling constrained to keep the corporation closely held.

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[15] Reiser, *For-Profit Philanthropy*, 77 Fordham L. Rev. at 2438.

[16] *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733, 860-61 (2005); *see also* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 Va. L. & Bus. Rev. 163 (2008).

The best known of the new hybrid forms is the "benefit corporation," a new form of corporation that has been introduced in more than a dozen states.[17] A benefit corporation is a for-profit corporation whose "corporate purpose requires it to create benefit for society generally as well as shareholders." Benefit-corporation legislation makes clear that officers' and directors' fiduciary duties include "creation of public benefit and consideration of non-financial interests" and allow shareholders to enforce the company's mission.[18]

Similarly, some states have also passed legislation creating business entities known as "low profit limited liability companies" or L3Cs—"a taxable for-profit business whose primary goal is to achieve a stated social mission. Profit is a secondary goal."[19] L3Cs must satisfy three criteria: (1) they must "significantly further the accomplishment of one or more charitable or educational purposes"; (2) they must ensure that "[n]o significant purpose of the company is the production of income or the appreciation of property"; and (3) they must not be organized "to accomplish any political or legislative purposes."

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[17] *See* State by State Legislative Status, Benefit Corp Information Center, http://www.benefitcorp.net/state-by-state-legislative-status/ (last visited Jan. 24, 2014).

[18] *See id.*, Legal FAQ's, http://www.benefitcorp.net/for-attorneys/legal-faqs (last visited Jan. 24, 2014).

[19] Malika Zouhali-Worrall, *For L3C companies, profit isn't the point*, CNN MONEY (Feb. 9, 2010, 10:49 AM), http://money.cnn.com/2010/02/08/smallbusiness/l3c_low_profit_companies/.

Because the primary mission of these companies has nothing to do with earning a profit, they have been dubbed "the for-profit with a nonprofit soul."[20]

As these examples illustrate, the government's bright line between for-profit and non-profit corporations simply does not fit reality. For-profit corporations are not required to maximize profits ahead of every other goal, and not-for-profits are not precluded from seeking to maximize profits. Moreover, given the explosion of new hybrid corporate forms, the line between a for-profit corporation and a not-for-profit corporation is not even well defined. Ultimately, a corporation's ability to pursue goals other than profit—including religious, charitable, or philanthropic goals—has nothing to do with whether it adopted the for-profit or not-for-profit form. The Court should not condition free-exercise rights on such an arbitrary test.

B. For-Profit Entities May Be Formed and Operated for Religious Purposes.

Just as for-profit entities may and frequently do have charitable or philanthropic purposes, they also often have religious purposes. To some, this may seem counterintuitive—although it is obvious how a for-profit corporation can perform charitable or philanthropic acts, it may initially be less obvious how a for-profit corporation can practice religion.

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[20] Grant Williams, *Dozens of Companies Are Sprouting with the Same Goal: Doing Good,* THE CHRONICLE OF PHILANTHROPY (Nov. 12, 2009), http://philanthropy.com/article/Dozens-of-Companies-Are/57786/.

After all, a corporation cannot pray or take communion. Still, it is obvious that for-profit corporations can engage in certain religiously motivated conduct such as closing on Sunday, and to the extent that the law views a corporation as an independent person, it follows that it is the corporation itself that takes this religiously motivated action.

Nevertheless, the exercise of religion by for-profit corporations goes far beyond closing on Sundays. To see how, it helps to consider the religious beliefs of the C12 Group and its members, who view their for-profit corporations as fundamentally religious institutions and who attempt to run their corporations primarily for the glory of God.

At the heart of the C12 Group's mission is a simple belief—that Christian men and women are called to live every part of their lives for the glory of God. As a result, C12 rejects the rigid separation of faith and business advocated by the Solicitor General. Indeed, C12 believes that for Christians, "there is no sacred/secular divide,"[21] and it believes that "no other misconception has hindered and damaged the cause of Christ in modern times as much as this sort of compartmentalization." For that reason, the mission of the C12 Group is to teach and encourage Christian businessmen and women to live their whole lives—and to operate their businesses—in accordance with their Christian faith.

C12 members espouse the idea that some people are called to serve God not through full-time ministry in a church or through a traditional religious charity, but through a for-profit business—by owning and operating a business that glorifies God and shows God's love to others. Thus, while C12 and its members do not view their for-profit businesses as churches *per se*, they view the purpose of their businesses as analogous to the purpose of the church. As C12 founder Buck Jacobs explains in one of his books for owners and CEOs of Christian businesses:

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[21] Jacobs, *A Light Shines Bright in Babylon: A Handbook for Christian Owners and CEOs* at 4.

> Your company is not a church, but its purpose is ultimately the same as that of the church. It represents your primary ministry opportunity. Your business is your platform for ministry, uniquely given to you by God to run for Him, to use for His glory and the building up and equipping of His Body. If you're called by God to run His company, your calling is as holy as that of any pastor, priest or missionary. The person placed in charge of a property belonging to the Most High God is a person given a sacred task.[22]

Consistent with this view, C12 and its members view their businesses—the vast majority of which are organized as for-profit entities—as "the leading ministry opportunity in [their] li[ves]."[23] They see the "natural conduct of business" as presenting "perhaps the greatest array of opportunities to give our testimony to the Gospel" because "it is so unusual and unexpected to hear of Christ in the marketplace."[24] Indeed, because "people expect to be exploited or manipulated by others in the marketplace," they believe that doing business in a Christian way can serve as a powerful testimony—in some cases even more powerful than traditional forms of religious exercise such as preaching a sermon or doing charitable activities.

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[22] *Id.* at 1.

[23] *Id.*

[24] *Id.* at 22.

These beliefs strongly shape the way that C12 and its members conduct business—from the way they deal with their customers, suppliers, and employees to the way they evaluate the success of the business. For example, C12 believes that companies should treat everyone who interacts with the business in accordance with the Golden Rule, meaning, for example, that suppliers should not be "abused or taken advantage of unfairly"[25] and that "we should not unfairly play one supplier against another to their detriment."[26] Similarly, although C12 and its members inevitably experience personnel problems, their companies aim to resolve these problems in the most compassionate and loving way possible—as they believe the Bible requires. Thus, even if it becomes necessary to fire an employee, "the employee should be out-placed by management using whatever helpful tools may be available. Concern should be expressed *and demonstrated* for the employee even while acknowledging that they may no longer have a role at your firm."[27]

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[25] *Id.* at 56.

[26] *Id.*

[27] *Id.* at 55.

C12 and its members similarly believe that Biblical principles govern how they should treat their competitors. As employees, they resolve not to "gossip about competitors or say anything derogatory."[28] Rather, they aspire to follow the spirit of Proverbs 25:21, which says that "If your enemy is hungry, give him food to eat; if he is thirsty, give him water to drink."

These principles particularly apply to the relationship between a company and its CEO—one that has been the subject of a great deal of recent attention by both regulators and the media. C12 and its members believe that God requires them to set the CEO or owner's compensation *fairly* and "in proportion to the compensation of the team." Toward this end, C12 encourages even the CEOs of owner-operated companies to set their salaries through a "council of advisors, accountability group, or board compensation committee" rather than unilaterally.[29]

These religious beliefs ultimately mean that, contrary to the picture painted by the Solicitor General, C12 and the for-profit companies of many of its members do *not* aim simply to maximize profits. While C12 and its members believe that earning a legitimate profit can be perfectly compatible with living their Christian faith (and in fact, C12 members typically drastically outperform their competitors), there are also frequently situations in which they believe that God calls their companies *not* to maximize profits, and they run their businesses accordingly. A prime illustration involves what a company should do when it is inconvenient to comply with a contract. While many companies would breach the contract if they believe they can get away with doing so, C12 and its members believe that God calls them to keep their word—even when doing so is costly:

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[28] *Id.* at 58.

[29] *Id.* at 66.

> If the company enters into a contract, it will keep it even if it hurts (Psalm 15:4b)! This doesn't mean that a Christian company cannot or will not ask to be released from an unfair or undesirable agreement. But if it is unable to obtain permission from the other party to alter or eliminate the agreement, then [it] will keep [the contract] without complaint. A Christian company's word must be good, even if unforeseen circumstances make things difficult."[30]

Not surprisingly, then, C12 and the for-profit companies of its members measure their "profitability" in terms other than monetary profitability—including the company's "reputation within the body of Christ," its "[r]eputation with the [u]nbelieving [w]orld," and its "production of eternal fruit."[31]

Of course, these views about the relationship between faith and business are not unique to C12. Indeed, there are numerous other organizations with missions similar to C12's.[32] Nor is C12's view of work a uniquely Protestant view. As the Pontifical Council for Justice and Peace has explained, the Catholic Church believes, like C12, that "[t]he vocation of the businessperson is a genuine human and Christian calling,"[33] and that God has important things to say about how businesspeople run their businesses. Importantly, as Pople John Paul II explained, the purpose of a business "is not simply to make a profit, but is to be found in its very existence as a community of persons who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society."[34] As a result, many Catholics similarly believe that business institutions—including for-profit corporations—should be run according to important religious principles that ensure that they honor God and respect "the dignity of people as ends in themselves who are intelligent, free, and social."[35] Similarly, many adherents to Judaism believe that God requires them to close on the Sabbath and

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[30] *Id.* at 65-66.

[31] *Id.* at 39-42.

[32] Other businesses include: CEO Forum (roughly 300 companies), Convene (roughly 400 members), CBMC Forums (roughly 550 members), FCCI Christ at Work

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Groups (roughly 400 members), Truth@Work (roughly 350 members), the Full Gospel Business Men's Fellowship (roughly 500 members), and Legatus (roughly 600 Catholic CEOs of businesses of all sizes).

[33] *See* Brief of Wywatch Family Action, Inc., and Eagle Forum Amici Curiae in Support of Appellants and Reversal at 19-20, *Hobby Lobby v. Sebelius*, No. 12-6294 (10th Cir. Feb. 19, 2013) (internal quotation omitted).

[34] Vocation of the Business Leader: A Reflection, Pontifical Council for Justice and Peace at 18 ¶ 57, *available at* http://www.stthomas.edu/cathstudies/cst/conferences/Logic%20of%20Gift%20Semina/Logicofgiftdoc/FinalsoftproofVocati.pdf.

[35] *Id.* at 12 ¶ 35.

conduct their businesses with honesty and integrity—and they believe that God does not distinguish between the acts of the corporation and the acts of its owner.[36]

From this exposition, it should be obvious that the Solicitor General is wrong to assert that "[f]or-profit corporations 'are different from religious non-profits in that they use labor *to make a profit*, rather than to perpetuate a religious values-based mission.'" Gov't *Hobby Lobby* Br. 19. While C12 and the companies of its members do hope to earn a profit, that goal is subsidiary to their primary purpose, which is a religious one. In other words, the fact that these companies may legally distribute profits to investors doesn't mean that they are legally obligated to maximize profits at the expense of other considerations. The purpose of these companies is not, as the Solicitor General asserts, "simply to engage in commerce." *Id.* Rather, the purpose of the company is to serve God—just as it is the purpose of a church to do so.

It follows that for-profit corporations deserve free-exercise rights every bit as much as the "religious non-profits" that the Solicitor General concedes merit this protection. Both sorts of company may be organized to "perpetuate a religious values-based mission," and free exercise for both types of entity is integral to ensuring that the government does not substantially burden '"a person's exercise of religion." 42 U.S.C. § 2000bb-1(a).

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[36] Mark L. Rienzi, *God and the Profits: Is There Religious Liberty for Moneymakers?*, 21 Geo. Mason L. Rev. 59, 68 (2013) (citing Moses L. Pava, *Developing a Religiously Grounded Business Ethics: A Jewish Perspective*, 8 Bus. Ethics Q. 65, 65 (1998)).

III. THE GOVERNMENT IS WRONG TO ASSERT THAT THE GREENS' RELIGIOUS VIEWS CANNOT BE IMPUTED TO HOBBY LOBBY.

The Solicitor General also makes a separate—and not wholly consistent—argument that, regardless of the nature of Hobby Lobby's corporate structure, the Green family's religious views cannot be imputed to Hobby Lobby. *See* Gov't *Hobby Lobby* Br. 23. The Solicitor General maintains that Hobby Lobby is improperly conflating the Greens' personal beliefs with its own, thereby running afoul of the "bedrock principle that a corporation is legally distinct from its owners." *Id.* at 25. The Solicitor General asserts that there is "no basis on which to impute the [Green's] religious beliefs to [Hobby Lobby]." *Id.*

This argument fails first because the Court has *already* found corporations capable of having the views of their constituents imputed to them. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525–26 (1993) (recognizing free-exercise rights of non-profit church corporation).

Setting this aside, however, the Solicitor General's assertion also places an unwarranted emphasis on a corporation's religious "beliefs" in place of its religiously-motivated acts. The language of the free-exercise clause reflects a decision to protect not only conscience, but more centrally to protect religious acts.[37] When Hobby Lobby closes stores on Sunday, what is it doing if not taking a religious act?

Nevertheless, even if the primary issue were what a corporation "believes," the Solicitor General's argument still misses the forest for the trees. Of course corporations are "legally distinct" from their owners; but the unusual conclusion the Solicitor General draws from that fact is that the thoughts, beliefs, or actions of a corporation's owners or agents cannot be imputed to a corporation. But what could a corporation do, know, and intend if not derived from the human beings related to the corporation? To the contrary, corporations can *only* derive their acts, thoughts, and intentions from their constituents.

Courts have for well over a century analyzed the "minds" of corporations in tort and criminal law. In 1909, the Court quoted a treatise to describe the "modern" authority on whether a corporation can meet the mental state requirements to commit a crime: "'If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.'" *New York Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 492–93 (1909) (quoting *Bishop's New Criminal Law*, § 417). More contemporary criminal law cases from the circuits often perform detailed analyses of employees' and directors' thoughts and actions to determine whether a corporation knew certain information and intended to break the law. *See, e.g.*, *United States v. Bank of New England, N.A.*, 821 F.2d 844, 854–55 (1st Cir. 1987) (upholding jury instructions on a corporation's willfulness and collective knowledge that led to conviction of defendant corporation).

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[37] *See* McConnell, *The Origins & Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. at 1490 (also noting that "[a]s defined by dictionaries at the time of the framing, the word 'exercise' strongly connoted action.").

Thus, to the extent that the exercise of religion requires both (1) an act and (2) an intention to act based on a religious "belief", the Court has long held that corporations may derive both from their owners or agents. To return, then, to Hobby Lobby's practice of closing stores on Sunday: If Hobby Lobby could be criminally prosecuted for, say, closing stores with the intent to obstruct justice, *see, e.g.*, *United States v. Washington Water Power Co.*, 793 F.2d 1079, 1084 (9th Cir. 1986) (finding that defendant corporation had the mental state to obstruct justice), then Hobby Lobby surely by the same principle can close stores to follow religious precepts.[38]

Much of this Court's jurisprudence on other constitutional rights of corporations follows this same theme: that a corporation is a separate legal entity, yet still the creature of real human beings, who imbue corporations with rights and views. In

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[38] *See also* Rienzi, *God and the Profits: Is there Religious Liberty for Moneymakers?*, 21 Geo. Mason L. Rev. at 89 ("It is unclear what principled reason would justify viewing a corporation as capable of forming and acting upon criminal intentions but incapable of forming and acting upon religious ones.").

Boy Scouts of Am. v. Dale, 530 U.S. 640, 655–56 (2000), for example, the Court analyzed the free speech rights of the Boy Scouts of America with particular attention to the mechanics of how opinions of constituents were expressed through the association. *See id.* at 655 ("the First Amendment simply does not require that every member of a group agree on every issue in order for the group's policy to be 'expressive association.'"); *see also Citizens United,* 558 U.S. at 349, 354 (referring to corporations with free speech rights as "associations of citizens"). Likewise, in *Barlow's,* 436 U.S. at 311, the Court accorded Fourth Amendment search and seizure rights to a corporation, noting that the Fourth Amendment was intended in large part to address the negative experience of "merchants and businessmen" who had consistently put up with unceremonious inspections of their business premises by the Crown. *See also Hale v. Henkel*, 201 U.S. 43, 76 (1906) (according Fourth Amendment rights to corporations, stating, "A corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body.").

The Solicitor General cites a number of cases to support its assertion that the Greens' views cannot be imputed to Hobby Lobby, but these cases undermine rather than buttress the Solicitor General's point. Thus, the Solicitor General points out that in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001), this Court found that boxing promoter Don King and his single-shareholder corporation were sufficiently separate so that the corporation could be an "enterprise" that King could participate in for purposes of RICO. Gov't *Hobby Lobby* Br. 23–24. But no one denies Hobby Lobby's legal separateness from the Green family. Instead, the useful analogy from that case is that, like Hobby Lobby, the affairs of the corporation in *Cedric Kushner* were conducted by its shareholder and employee, Don King. *Cedric Kushner*, 533 U.S. at 166 ("The alternative that we endorse ... does not deny that a corporation acts through its employees; it says only that the corporation and its employees are not legally identical."). Thus, Don King's acts and intentions were imputable to the corporation that he owned and controlled. The same is true for *Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946) and *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), both cases in which the Court pointed out the distinct rights and obligations of corporations, but also illustrated that corporations only act through employees and owners.

This specific issue is particularly relevant to C12's members, who represent more than a thousand closely held faith-based businesses. The women and men who own and run these businesses place their religious faith before all other considerations—profit, prestige, or power—in business management. And the corporations associated with these businesses in turn reflect this orientation. In many instances, this approach in fact serves to increase profits by, among other things, engendering greater levels of trust and loyalty with all stakeholders (*i.e.*, employees, customers, suppliers, investors). But importantly, when additional profit conflicts with religious views, these corporations consistently follow their owners' and employees' faith, and forego profits in favor of religion. To suggest that such corporations are so divorced from their human constituents that they are *not* exercising religion in this context makes little sense—both as an analytical matter and as a matter of public policy.

In the final footnote at the close of the Solicitor General's argument about this topic, the Solicitor General appears to nod to this reality, arguing suddenly that if corporations can derive their exercise of religion from owners and agents, this would create "significant RFRA-created gaps in employment regulation," because privately held corporations make up a large part of the American economy. Gov't *Hobby Lobby* Br. 26 n.7. The Solicitor General's point, however, should influence the Court in the other direction. The prevalence of privately held corporations in the economy means that the number of corporations that put religious views above profits is significant, as is the potential burden placed on these corporations by denying their free-exercise rights. Indeed, the practical effect of a finding that corporations cannot exercise religion may well be that many of the business leaders and owners who are part of C12 will find that their consciences do not allow them to continue to own and lead businesses. And in most cases, this means that the businesses they own and run will no longer exist.

The Court should not let this happen. Nor should the Court rely on the Solicitor General's artificial description of for-profit corporations to deny protection under RFRA and the free exercise clause. Instead, the Court should recognize that the corporations owned and run by the likes of C12's members exercise religion in a very real way, and that the right to do so should be protected.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Tenth Circuit should be affirmed, and the judgment of the U.S. Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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AND
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Supreme Court, U.S.
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Nos. 13-354 & 13-356

In the
Supreme Court of the United States

◆

KATHLEEN SEBELIUS, SECRETARY OF
HEALTH AND HUMAN SERVICES, et al.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., et al.,
Respondents.

◆

CONESTOGA WOOD SPECIALTIES CORP., et al.,
Petitioners,
v.
KATHLEEN SEBELIUS, et al.,
Respondents.

◆

On Writs Of Certiorari To The United States Courts Of Appeals For The Tenth And Third Circuits

◆

BRIEF OF CALIFORNIA, MASSACHUSETTS, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, NEW MEXICO, NEW YORK, RHODE ISLAND, OREGON, VERMONT, AND WASHINGTON AS AMICI CURIAE SUPPORTING FEDERAL PETITIONERS AND RESPONDENTS KATHLEEN SEBELIUS, ET AL.

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INTERESTS OF THE AMICI

These cases involve the intended reach of the federal Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.* Construing RFRA to extend free-exercise rights to for-profit corporations would depart sharply from the fundamental state-law rule that a corporation's legal identity is separate and distinct from that of its shareholders or managers. Any such departure from this background norm is improper absent a clear expression of congressional intent. States have a strong interest in ensuring that RFRA and other federal statutes are not improperly read to displace, *sub silentio*, settled principles of state law that provide the presumptive backdrop for congressional action.

Extending free-exercise rights under RFRA to for-profit corporations would also affect the States by calling into question the effective enforcement of important health care, antidiscrimination, and other protections for state residents under federal and state laws.

Finally, States have their own compelling interests in promoting public health and gender equity. Many States have furthered these interests by expanding access to contraceptive services, in part through requirements that health plans include coverage for contraceptives. The federal Patient Protection and Affordable Care Act (ACA) and its coverage requirements for women's preventive services substantially advance these same goals. State initiatives cannot be fully effective without the ACA's coverage requirement, which protects large numbers of state residents whose health plans the States cannot regulate because of the preemptive effect of other federal law. The States accordingly have a direct interest in ensuring that RFRA is not misconstrued to interfere with that requirement.

◆

SUMMARY OF ARGUMENT

The ACA and its implementing regulations relating to coverage of contraceptives seek to advance compelling interests in public health and gender equity while avoiding any undue interference with the free exercise of personal religious beliefs. As a general matter, they require that all health plans, including those provided by employers, cover FDA-approved contraceptives. They provide, however, a complete exemption for non-profit "religious employers"; and other non-profit religious organizations need not provide coverage for contraceptives directly if they object to doing so. *See generally* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,873-82, 39,886-88 (July 2, 2013) (preamble to final regulations adopted at 45 C.F.R. § 147.131).

In the cases now before the Court, private for-profit corporations argue that RFRA requires they be exempted from the ACA's contraceptive-coverage provision because of the personal religious beliefs of their shareholders, directors, or managers. Construing RFRA to provide any such extended exemption would improperly disregard settled background principles of state law; threaten to undermine the enforcement of important protections afforded to all state residents under federal and state law; and directly threaten States' ability to pursue their own compelling public interests.

1. Nothing in RFRA suggests any congressional intention to ignore or displace basic principles of state corporation law. The fundamental point of organizing a business in corporate form is to separate the legal identity of the business from that of its shareholders or managers. Interpreting RFRA to allow a for-profit business corporation to assert religious free-exercise rights based on the personal beliefs of some group of individual shareholders or managers would be a startling departure from that norm. Allowing individual shareholders to assert personal free-exercise rights as a basis for limiting public regulation of the corporation, despite the choice they previously made to hold and conduct their business in corporate form, would likewise require overriding settled principles of state corporate law.

Disregarding the principle of separate legal identity would be especially problematic in the context of free-exercise rights. It is entirely unclear how courts, legislatures, or public administrators could appropriately attempt to ascertain what religious beliefs should be legally attributed to a for-profit corporation. Nor is it clear how one would decide which shareholders or managers should be allowed to seek accommodations for their individual beliefs in the operation of the corporate business.

These concerns cannot be set aside on the ground that religious organizations, including many that are organized for legal purposes in non-profit corporate forms, are often treated as properly able to assert statutory or constitutional free-exercise rights. Such organizations play a unique role in facilitating religious exercise by individuals and communities of faith, and have historically been accorded special legal consideration. There is, however, no fair analogy between such institutions and private, for-profit corporations whose shareholders have chosen to avail themselves of the advantages of separate corporate legal identity for purposes of conducting a commercial business. Nor is there any indication that Congress, in enacting RFRA, intended to go well beyond historical norms by extending the Act's special accommodations to for-profit corporations.

2. Construing RFRA to permit free-exercise claims by for-profit corporations would threaten important state interests. It would call into question the effective enforceability of federal and state laws that provide important rights and protections for all state residents, promoting public interests in full participation by all residents in economic and social activity. These include laws ensuring access to health care, protecting civil and economic rights, and regulating land use. Although RFRA by its terms affects only the enforcement of federal laws, any decision by

this Court expanding the scope of the Act in the manner proposed in these cases would likely influence the construction of other laws. These include both other federal restrictions that directly limit state and local regulation, and state statutes with provisions parallel to those of RFRA. None of this is warranted by RFRA.

3. Finally, even if RFRA were properly read to permit for-profit corporations to assert statutory free-exercise rights, compelling public interests justify any minimal burden imposed on those rights by the ACA's contraceptive-coverage provision. The law does not require corporate employers, or their shareholders or managers, to endorse any form of medical treatment. It requires only that employer health plans cover, among many other possible treatments or services, the cost of FDA-approved contraceptives for any employee who might make the personal choice to use them. That requirement imposes at most a highly attenuated burden on any free-exercise right held by a for-profit corporation.

Conversely, from the point of view of individual employees and the public as a whole, ensuring affordable access to contraceptives serves compelling public interests in promoting public health, gender equity, individual autonomy, and other social and economic goals, including easing burdens on the public fisc. Twenty-eight States, including all amici except the District of Columbia, have sought to further these same interests by adopting state rules requiring coverage for contraceptives, as well as by expanding low-income families' eligibility for family-planning services. As a practical matter, however, state coverage requirements cannot benefit some 60% of workers and their families, because federal law preempts state regulation of self-funded employer health plans. The ACA's contraceptive-coverage provision addresses this and other gaps in affordable access to contraceptives, thus providing an essential complement to state regulation and serving compelling interests not only of the United States but also of the States themselves.

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ARGUMENT

I. For-Profit Corporations Cannot Claim RFRA Free-Exercise Rights Based on the Beliefs of Their Shareholders or Managers

A. Exempting a For-Profit Corporation from Regulation Based on the Personal Religious Beliefs of Shareholders or Managers Would Violate the Fundamental Principle of Separate Corporate Identity Under State Law

Like any federal law, RFRA must be construed in light of other law existing at the time of its enactment, which Congress is presumed to have understood formed the background for the new Act. *See Burks v. Lasker*, 441 U.S. 471, 478 (1979). This is especially true where that background consists of well settled and widely understood principles of state law, which this Court assumes Congress does not intend to displace absent some clear indication to the contrary. *See Wyeth v. Levine*, 555 U.S. 555, 565 (2009). The Court has emphasized this presumption in the area of corporation law, because corporations "are creatures of state law." *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479 (1977).[1]

Here, it is a foundational – indeed, definitional – principle of state corporate law that corporations have a legal identity distinctly separate from that of their shareholders or managers. Construing RFRA to allow corporations to assert the personal religious beliefs of shareholders or managers as a shield against the enforcement of generally applicable laws or regulations would require disregarding or overriding that basic legal distinction. Blurring the otherwise clear line between the corporation's artificial legal identity and the personal beliefs of individual shareholders or managers would, in turn, create grave practical difficulties in application. There is no basis for concluding that Congress would have contemplated a construction of RFRA that thus ignores "the historical presence of state law" governing respect for the separate corporate form. *See Wyeth*, 555 U.S. at 565 n.3.[2]

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[1] *See Santa Fe Indus.*, 430 U.S. at 479 (refusing to read federal securities laws as displacing state law regarding fiduciary responsibilities, and expressing reluctance to "override[ ]" "established state policies of corporate regulation"); *cf. Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1981 (2011) (even in uniquely federal area of immigration law, Congress "expressly preserve[d]" state power to regulate corporate charters).

1. It is a central principle of state corporate law that shareholders of a corporation are "distinct from the corporation itself, . . . with different rights and responsibilities. . . ." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001); *see also Harris v. Stony Clove Lake Acres*, 202 A.2d 745, 747 (N.Y. App. Div. 1994) ("A corporation, even when wholly owned by a single individual, has a separate legal existence from its shareholders, and courts are loathe to disregard the corporate form for the benefit of those who have chosen that form to conduct business.") (citations omitted); *see generally* Brief of Corporate and Criminal Law Professors at 3-19 (Professors' Brief). The creation of a separate legal identity provides many benefits in conducting business. Unlike a traditional partnership, for example, a business corporation typically maintains its unitary identity with respect to customers, creditors, employees, regulators, and even its own shareholders and agents,

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[2] Petitioners in *Conestoga Wood Specialties v. Sebelius* also argue briefly that the ACA's contraceptive-coverage provision violates not only RFRA but also the Free Exercise Clause. 13-356 Pet. Br. 43-48. That claim fails for reasons similar to those addressed in this brief with respect to RFRA. *See* 13-356 Pet. App. 28a. In addition, constitutional strict scrutiny does not apply because the contraceptive-coverage provision is a neutral and generally applicable regulation of economic conduct. There is no indication that it aims "to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993).

notwithstanding possible changes in ownership interests or disputes among different shareholders or managers. The separate identity also benefits shareholders in various ways, the most obvious being that they limit their investment in the business and their liability to each other or third parties for the business's debts or torts. *See, e.g.*, *Kush v. Am. States Ins. Co.*, 853 F.2d 1380, 1384 (7th Cir. 1988). This legal separation between an incorporated business and its owners is so fundamental that each State maintains a specific body of law for determining what must be done to establish and maintain it, and under what limited circumstances it may be breached. *See, e.g.*, *Zaist v. Olson*, 227 A.2d 552 (Conn. 1967) (plaintiff may sue shareholder directly by showing such "a unity of interest and ownership that the independence of the corporation had in effect ceased").

2. As independent legal entities, corporations can hold and exercise many legal rights, just as they are subject to legal obligations. Most obviously, a business corporation may engage in trade, incurring enforceable debts and obtaining rights to enforce debts or contracts against others. More broadly, a for-profit corporation may, through its ordinary governance structures, develop positions on matters relevant to its business or operations, including matters of public policy. In such cases the Court has viewed the corporation, as an entity, as holding a right to express those positions in public debate. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342-43, 361 (2010).

In contrast, certain rights by their nature are "'purely personal' guarantees" that cannot be held by a business corporation (or, in some cases, by any corporation or collective entity). *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) (citation omitted). The right to vote, for example, is inherently personal. Similarly, the Court has long held that the privilege against self-incrimination, which "'respects a private inner sanctum of individual feeling and thought' . . . and 'proscribes state intrusion to extract self-condemnation,'" is a personal right that cannot be held by a collective entity or asserted by a corporate owner or manager as such. *Bellis v. United States*, 417 U.S. 85, 91 (1974) (citation omitted).

Rights to the free exercise of religious beliefs, whether created by statute or by the Constitution, likewise protect the development and expression of an "inner sanctum" of personal religious faith. Free-exercise rights have thus also been understood as personal, relating only to individual believers and to a limited class of associations comprising or representing them. *See generally Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1212-13 (D.C. Cir. 2013).

Unsurprisingly, there is no tradition of recognizing or accommodating the exercise of such inherently personal rights by ordinary, for-profit business corporations. Accordingly, in the present context, those courts of appeals that have allowed for-profit corporations to claim RFRA exemptions from the ACA's contraceptive-coverage provision have justified that conclusion by reference to the religious beliefs of individual corporate shareholders or managers. *See Korte v. Sebelius*, 735 F.3d 654, 683 (7th Cir. 2013) (burden arises from "[t]he Kortes and the Grotes as corporate owners and managers" being forced to provide coverage); *Gilardi*, 733 F.3d at 1216 (basing holding only on individual religious beliefs); 13-354 Pet. App. 8a-9a, 50a (identifying purported corporate beliefs based on complaint alleging that corporation "bears the imprint of its owners' faith," *see* J.A. 135); *see also E.E.O.C. v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 (9th Cir. 1988) ("Townley is merely the instrument through and by which Mr. and Mrs. Townley express their religious beliefs. . . . [T]he rights at issue are those of Jake and Helen Townley.").

3. Allowing for-profit corporations to seek exemptions from their ordinary regulatory obligations based on the religious beliefs of individual shareholders or managers is not a sustainable way of construing RFRA, in light of the basic principle of separate corporate identity under state law. Lower courts that have sought to apply RFRA to such corporations in the ACA context have either (a) attributed the rights of individual shareholders or managers to their corporations or (b) allowed the shareholders to assert their personal rights based on the obligations of the corporation. Neither approach is sound.

a. Courts that have allowed for-profit business corporations to assert a religious exemption on their own behalf have confused the rights of a corporation with those of its shareholders or managers. *Korte*, 735

F.3d at 683-85; *see* 13-354 Pet. App. 50a-56a. But corporations can properly exercise only those substantive rights that they possess as "separate . . . institutions," legally distinct from their shareholders or agents. *United States v. White*, 322 U.S. 694, 703 (1944) (self-incrimination). Thus, for example, corporations own property and hold resources in their own right, "apart from the private and personal" resources of their shareholders. *Id.* at 702; *see Bellis*, 417 U.S. at 93 (same).

Similarly, a business corporation's claims to rights of privacy or speech may be analyzed coherently as asserted based on the activities and interests of the corporate entity itself, without reference to the interests of individual shareholders or managers. *See Citizens United*, 558 U.S. at 361; *See v. City of Seattle*, 387 U.S. 541, 543 (1967). Assessing whether a law infringes on corporate privacy or speech rights does not require determining whether the rights of the company's shareholders or managers are burdened as individuals. In sharp contrast, lower courts have found no way to analyze how a business corporation would exercise "its" religion. They have considered instead the personal religious beliefs of the corporation's "owners, officers, and directors." *Korte*, 735 F.3d at 668; *see also* 13-354 Pet. App. 8a-9a, 50a.

Courts that have taken this approach have done so in actions involving corporations owned and run by small family groups, with an asserted unanimity of religious belief as to morally permissible methods of contraception and the burden imposed by the ACA's coverage requirement. *Korte*, 735 F.3d at 662; 13-354 Pet. App. 7a-9a. Even in that situation, looking to the beliefs of shareholders and managers to define the basis for a corporate free-exercise claim would either disregard or override the state-law principle of separate legal identity. Beyond that concern, however, RFRA cannot be construed on the assumption that the shareholders and officers of a business corporation will share the same religious beliefs. If some are from different faiths (or of no faith), or hold differing understandings or beliefs on particular issues even within one faith tradition, there is no sound way for counsel, regulators, or courts to determine what particular religious beliefs the corporation may properly assert on its own behalf.

b. Other courts have sought to apply RFRA to for-profit corporations not by allowing the corporation to assert free-exercise rights as its own, but by treating any burden imposed by applying ACA's contraceptive coverage requirement to the corporation as also burdening the personal free-exercise rights of the corporation's shareholders or agents. *Gilardi*, 733 F.3d at 1216; *Korte*, 735 F.3d at 666. This approach is equally incompatible with the principle of separate corporate identity under settled state-law principles.

Shareholders are often able to assert some practical interest in the operations of business corporations in which they have invested. There would, however, be legal chaos if individual shareholders thereby gained standing to proceed on behalf of the corporation. Instead, the law commits vindication of the corporation's legal rights to the corporation, acting in its separate capacity and through its duly constituted governance mechanisms and agents. Under standard state-law rules of shareholder standing, the legal distinction between shareholder and corporate entity is maintained by allowing shareholders to bring suit on their own behalf only if they can assert and maintain "a direct, personal interest in a cause of action," separate and distinct from any injury suffered by the corporation. *Franchise Tax Bd. of California v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990). This rule prevents a multiplicity of individual suits, protects the rights of creditors, and ensures that any judgment inures to the benefit of the corporation as a whole. *See, e.g.*, *Thomas v. Dickson*, 301 S.E.2d 49, 50 (Ga. 1983).

Similarly, corporate managers and other agents have, as such, legal personalities quite distinct from those they have as individuals. As this Court has explained in the Fifth Amendment context, "'individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations.'" *Bellis*, 417 U.S. at 90 (quoting *White*, 322 U.S. at 699). Thus, an individual right or privilege held by a particular corporate manager may not be asserted to shield the corporation from a duty or obligation that the individual is required to perform on its behalf.

In the ACA context, any burden imposed on a business corporation, as an employer required to provide certain health benefits as part of any health plan it may sponsor for its employees, falls only on the corporation. Any incidental effect on individual shareholders or managers affects them only in their capacities as part-owners or corporate agents. Actions that an agent might be required to take, for example, "are not actions taken in an individual capacity, but as officers and directors of the corporation." *Autocam Corp. v. Sebelius*, 730 F.3d 618, 623 (6th Cir. 2013). Requirements imposed on the corporation by the ACA thus cause no cognizable personal injury to any individual shareholder or manager; and any injury suffered by the corporation would, under settled law, have to be asserted by the corporation on its own behalf. Again, RFRA provides no warrant for departing from standard background principles of state law by allowing a legally separate, for-profit corporation to challenge a regulatory obligation on the ground that compliance would burden the religious exercise of individual shareholders or managers.

B. Churches and Non-Profit Religious Entities Are Not Analogous to For-Profit Corporations

Organized churches and related religious institutions have been recognized as capable of asserting free-exercise rights. Lower courts that have treated for-profit corporations as "persons" covered by RFRA have effectively put them in the same category as these traditional religious institutions, on the ground that the institutions are often legally organized in some non-profit corporate form. *See Korte,* 735 F.3d at 674-75; 13-354 Pet. App. 24a-25a. There is, however, no good analogy between the two situations. The fact that the law "gives special solicitude to the rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran v. Equal Employment Opportunity Comm'n*, 132 S. Ct. 694, 697 (2012), provides no basis for extending the statutory free-exercise rights created by RFRA to ordinary, for-profit business corporations.

Individuals commonly practice their religions at least in part collectively, in or under the auspices of religious institutions. The term "religion" itself connotes a "community of believers." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1490 (1990). The "very existence" of religious organizations "is dedicated to the collective expression and propagation of shared religious ideals." *Hosanna-Tabor*, 132 S. Ct. at 712 (Alito, J., concurring) (citation omitted). Religious organizations act as "critical buffers between the individual and the power of the State," giving individuals a space in which to exercise faith without state intrusion. *Id.* (citations omitted). In addition, religious organizations often serve as authoritative voices on matters of religious doctrine. *Korte,* 735 F.3d at 695 (Rovner, J., dissenting).

In this unique context, the law often gives special consideration to religious organizations. For example, although neutral and generally applicable regulations may usually be applied constitutionally without regard to incidental effects on religious exercise, the First Amendment may require special protection for religious institutions. *Hosanna-Tabor*, 132 S. Ct. at 707 (majority opinion); *see also Korte*, 735 F.3d at 676-77 (majority opinion) (identifying claims involving rights of conscience and church autonomy rights) (citing Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1388-89 (1981)). Thus, the Court has held that implied or charitable trust doctrines, which generally require courts to investigate the extent to which a secular charity conforms to the purpose of a grant, *see In Pacific Home v. Los Angeles*, 264 P.2d 539, 543 (Cal. 1953), do not apply when they would require an analysis of conformity to church doctrine. *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 446 (1969). Similarly, although actions for breach of the bylaws of secular organizations are treated as traditional breach of contract actions under state law, *see Burke v. Ipsen*, 189 Cal. App. 4th 801 (2010); *Little Canada Charity Bingo Hall Ass'n v. Movers Warehouse, Inc.*, 498 N.W.2d 22, 24 (Minn. Ct. App. 1993), when an organization is religious, its own judicial bodies may retain greater authority on the interpretation of bylaws. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 720 (1976). Most recently, the Court confirmed that religious institutions enjoy a ministerial exception from employment laws in certain contexts. *Hosanna-Tabor*, 132 S. Ct. at 710.

These special accommodations for religious organizations have deep historical roots. Blackstone explains that, at common law, religious organizations did not need to show a charter in order to claim "corporate" status. *See* 1 William Blackstone, *Commentaries* *460; *see also* Joseph Angell et al., *Treatise of the Law of Private Corporations Aggregate* §§ 69-70 (1882) (citing similar cases in the American context). Similarly, by the time the First Amendment was adopted, general incorporation laws existed *only* for religious corporations. 2 Joseph Stancliffe Davis, *Essays in the Earlier History of American Corporations* 16-17 (1917). In contrast, for-profit corporations – which were typically special-purpose entities, unlike modern general-purpose business corporations – required special state charters. Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. Econ. Hist. 1, 22 (1945). Today, many States continue to exempt religious corporations from normal registration requirements. *See* *generally* Patty Gerstenblith, *Associational Structures of Religious Organizations*, 1995 B.Y.U. L. Rev. 439, 469 & n.92 (1995).

Religious corporations also have been subject to more limited state oversight. Secular non-profits at common law were subject to supervision "in order to . . . secure their adherence to the purposes of their institution." Roscoe Pound, *Visitatorial Jurisdiction over Corporations in Equity*, 49 Harv. L. Rev. 369, 371 (1935). However, based on the "old separation of spiritual from temporal jurisdiction," churches were permitted to self-supervise. This rule survives to the modern day: in many States, "[r]eligious corporations are subject to minimal attorney general supervision." Model Nonprofit Corp. Act 2d ed. § 3.01 cmt. (1987); *see also* Cal. Corp. Code § 9230(a) (state Attorney General "shall have no powers with respect to any corporation incorporated or classified as a religious corporation under or pursuant to" California law).

Finally, States routinely grant statutory exemptions from other generally-applicable laws in an effort to accommodate religion. For example, Congress and the vast majority of States with antidiscrimination laws typically exempt religious organizations from compliance, at least under certain circumstances. *See, e.g.*, Sidley, Austin, Brown & Wood, *Religious Employer Exemptions: A State by State Guide*;[3] *see also*

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[3] http://www.sidley.com/db30/cgi-bin/pubs/final_religious%20institutions%20practice%20group.pdf (last visited January 24, 2014).

42 U.S.C. § 2000e-1(a) (federal analog). States also commonly exempt certain religious institutions from educational licensing, taxes, and other regulations. Rute A. Pinhel, *Exemptions From the Higher Education Licensing Process for Religious Colleges* (2007).[4]

For present purposes, however, the main point of this tradition of special accommodation for religious organizations is what it does *not* include. There is no tradition of special exemptions for corporations formed and used to conduct businesses for profit. Nor is there any tradition of attributing to such corporations the individual free-exercise rights of their shareholders or managers, or of treating incorporated businesses as religious institutions simply because their shareholders or managers may have deeply-held beliefs, and may strive to put their religious principles into action in their commercial activities as in other aspects of their lives.

In the absence of any such tradition, there is no basis for concluding that Congress would have intended RFRA's special free-exercise protections to extend to ordinary, for-profit business corporations. On the contrary, the presumption is that Congress enacted RFRA with an understanding of existing law, and did not intend to modify existing background principles unless it did so expressly. *See, e.g.*, *Santa Fe Indus.*, 430 U.S. at 479. There is nothing to suggest that, in enacting RFRA, Congress intended either to override standard principles of separate corporate identity or to provide for a radical extension of traditional religious accommodations to for-profit corporations.

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[4] *Available at* http://www.cga.ct.gov/2007/rpt/2007-R-0023.htm.

II. Extending RFRA to Allow Claims by For-Profit Corporations Would Imperil Effective Enforcement of Important Federal and State Laws

Allowing for-profit corporations to invoke RFRA and seek religious exemptions from generally-applicable laws would threaten broad disruption in the enforcement of federal and state laws that are of signal importance to States and their residents.

A. A Decision Extending RFRA to For-Profit Corporations Would Cover a Broad Range of Commercial Enterprises

Some lower courts that have permitted RFRA claims by for-profit corporations have suggested that their holdings are narrow, applying only to closely-held or essentially family corporations. *Korte*, 735 F.3d at 682 n.17; *Gilardi*, 733 F.3d at 1216 n.5; 13-354 Pet. App. 42a-43a. There is, however, no clear basis for such a limitation. To the extent, for example, that a construction of RFRA relies on the fact that a corporation is in many contexts a legal "person," it is not clear why any corporation could not make the same argument. *See* 1 U.S.C. § 1; *Korte*, 735 F.3d at 673-82; 13-354 Pet. App. 24a-42a.

In any event, even an extension of RFRA that is purportedly limited to closely-held or family businesses would have an exceptionally broad sweep. Family-held Hobby Lobby, for example, operates more than 500 stores and has some 13,000 full-time employees. 13-354 Pet. App. 171a. Indeed, according to one account, family-owned or -controlled businesses account for some 80-90% of all North American businesses, including more than one-third of Fortune 500 companies, and account for 60% of all U.S. employment. Conway Center for Family Business, *Family Business Facts, Figures and Fun.*[5] Likewise, some of the largest corporations in the United States can be described as "closely-held," including Cargill, Mars, Bechtel, Koch Industries, and Dell. Forbes.com, *America's Largest Private Companies 2013;*[6] *see also* 13-354 Pet. App. 128a (Briscoe, C.J., concurring in part, dissenting in part) ("[I]t is difficult to imagine why the majority's holding would not apply to any number of large, closely-held corporations that employ far more employees . . . than Hobby Lobby and Mardel."). There should, accordingly, be no attempt to minimize the scope and importance of the statutory question at issue in these cases.

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[5] http://www.familybusinesscenter.com/resources/family-business-facts/ (last visited January 24, 2014).

[6] http://www.forbes.com/sites/andreamurphy/2013/12/18/americas-largest-private-companies-2013/ (last visited January 24, 2014).

B. Extending RFRA to For-Profit Corporations Would Create Unwarranted Potential Exceptions to Other Federal Laws that Protect State Residents

Allowing ordinary business corporations to claim religious exemptions from generally-applicable laws would "profoundly affect the relationship between the government and potentially millions of business entities in our society in ways we can only begin to anticipate." 13-354 Pet. App. 150a (Matheson, J., concurring in part and dissenting in part). Without any clear congressional mandate, it would create a direct threat of substantial disruption in the enforcement of important protections otherwise provided to state residents by both federal and state law. The following are just two examples.

Health Care. If accorded free-exercise rights under RFRA, commercial enterprises could seek to deny customers or employees access to a broad range of health care products or services that they would otherwise be required to provide. Some religious denominations or adherents object to aspects of medical care other than contraceptives: blood transfusions, immunizations, stem-cell based treatments, and psychiatric care, to name a few. *See* Lesley Stone et al., *When the Right to Health and the Right to Religion Conflict: A Human Rights Analysis*, 12 Mich. St. J. Int'l L. 247, 259 & n.49, 288 n.190, 307 (2004). Indeed, some object to the use of modern medical treatment at all. Janna C. Merrick, *Spiritual Healing, Sick Kids and the Law: Inequities in the American*

Healthcare System, 29 Am. J.L. & Med. 269, 272-73 (2003).

Civil Rights. Some for-profit corporations asserting free-exercise rights under RFRA would no doubt also seek exemptions from historic nondiscrimination guarantees in areas such as employment, housing, and public accommodations. Presumably, for example, a corporation treated as having free-exercise rights could seek exemption from prohibitions on hiring or firing employees based on their own religious beliefs or practices. Thus, an ordinary business could, like a church or parochial school, seek to impose religious tests for employment. Similarly, for-profit corporations whose shareholders or managers shared particular religious beliefs could claim a right to discriminate, in employment or the provision of goods or services, on the basis of otherwise prohibited criteria such as gender, marital status, disability, sexual orientation, or even race. *Cf. E.E.O.C. v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (sex discrimination claim); *Hosanna-Tabor*, 132 S. Ct. 694 (claim under Americans with Disabilities Act); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (sexual orientation discrimination claim); *see generally* William N. Eskridge, Jr., *Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 Ga. L. Rev. 657 (2011); Professors' Brief at 22-23.

Allowing business corporations to claim religious exemptions would thus pose a serious threat to hard-won antidiscrimination protections that otherwise safeguard the rights of all state residents. Comprehensive enforcement of those protections is essential to continue the progress that has been made in ensuring fair and equal opportunities for all state residents in most areas of economic and social activity. Recognizing potential exceptions to these laws under RFRA would invite resumption of the sort of invidious discrimination that preceded and engendered the prohibitions.

C. Extending RFRA Would also Imperil Enforcement of a Range of State Laws

Extending RFRA free-exercise rights to for-profit corporations would also threaten the continued effective enforcement of state and local laws, in at least two ways.

First, the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, directly limits state and local land use regulation in much the same way that RFRA limits the enforcement of federal law. RLUIPA requires state and local governments to demonstrate a compelling government interest when an application of certain land-use regulations is challenged on the basis that it imposes a substantial burden on "the religious exercise of a person." *Id.* § 2000cc-1(a). A decision according for-profit corporations free-exercise rights under RFRA would surely lead to claims by for-profit corporations under RLUIPA seeking religious exemptions from land use regulations, similar to actions that have up to now been brought solely by religious assemblies and institutions. Commercial enterprises could seek to expand structures or conduct operations in ways that override important local interests, such as limiting density or preserving areas for particular uses – as some religious institutions have been permitted to do under RLUIPA. *See, e.g.*, *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338 (2d Cir. 2007) (overturning denial of special use permit for significant expansion of religious school facilities); *see generally* Brief of the Nat'l League of Cities.

Second, a decision extending RFRA rights to for-profit corporations would undoubtedly lead to new litigation challenging the enforcement of state and local laws under state statutes modeled after RFRA.

In *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), this Court held that enforcement of a neutral and generally applicable regulation does not violate the Free Exercise Clause of the federal Constitution even if it incidentally burdens the religious exercise of an individual or group. Congress then enacted RFRA, seeking to establish strict scrutiny as a federal statutory standard for justifying enforcement of any general federal, state, or local law that imposed a substantial burden on religious exercise. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), however, this Court held that RFRA could not be applied to state regulation.

After *Boerne*, a number of States passed state laws "modeled after the federal RFRA." *Warner v. Boca Raton*, 887 So. 2d 1023, 1031 (Fla. 2004). The legislative history of some of these laws "makes it clear that in adopting the statute, the . . . legislature intended to adopt" the standards of the "federal counterpart" in certain, if not all, respects. *State v. Cordingley*, 302 P.3d 730, 733 (Idaho Ct. App. 2013). Thus, while constructions of RFRA are "technically not binding in [state] interpretation of" similar state statutes, *State v. Hardesty*, 214 P.3d 1004, 1008 n.7 (Ariz. 2009), state courts often interpret the state Acts *in pari materia* with the "substantially identical" provisions of federal law. *Id.*; *see also Barr v. Sinton*, 295 S.W.3d 287, 296 (Tex. 2009) ("Because TRFRA, RFRA, and RLUIPA were all enacted in response to *Smith* and were animated in their common history, language, and purpose by the same spirit of protection of religious freedom, we will consider decisions applying the federal statutes germane in applying the Texas statute."). Accordingly, any improper extension of federal RFRA rights to for-profit business corporations will, at a minimum, require state and local governments to defend against similar claims under state law. It will thus put at risk the fair and comprehensive enforcement of many state and local regulations, including those addressing matters of vital state concern such as health care coverage requirements, land use, and civil rights protections.

III. Requiring Health Plans Sponsored by For-Profit Corporations to Include Coverage for Contraceptives Imposes at most Minimal Burdens on any Affected Free-Exercise Rights, While Precisely Furthering Compelling Public Interests

If application of the ACA's contraceptive coverage requirement to for-profit corporations is subject to review under RFRA, it should be sustained.

Under RFRA, the United States may not "substantially burden a person's exercise of religion" unless it shows that imposition of that burden is the least restrictive means available to further a compelling public interest. 42 U.S.C. § 2000bb-1(a)-(b). The contraceptive-coverage requirement imposes at most a highly attenuated burden on any free-exercise right of the corporation or of its individual shareholders or managers. At the same time, it is narrowly tailored to further compelling public interests in expanding affordable access to contraceptives and related family planning services, which are critical to promoting public health goals, individual autonomy, and social and economic equality for women.

Seeking to further those same interests, a majority of States have established contraceptive coverage requirements of their own, and expanded Medicaid eligibility to increase access to contraceptives. State coverage requirements cannot, however, benefit many state residents, because federal law preempts their application to health plans maintained by many corporate employers. The ACA's coverage requirement is thus also essential to enable these States to pursue their own compelling public interests.

A. Requiring that Health Plans Cover Contraceptives Does Not Substantially Burden any Free-Exercise Right of For-Profit Corporate Employers

The ACA requires all health plans, including those provided by employers, to cover various preventive health services. *See* 42 U.S.C. § 300gg-13. These include services for women provided for in guidelines adopted by the Health Resources and Services Administration, *see id.* § 300gg-13(a)(4), and those guidelines include, among other things, access to FDA-approved contraceptives. *See, e.g.*, 13-354 Pet. Br. 5-7.

Complying with these requirements (along with many others) when providing health coverage to employees does not substantially burden any free-exercise right of a for-profit corporation. As discussed above, the personal religious beliefs necessary to give content to any such right can only be those of one or more of the corporation's shareholders or managers. The ACA does not, however, require any individual shareholder or manager to engage in any conduct, such as the personal use of particular types of contraceptives, that might be inconsistent with individual beliefs.

The corporation, as a separate legal entity, provides health coverage for its employees. Covered employees and their personal physicians or other health care providers then make all decisions concerning what covered services they need or want to use. An employee may have no need for a particular covered service, or may choose not to use it – because he or she personally shares the religious views of the corporate employer's shareholders or managers, or for any other reason. In any event, neither the corporate employer nor, certainly, any of its individual shareholders or managers can reasonably be seen as having anything to do with the employee's personal choices, or as bearing any moral or other responsibility for them. These parties no more cause an increase in contraceptive use by any employee "when they authorize [the corporation] to pay for a benefits plan that employees *might* use to get contraception" than they would simply by "authoriz[ing] wages that an employee *might* use to purchase contraception she would not otherwise be able to afford." *Gilardi*, 733 F.3d at 1237-38 (Edwards, J., concurring in part and dissenting in part). Under these circumstances, any burden that the ACA's contraceptive coverage requirement might be said to impose on the private parties in the cases now before the Court is too attenuated to be deemed "substantial."

Moreover, treating a corporate shareholder or manager's objection to such an indirect association with an employee's health care choices as a "substantial burden" for purposes of RFRA could have serious implications for other areas of the law. Heretofore, for example, courts have consistently dismissed claims for religious exemptions from routine tax or fee obligations on the ground that any harm alleged by a taxpayer based on how the government may use funds it collects is too indirect and attenuated to support standing. *See, e.g.*, *Tarsney v. O'Keefe*, 225 F.3d 929, 938 (8th Cir. 2000) (state taxpayers lacked direct injury required for standing); *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) (any harm flowing from fact that university registration fee was used in part to fund health insurance program that subsidized abortions was too attenuated to be a "substantial burden"). These cases have relied on the fact that mere payment of a tax or fee does not require a party to "accept, participate in, or advocate in any manner for the provision of" any service or benefit to which the party may object. *Goehring*, 94 F.3d at 1300. If, however, this Court holds that a corporate employer suffers a "substantial burden" because its employee health plan is required to offer coverage for services to which some of its shareholders or managers may object, then it is not clear why other plaintiffs should be barred from challenging the collection of taxes or fees because the government might use them in part to fund "executions, stem cell research, civil unions, or various civil rights laws" to which the plaintiff likewise might personally object. *Tarsney*, 225 F.3d at 938. This Court should not adopt a new approach to assess what constitutes a "substantial burden" that could "subject[ ] a potentially wide range of statutory protections to strict scrutiny." *Korte*, 735 F.3d at 693 (Rovner, J., dissenting).

B. There is a Compelling Public Interest in Expanding Affordable Access to Contraceptives

Even if the ACA's contraceptive-coverage requirement could be viewed as imposing a substantial burden on a for-profit corporate employer or its shareholders or managers, it should still be sustained against a RFRA challenge. Measures adopted by States, and now the federal government, to expand affordable access to contraceptives through health plan coverage provisions are narrowly tailored to further compelling public interests in promoting gender equity and achieving significant health, social, and economic benefits.

Approximately one-half of all pregnancies in the United States are unintended, often causing negative health and economic effects. Institute of Med., Nat'l Acad. of Sci., *Clinical Preventive Services for Women: Closing the Gaps* 102 (2011) (*IOM Report*). Allowing a woman "to control [her] reproductive li[fe]" permits her to take lifesaving drugs that cannot be taken during pregnancy, plan for prenatal care, avoid risky behavior, and plan her professional, "economic and social" goals accordingly. *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992); *see IOM Report* at 103-04; Nat'l Health Law Program, *Health Care Refusals: Undermining Quality Health Care for Women*

27-29, 67-69 (2010);[7] Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Contraceptives and Women's Career and Marriage Decisions*, 110 J. of Pol. Econ. 730, 731 (2002).

Affordable access to contraceptives also provides women with important health benefits apart from avoiding unwanted pregnancies, including decreasing the risk of certain ovarian and uterine cancers, treating menstrual disorders, and preventing menstrual-related migraines. 78 Fed. Reg. at 39,872; Rachel Jones, *Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills* 3 (2011);[8] Nat'l Guideline Clearinghouse, U.S. Dep't of Health & Human Servs., *Noncontraceptive Uses of Hormonal Contraceptives* (2010).[9] It reduces pregnancy-related morbidity and mortality, prematurity, poor birth outcomes, and abortions. *See* Megan L. Kavanaugh & Ragnar M. Anderson, Guttmacher Inst., *Contraception and Beyond: The Health Benefits of Services Provided at Family Planning Centers* 8-9 (2013);[10] Institute of Med., Nat'l Acad. of Sci., *Best Intentions, Unintended Pregnancy and the Well-Being of Children and Families* (Sarah

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[7] *Available at* http://www.healthlaw.org/publications/health-care-refusals-undermining-care-for-women.

[8] *Available at* http://www.guttmacher.org/pubs/Beyond-Birth-Control.pdf.

[9] *Available at* http://www.guideline.gov/content.aspx?id=15428.

[10] *Available at* www.guttmacher.org/pubs/health-benefits.pdf.

S. Brown & Leon Brown, eds., 1997).[11] And it helps families and children by reducing rates of single motherhood, and promoting the ability of mothers, especially single mothers, to obtain medical care and pursue professional and economic opportunities to provide for their families. Kavanaugh & Anderson, *supra*, at 8.

Requiring coverage for contraceptives also helps equalize the cost of health care for women as compared to men. Women of reproductive age spend 68% more out of pocket than men on health care, partly because reproductive medical treatment requires more frequent health care visits and is not always adequately covered by insurance. 155 Cong. Rec. 29,070 (2009) (statement of Sen. Feinstein); *see* Cynthia Dailard, *Contraceptive Coverage: A 10-Year Retrospective, Guttmacher Report on Public Policy* 6 (2004).[12] Further, coverage requirements prevent insurance plans from discriminating against women by denying coverage for contraceptives while covering other prescription drugs and devices that may be differentially used by men.

Finally, from a fiscal perspective, the public costs associated with unintended pregnancies are high. Publicly-funded care for unintended pregnancies, births, and essential infant care alone cost the States almost $5.2 billion in 2008, including over $700 million in California and almost $100 million in Massachusetts. Adam Sonfeld & Katherine Kost, *Public Costs from Unintended Pregnancies and the Role of Public Insurance Programs in Paying for Pregnancy and Infant Care: Estimates for 2008*, at 7-9 (2013).[13] Lack of access to contraceptives also contributes to economic insecurity for women and their families, limiting their potential contributions to the general economy. Expanded access to contraceptives helps control these and other associated public costs. A California Medicaid program that expanded access to contraceptives to otherwise ineligible women saved the State an estimated $1.35 billion in medical, welfare, and other social service costs by averting unwanted pregnancies in 2007 alone, and double that amount – $2.7 billion – in cost savings to the federal government for the same period. M. Antonia Biggs et al., Univ. Cal. S.F.: Bixby Ctr. for Global Reproductive Health, *Cost-Benefit Analysis of the California Family PACT Program for Calendar Year 2007* at 19-21 (2010).[14]

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[11] *Available at* http://books.nap.edu/openbook.php?record_id=4903.

[12] *Available at* https://www.guttmacher.org/pubs/tgr/07/2/gr070206.pdf.

Accordingly, both States and the federal government have compelling interests in promoting access to contraceptives, both to promote the health and equitable treatment of all residents and to ease substantial burdens on public programs.

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[13] *Available at* http://www.guttmacher.org/pubs/public-costs-of-UP.pdf.

[14] *Available at* http://bixbycenter.ucsf.edu/publications/files/FamilyPACTCost-BenefitAnalysis2007_2010Apr.pdf.

C. State Initiatives to Expand Access to Contraception, While Successful, Are Subject to Limits that Require Supplemental Federal Action

A majority of States have sought to further the same public interests on their own, by adopting contraceptive coverage requirements under state law and expanding access to contraception under the cooperative state and federal Medicaid program. These efforts have met with considerable success, but their effectiveness has been limited by federal preemption that bars States from imposing coverage requirements on self-funded employer plans that cover some 60% of workers. The ACA's coverage provision is thus essential to enable these States to fulfill their own goals of ensuring affordable access to contraceptives for all state residents and their families.

States have made significant efforts to increase affordable access to contraceptives. A majority of States, for example, have enacted their own contraceptive-coverage requirements. *See* Guttmacher Inst., *State Policies in Brief: Insurance Coverage of Contraceptives* 2 (2014).[15] These state provisions have targeted gender discrimination in insurance coverage and inequities in costs and prescription coverage for women, as well as the public health implications of barriers to contraceptive access. *See Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67, 92 (Cal. 2004) (noting that elimination of gender inequities in coverage was principal object of California's coverage law); *Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 461-62 (N.Y. 2006) (stating that New York's coverage law was "designed to advance both women's health and the equal treatment of men and women"); Carey Goldberg, *Insurance for Viagra Spurs Coverage for Birth Control*, N.Y. Times, June 30, 1998, at A1.

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[15] *Available at* www.guttmacher.org/pubs/spib_ICC.pdf.

These state laws demonstrably expanded women's access to contraceptives. In 1993, only 28% of typical non-self-funded insurance plans covered the five leading prescription methods of reversible contraception; by 2002, that figure had increased threefold, to 86% of insurance plans nationwide. Adam Sonfeld et al., *U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates 2002*, 36 Perspectives on Sexual & Reproductive Health, No. 2, 72-79 (2004).[16] The state contraceptive-coverage requirements played a significant role: health plans specific to those States with a coverage rule were far more likely to cover the five leading contraceptive methods than such plans in States with no coverage requirement. *Id.* at 76-77. State requirements accounted for 30%-40% of the increases in overall coverage for various contraceptive methods in that period. *Id.* at 78.

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[16] *Available at* http://www.guttmacher.org/pubs/journals/3607204.pdf.

In addition to enacting contraceptive-coverage requirements applicable to private insurance plans, a majority of States have, with federal approval, expanded Medicaid eligibility limitations to allow more low-income women to receive Medicaid-supported family planning services without cost sharing. Rachel Benson Gold et al., *Next Steps for America's Family Planning Program: Leveraging the Potential of Medicaid and Title X in an Evolving Health Care System* 8 (2009).[17] These programs have shown dramatic results in expanding and improving contraceptive use and preventing unintended pregnancies. *See* Adam Sonfeld & Rachel Benson Gold, *Medicaid Family Planning Expansions: Lessons Learned and Implications for the Future*, 14-16.[18] In 2009-10, California's expansion program provided contraceptives to more than 1 million women, including 215,000 teenagers, and helped avoid some 200,000 unintended pregnancies. Diana G. Foster, et al., Univ. Cal. S.F.: Bixby Ctr. for Global Reproductive Health, *Cost Benefits from the Provision of Specific Methods of Contraception in 2009*, at 18-20 (2010).[19] These programs have resulted in billions of dollars in cost savings for the States and federal government. M. Antonia Biggs et al., *supra*, at 19-20; Sara Sills, Nat'l Acad. of State Health Pol'y, *Cost-Effectiveness of Medicaid Family Planning Demonstrations passim* (2007).[20]

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[17] *Available at* http://www.guttmacher.org/pubs/NextSteps.pdf.

[18] *Available at* www.guttmacher.org/pubs/Medicaid-Expansions.pdf.

[19] *Available at* http://www.familypact.org/Research/reports/2009CostBenefitAnalysis_ADA.pdf.

Notwithstanding the gains realized by these state initiatives, significant gaps remain in contraceptive coverage. This results in large part from the fact that the federal Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, preempts States from imposing coverage requirements on (or otherwise regulating) the self-funded health plans offered by many employers. *See FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990). Such plans cover 61% of all U.S. workers covered by employer-sponsored insurance. Kaiser Family Found. & Health Research & Educ. Trust, *Employer Health Benefits 2013 Annual Survey* 158, 160 (2013).[21] In addition, Medicaid, even under the state expansion programs, serves only low-income residents.

The federal ACA's contraceptive-coverage provision thus plays an essential role in closing gaps that the States' own programs cannot fill. Any minimal burden that the provision may impose on free-exercise rights of for-profit corporate employers, or their individual shareholders or managers, under

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[20] *Available at* http://www.nashp.org/sites/default/files/shpbriefing_familyplanning.pdf.

[21] *Available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/08/8465-employer-health-benefits-20131.pdf.

RFRA is thus justified by the compelling public interests that the federal coverage requirement serves not only for the United States, but also for the many States whose own similar requirements cannot be fully effective in the absence of the federal rule.

◆

CONCLUSION

In No. 13-354, the judgment of the Tenth Circuit should be reversed. In No. 13-356, the judgment of the Third Circuit should be affirmed.

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IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL.,
Petitioners,

— v.—

HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMICUS CURIAE BRIEF OF CATHOLIC MEDICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

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AMICUS CURIAE BRIEF OF CATHOLIC MEDICAL ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS*[1]

Amicus curiae is the Catholic Medical Association, a national non-profit organization comprised of approximately 2,000 members practicing in more than

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus* or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), Petitioners have filed a letter of consent to the filing of this brief with the Clerk, and Respondents' letter of consent is filed with this brief.

75 medical specialties across the United States. The Catholic Medical Association helps to educate the medical profession and society at large about issues in medical ethics, including abortion and maternal health, through its annual conferences and quarterly journal, *The Linacre Quarterly*.

As Catholic physicians and medical professionals, the members of the Catholic Medical Association have a profound interest in providing the best health care to their patients and all Americans, including the unborn. Based on well-established biological and embryological understanding of human reproduction, *Amicus* believes that human life begins at fertilization. *Amicus* opposes Petitioner's requirement that Respondents and other employers provide drugs and devices that can operate post-fertilization by preventing implantation of existing human embryos in the endometrium, thereby terminating the pregnancy and killing the embryo.

SUMMARY OF ARGUMENT

Although the Court need not decide what "abortion" or "pregnancy" mean to decide this appeal, the Court should recognize that Petitioners' proffered definition of "pregnancy" as beginning at implantation is anomalous. As shown below, both science and the bulk of federal law treat fertilization and the presence of a human embryo as the beginning of pregnancy and human development. Any method preventing implantation of the human embryo thus results in an abortion.

Here, Respondents object to two types of intrauterine devices ("IUDs") and two so-called "emergency contraceptives" in pill form because they affect the endometrium or uterine lining and can prevent implantation of an already-existing human embryo. *See* Resp. Br. on Pet. for Cert. at 4–5

Petitioners do not dispute that each of the objected-to "contraceptive methods" alters the endometrium and that each such method "may" prevent or "possibly" prevents implantation of an existing embryo. Pet. Br. at 9–10 n.4. Instead, Petitioners re-define "pregnancy" and argue that preventing the implantation of a human embryo in the endometrium does not terminate a "pregnancy" and therefore is not abortive. *Ibid.*

Petitioners contend that preventing an embryo from implanting in the endometrium does not terminate a pregnancy because they claim that federal law "defines pregnancy as beginning at implantation." *Ibid.* (citing 45 C.F.R. § 46.202(f)). Because pregnancy begins at implantation, according to Petitioners, any device or drug that prevents implantation merely prevents pregnancy and is, therefore, a contraceptive and not an abortifacient. But section 46.202's definition is not consistent with the scientific understanding of the earliest stages of human development. Indeed, it ignores completely the process of fertilization and existence of a human embryo prior to implantation. In the face of well-established science, Petitioners' semantic argument based on a federal regulation does not alleviate the religious and moral concerns of Respondents.

Moreover, Petitioners cherry pick section 46.202(f)'s definition of "pregnancy" from among numerous other federal regulations addressing pregnancy and the earliest stages of human development. Though not cited by Petitioners, federal law elsewhere focuses on the presence of an embryo, regardless of implantation, to determine whether a woman is pregnant or whether a separate organism exists. The focus on the presence of an embryo in those regulations is for good reason. The biological evidence is that a unique organism—the embryo—exists upon fertilization prior to the embryo's implantation in the endometrium.

Petitioners cannot dismiss Respondents' religious objections by resorting to semantics and re-defining "pregnancy" to avoid the reality that the objected-to devices and drugs can abort an existing embryo by preventing implantation. Moreover, the focus of federal regulations—which Petitioners have ignored—on the presence of an embryo to determine pregnancy, demonstrates that a single regulation defining pregnancy as "implantation" does not end the debate. Respondents' religious objections to providing the specified IUDs and drugs because they may be abortive are well grounded in science and supported by federal law.

Finally, Petitioners' requirement that Respondents provide coverage for these abortifacient drugs and devices or face severe fines violates federal law. As alleged in Respondents' complaint, the Weldon Amendment prohibits Petitioners from discriminating against Respondents' insurance plan by subjecting Respondents to draconian fines simply because they will not provide, pay for, or provide coverage of abortions. Respondents should not be permitted to trample over Congress's explicit recognition that religious objections to abortion are legitimate and worthy of accommodation simply by ignoring the existence of the embryo—an individual human life—prior to implantation.

Argument

I. Fertilization Prior To Implantation Marks The Existence Of A Human Embryo.

To avoid the religious and moral implications of terminating a pregnancy through the devices and drugs in contention, Petitioners simply redefine pregnancy as beginning after those devices and drugs have acted to end the pregnancy. Specifically, Petitioners contend that pregnancy begins upon implantation of a "fertilized egg in the uterus."[2] Pet. Br. at 9–10 n.4. If pregnancy begins upon implantation, then any device or drug that prevents implantation of a "fertilized egg in the uterus"—as the objected-to devices and drugs indisputably can—prevents pregnancy rather than terminating pregnancy. *Ibid.* Identifying implantation as the commencement of pregnancy ignores the long-established biological and embryological evidence that a distinct organism—a human embryo—exists well before implantation in the uterus.

Human existence is a continuum marked by a distinct beginning and ending with death. *See* Maureen L. Condic, *When Does Human Life Begin? A Scientific Perspective* 12 (The Westchester Institute for Ethics & the Human Person Oct. 2008), http://bdfund.org/wordpress/wp-content/uploads/2012/06/wi_whitepaper_life_print.pdf (last visited January 25, 2014). There can be no dispute that human life begins with fertilization and the formation of the human embryo. "Human development begins at fertilization when a male gamete or sperm (spermatozoon) unites with a female gamete or oocyte (ovum) to form a single cell—a zygote. This highly specialized, totipotent cell marked the beginning of each of us as a unique individual." Keith L. Moore & T.V.N. Persaud, *The Developing Human: Clinically Oriented Embryology* 16 (7th ed. 2003). "[T]he male and female sex cells or gametes . . . will unite at fertilization to initiate the embryonic development of a new individual." William J. Larsen, *Human Embryology* 1 (3d ed. 2001); *see* Ronan O'Rahilly & Fabiola Müller, *Developmental Stages in Human Embryos* 9 (1987) ("Embryonic life commences with fertilization.").

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[2] A "fertilized egg," of course, is an embryo since by definition fertilization means the "egg" and sperm have united to become the zygote or embryo. Bruce M. Carlson, *Human Embryology and Developmental Biology* 3 (1st ed. 1994).

Even the National Institutes of Health defines "fertilization" as "the process of union of two gametes whereby the somatic chromosome number is restored and *the development of a new individual is initiated.*" National Institutes of Health, *Medline Plus Merriam-Webster Medical Dictionary* (2013), www.merriam-webster.com/medlineplus/fertilization (last visited January 26, 2014) (emphasis added); *see also* O'Rahilly & Müller, at 9 ("Despite the small size (ca. 0.1mm) and weight (ca. 0.004 mg) of the organism at fertilization, the embryo is 'schon ein individual-spezifischer Mensch.'" (translated from German to English: "already an individual-specific human")).

Fertilization itself is a process that "begins when a spermatozoon makes contact with an oocyte or its investments and ends with the intermingling of maternal and paternal chromosomes at metaphase of the first mitotic division of the zygote." O'Rahilly & Müller, at 9; *see also* Moore & Persaud, at 31 ("Fertilization is a complex sequence of coordinated molecular events that begins with contact between a sperm and an oocyte . . . and ends with the intermingling of maternal and paternal chromosomes at metaphase of the first mitotic division of the zygote, a unicellular embryo."); Larsen, at 1–2. A zygote is the cell that "results from the union of an oocyte and a sperm during fertilization. A zygote is the beginning of a new human being (i.e., an embryo)." Moore & Persaud, at 2.

Because it is a process, scientific debate exists regarding when in the process of fertilization—at the beginning or the end—the human embryo comes into existence. *Amicus* contends, and the great weight of evidence supports, that the distinct human organism exists at the beginning of the process at the "'moment' of sperm-egg fusion." Condic, at 5–7.

However, even if the embryo is not considered to exist until the end of the fertilization process, when the zygote begins to divide, the embryo still exists for five or six days before implantation takes place. *See* Larsen, at 21–22; Moore & Persaud, at 37. "Fertilization requires probably slightly longer than 24 hours in primates" and "takes place normally in the ampulla of the uterine tube." O'Rahilly & Müller, at 9; Moore & Persaud, at 31–32 ("The usual site of fertilization is the ampulla of the uterine tube, its longest and widest part. . . . Although fertilization may occur in other parts of the tube, it does not occur in the uterus. . . . The fertilization process takes about 24 hours."). While fertilization occurs in the fallopian tube in the first 24 hours after the sperm and oocyte unite, implantation of the embryo in the endometrium does not occur until five or six days later. *See* Larsen, at 21–22; Moore & Persaud, at 37.

Since the embryo exists at least five to six days before implantation, efforts to prevent implantation—including the particular IUDs and drugs at issue here—are necessarily efforts to destroy the embryo. "The administration of relatively large doses of estrogens ("morning-after pills") for several days, beginning shortly after unprotected sexual intercourse, usually does not prevent fertilization but often prevents implantation of the blastocyst." Moore & Persaud, at 52. Likewise, IUDs that "contain progesterone that is slowly released and interferes with the development of the endometrium so that implantation does not usually occur." *Ibid.* Indeed, because the drugs in contention

> *prevent implantation, not fertilization* . . . . they should not be called contraceptive pills. Conception occurs but the blastocyst does not implant. It would be more appropriate to call them "contraimplantation pills." Because the term *abortion* refers to a premature stoppage of a pregnancy, the term *abortion* could be applied to such an early termination of pregnancy.

Id. at 504.

Defining "pregnancy" as beginning at implantation ignores the process of fertilization and the existence of the embryo prior to implantation. *See* Carlson, at 3 ("Human pregnancy begins with the fusion of an egg and a sperm . . . . [T]he fertilized egg, now properly called an embryo, must make its way into the uterus, where it sinks into the uterine lining (implantation)."). Even if "pregnancy" has not commenced until implantation, a human embryo exists. By preventing implantation, that embryo is killed. This is the crux of Respondents' religious and moral objection to providing drugs or devices that prevent implantation. The semantics of defining "pregnancy" cannot alter the biological evidence or, more importantly, alleviate Respondents' religious and moral objection to abortion, including abortion by preventing implantation.

II. THE TERM "IMPLANTATION" IS ANOMALOUS TO THE CODE OF FEDERAL REGULATIONS' DEFINITION AND UNDERSTANDING OF PREGNANCY.

In their effort to avoid the religious and moral implications of terminating a pregnancy by preventing the implantation of an existing human embryo, Petitioners rely on the definition of "pregnancy" in Title 45 of the Code of Federal Regulations pertaining to protections for pregnant women who are subjects in research supported by the Department of Health and Human Services. Pet. Br. at 9–10 n.4. (citing 45 C.F.R. § 46.202(f)); *see* 45 C.F.R. § 46.201(a). But that definition does not conclusively establish that the devices and drugs in contention are not abortive under federal law. Petitioners are wrong to suggest that federal regulations recognize pregnancy or individual life as existing only post-implantation.

Significantly, for purposes of the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), the Code of Federal Regulations defines "Pregnant women" as "women determined to have one or more embryos or fetuses in utero." 7 C.F.R. § 246.2. These "Pregnant Women" are categorically eligible for benefits under the program, provided that other eligibility criteria are met. *Ibid.*; *id.* § 246.7(c). This same definition of "Pregnant Women" appears again in 32 C.F.R section 199.23(b)(23), which contains guidelines and policies for delivery and administration of the WIC Overseas Program.

Nothing in the WIC regulations restricts eligibility to only those women whose embryos have already implanted in the uterine wall. On the contrary, a State agency "opting to require proof of pregnancy" may "issue benefits to applicants who claim to be pregnant" even if they have no "visibly noticeable" pregnancy conditions, provided that documentation of the pregnancy is received within a reasonable period of time. 7 C.F.R. § 246.7(c)(2)(ii). Such conditions, of course, would not be visible prior to implantation. The Code likewise requires that for "a pregnant woman, the State agency must count each embryo or fetus in utero as a household member in determining if the household meets the income eligibility standards" for the Commodity Supplemental Food Program. *Id.* § 247.9(b)(3).

Elsewhere in the Code, regulations use the term "conception"—not "implantation"—as the demarcation of life for purposes of the Code's health and safety protections. In the Nuclear Regulatory Commission's Standards for Protection against Radiation, an "embryo/fetus" is defined as "the developing human organism from conception until the time of birth." 10 C.F.R. § 20.1003. Those Standards explicitly protect the "embryo/fetus" from excessive radiation "during the entire pregnancy." *Id.* § 20.1208(a). The duration of the pregnancy is a function of the presence of an "embryo/fetus," which is the "developing human organism from conception until the time of birth." *Ibid.*; *id.* § 20.1003. Likewise, the Standards for Internal and External Exposure to radiation articulated by the Department of Energy grant similar protections to the "embryo/fetus from the period of conception to birth," with no mention of "implantation." *Id.* § 835.206(a). And the regulations governing the States' various Children's Health Insurance Programs straightforwardly define "child" as "an individual under the age of 19 including the period *from conception* to birth." 42 C.F.R. § 457.10 (emphasis added).

Other federal regulations pertaining to the protection of human research subjects focus on the presence of an embryo to establish pregnancy, again without reference to implantation. For example, to obtain legally sufficient informed consent from a woman who will be a research subject in a government study, the woman must receive a "statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) which are currently unforeseeable." *See* 15 C.F.R. § 27.116(b)(1) (applicable to "all research involving human subjects conducted, supported or otherwise subject to regulation by any federal department or agency," *id.* § 27.101(a)); *see also, e.g.,* 16 C.F.R. § 1028.116(b)(1) (same for the Consumer Product Safety Commission); 21 C.F.R. § 50.25(b)(1) (same for the Food and Drug Administration); 22 C.F.R. § 225.116(b)(1) (same for the Agency for International Development); 32 C.F.R. § 219.116(b)(1) (same for the Department of Defense). Whether the subject is pregnant depends on the presence of an embryo or fetus, not an implanted embryo.

To the extent Petitioners would elide the distinction between "conception" and "implantation," section 46.202 of Title 45 forecloses that argument. There, "Fetus" is defined as "the product of conception from implantation until delivery," meaning that conception is a distinct and necessary precursor to implantation. 45 C.F.R. § 46.202(c). Neither can section 46.202's notion that pregnancy begins with "implantation" be reconciled with other federal regulations focused on the presence of an embryo. In normal usage, the "conception" and "fertilization" are synonymous. *See, e.g.*, Philip G. Peters, Jr., *The Ambiguous Meaning of Human Conception*, 40 U.C. Davis L. Rev. 199, 202 (2006). The "product of conception" or fertilization is the embryo, which exists prior to implantation, both as a matter of biological fact and under section 46.202's definition of "Fetus."

III. Federal Law Prohibits Discrimination Against Respondents Because Of Their Opposition To Abortion.

Petitioners' requirement that Respondents provide coverage for abortifacient drugs and devices or face severe fines violates federal law. Congress has recognized that opposition to abortion is a matter of conscience worthy of statutory protection. *See* Weldon Amendment of the Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, div. F, tit. V, § 507(d)(1), 125 Stat. 786, 1111 (2011). Accordingly, it enacted the Weldon Amendment to the Consolidated Appropriations Act, 2012, which prohibits the use of funds by a "Federal agency or program" if that agency or program discriminates against "any institutional or individual health care entity" because the "health care entity does not provide, pay for, provide coverage of, or refer for abortions." *Ibid.*

The Amendment defines "health care entity" broadly to include "a health insurance plan, or any other kind of health care facility, organization, or plan." *Id.* § 507(d)(2). Because Respondents self-fund their employee insurance plan, Resp. Br. on Pet. for Cert. at i, 3, they fall within the ambit of the Weldon Amendment as an "insurance plan," and Petitioners may not discriminate against that plan by imposing ruinous fines simply because Respondents do not "provide, pay for, provide coverage of . . . abortions." Respondents have accordingly raised an Administrative Procedure Act claim—not before the Court on this appeal—based on the Weldon Amendment. J.A. 163.

Although the Weldon Amendment does not define "abortion," the prevention of the implantation of a human embryo by drug or device is, as noted by Professors Moore and Persaud, an abortion. Moore &

Persaud, at 504. Moreover, where a term is undefined, it should be given its ordinary meaning, which is informed by contemporaneous dictionaries. *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning.").

Stedman's Medical Dictionary defines "abortion" as the "[e]xpulsion from the uterus of *an embryo* or fetus [before] viability." *Stedman's Medical Dictionary* 4 (28th ed. 2006) (emphasis added). There is no requirement that the "expulsion" occur after implantation. The National Institutes of Health defines "abortion" as "the termination of a pregnancy after, accompanied by, resulting in, or closely followed by *the death of the embryo* or fetus." National Institutes of Health, *Medline Plus Merriam-Webster Medical Dictionary* (2013), http://www.merriam-webster.com/medlineplus/abortion (last visited January 26, 2014) (emphasis added). Again, implantation is not necessary to have an abortion, only the "death of the embryo," which occurs when drugs or devices alter the normal course and prevent implantation of the embryo. Under both definitions, drugs or devices that prevent implantation are abortive because they result in the "expulsion" and "death" of the embryo.

Another medical dictionary defines "pregnancy" as the "condition of having *a developing embryo* or fetus in the body, after union of an ovum and spermatozoon." *Dorland's Illustrated Medical Dictionary* 1500 (31st ed. 2007) (emphasis added); *see* National Institutes of Health, *Medline Plus Merriam-Webster Medical Dictionary* (2013), http://www.merriam-webster.com/medlineplus/pregnant (last visited January 26, 2014) ("containing a developing embryo, fetus, or unborn offspring within the body"). On this definition, abortion—the termination of pregnancy—is the termination of the "condition of having a developing embryo or fetus in the body." Preventing the implantation of the embryo in the endometrium indisputably ends the condition of having a developing embryo in the body.

Under these generally recognized definitions and the review of scientific literature addressed in Part I, four of the contraceptive-coverage mandate's required drugs and devices may cause abortion. Because the Respondents have a self-funded insurance plan that does not cover abortifacients, the Weldon Amendment prohibits discrimination against Respondents' insurance plan in the form of the severe fines proposed by Petitioners. The contraceptive-coverage requirement therefore violates federal law, and the anomalous definition of pregnancy in 45 C.F.R. § 46.202(f) provides no excuse. Petitioners cannot make an end run around the Weldon Amendment on the back of § 46.202(f), while ignoring the effect of the objected-to drugs and devices on human embryos existing at least five to six days prior to implantation.

In addition to prohibiting the fines Petitioners seek to impose on Respondent, the Weldon Amendment also establishes that religious objections to abortion are legitimate and worthy of accommodation. Section 46.202(f) does not ameliorate the Respondents' conscientious objections to providing drugs and devices that can terminate the existence of a human embryo. The Code of Federal Regulations is hardly an answer to Respondents' religious objections, and it cannot justify the substantial burdens imposed by the Petitioners on Respondents.

CONCLUSION

A mere regulatory definition cannot overcome the biological fact that a human embryo is created by fertilization *five to six days* before implantation of that embryo in the endometrium. Drugs and devices that prevent implantation destroy that human embryo and terminate the pregnancy. Indeed, under normal usage as reflected in dictionaries, killing an embryo and terminating a pregnancy is an abortion.

Respondents cannot define away this reality, given that even the Code of Federal Regulations in most cases understands or even defines pregnancy based upon the existence of an embryo—without regard to whether that embryo has implanted. Petitioners' requirement that Respondents provide coverage for abortifacient drugs and devices is a substantial burden on religious opposition to abortion and a violation of the Weldon Amendment. This Court should affirm the opinion issued in this case by the en banc United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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Nos. 13-354 & 13-356

IN THE

Supreme Court of the United States

OCTOBER TERM 2013

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL., PETITIONERS
v.
HOBBY LOBBY STORES, INC., ET AL., RESPONDENTS

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
PETITIONERS
v.
KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND
HUMAN SERVICES, ET AL., RESPONDENTS.

**On Writs of Certiorari
to the United States Courts of Appeals
for the Third and Tenth Circuits**

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE *HOBBY LOBBY* RESPONDENTS AND THE *CONESTOGA* PETITIONERS

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QUESTION PRESENTED

Whether individuals who wish to conduct their business lives in accordance with their religious beliefs forfeit the right to do so when they organize their business in the form of a corporation, in particular a closely held corporation.

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INTEREST OF AMICUS CURIAE[1]

Established in 1977, the Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual Cato Supreme Court Review. This case concerns Cato because it implicates the fundamental right of individuals to manage their affairs in accordance with the dictates of their own consciences.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The issue in these cases is not whether a for-profit corporation has religious beliefs or enjoys on its own a right freely to exercise religion. That is the issue that divided the Third and Tenth Circuits. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013); *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health and Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013). The real issue in these cases is whether *individuals* who wish to conduct their business lives in accordance with their religious beliefs forfeit the right to do so when they organize their business in the form of a corporation—in particular, a closely held corporation.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus made a monetary contribution its preparation or submission.

That question, *amicus* respectfully submits, answers itself. A corporation is a legal fiction created to foster economic activity; it is not a construct to shelter business conduct from the influence of religious faith and morals. There is nothing inherent in the corporate form that requires individuals seeking the civil protections of incorporation to surrender their personal right to exercise their religion in the way they conduct their business. And there is nothing to suggest that Congress, in passing legislation to broaden the protection of religious liberty, intended to restrict the religious liberties individuals enjoy in their business affairs based solely on how those affairs are organized under civil law. Indeed, there is at least a serious constitutional question whether Congress could exact a religious price upon those who seek the secular benefits of incorporation.

Whether a for-profit corporation can exercise religion is an interesting theoretical question. But there is no need to address that theoretical question when legislation regulating a corporation also restricts the religious liberty of the individuals who founded, own, and direct the affairs of that corporation.

These cases offer this Court an opportunity to clarify that compulsion directed towards a closely held corporation can amount to a substantial burden on the free exercise rights of its founder-owners when it compels them to direct the corporation's affairs in a manner that is contrary to their religious beliefs.[2]

2. The key fallacy in the government's argument to the contrary is its assumption that because a corporation

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[2] That these cases involve closely held corporations is significant. In a publicly or widely held corporation, it may be harder to identify a religious belief attributable to ownership.

has a distinct legal status, there is no personal dimension to corporate decision-making—or, at least, none that is worthy of recognition. The reality, however, is that a corporation can act only at the direction of human beings. *See* 1 William M. Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* (perm. ed. rev. vol. 2006 & 2013-2014 Supp.) ("Fletcher Cyclopedia") § 5. Thus, in a real sense, any government compulsion directed at a closely held corporation is also felt by the individuals who created the corporation and direct its affairs.

These individuals do not check their religious values at the office door. Indeed, this Court has recognized repeatedly that an individual may "exercise" religion in virtually every phase of life. For many people, religion determines the school they attend, the food they eat, the person they marry, and the place they work. It dictates how they lead their lives, how they raise their children, and how they are mourned when they die. For that reason, this Court has declined to cabin free exercise rights to any particular activity. Instead, this Court has sensibly determined that people engage in the exercise of religion whenever their actions are "rooted in religious belief." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

Inevitably, a great deal of religiously motivated action occurs in the workplace. People of faith often order their professional lives in accordance with their beliefs, and individuals who control corporations are no exception. Indeed, corporate decision-makers are often faced with moral choices—ranging from wages to working conditions to competitive practices—that squarely implicate religious teachings. And when these officials believe they are bound by faith to steer their corporation in a particular direction, that action is plainly "rooted in" the *individual's* "religious belief." *Id.*

3. The government cannot force individuals to forfeit their free exercise rights when they incorporate a business—just as it cannot force individuals to forsake these liberties when they enter the workforce, attend school, or engage in any other secular pursuit. More to the point, there is nothing about the act of incorporation that amounts to a waiver of individual free exercise rights. And there is nothing in this Court's jurisprudence or in the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb et seq. (RFRA), that requires an individual to surrender her right to conduct her business in accordance with her religious beliefs when she seeks the civil benefits of incorporation.

The fact is that the corporate form is an essential tool for operating successfully in the complex modern economy. The choice the government would put to devout businesspeople is, therefore, an untenable one: subject yourself to a severe competitive disadvantage by surrendering the protection of the corporate form (and maintain religious freedom), or incorporate (and lose the right to order your professional life in accordance with your faith).

Amicus therefore submits that the best and most straightforward way for the Court to approach these cases is to affirm that the right to "exercise" one's religion includes the freedom to implement one's religious beliefs in every phase of life, including one's work life—and that a law compelling action by a corporation can also amount to a substantial burden on the free exercise rights of those who create and control it. Such a holding would do no more than ensure that those individuals retain the same RFRA rights to exercise religion in their professional endeavors as they do in other aspects of their lives.

ARGUMENT

I. INDIVIDUALS EXERCISE THEIR RELIGION WHEN THEY ORDER THEIR PERSONAL AND PROFESSIONAL LIVES ACCORDING TO THEIR RELIGIOUS BELIEFS

"This Nation is heir to a history and tradition of religious diversity." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 589 (1989). That diversity manifests itself not just in the jumble of faiths and sects that flourish in America, but also in the various ways individual Americans exercise their religious beliefs. Some Americans compartmentalize their faith, "worship[ping] God on Sundays or some other chosen day and go[ing] about their business without reference to God the rest of the time." *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 624-25 (9th Cir. 1988) (Noonan, J., dissenting), *cert. denied*, 489 U.S. 1077 (1989). But many others believe that their religion requires far more than a periodic visit to a house of worship. Many religious people strive to "integrate their lives" with their faith, *id.*, and align their day-to-day activities with religious beliefs.

This Court's free exercise jurisprudence has always recognized this reality. In *Braunfeld v. Brown*, this Court entertained free exercise claims from Orthodox Jews whose "faith . . . require[d] the closing of their places of business . . . from nightfall each Friday until nightfall each Saturday." 366 U.S. 599, 601 (1961). In *Sherbert v. Verner*, it held that the government could not condition a Seventh-day Adventist's eligibility for unemployment benefits upon her willingness to work on the Sabbath in violation of her religious beliefs. 374 U.S. 398, 399 (1963). And in *Thomas v. Review Board of Indiana Employment Security Division*, the Court entertained a free exercise claim brought by Jehovah's Witness who had been discharged from his job because his pacifist "religious beliefs forbade participation in the production of armaments." 450 U.S. 707, 709 (1981).

The outcomes of these cases differed: the Orthodox Jews in *Braunfeld* lost, whereas the Seventh-day Adventist in *Sherbert* and the Jehovah's Witness in *Thomas* prevailed. But in entertaining the free exercise claims in all of these cases, this Court recognized that the exercise of religion is not restricted to activity that takes place within chapel walls and that, for many religious people, the personal and professional spheres of life are inseparable.

II. INDIVIDUALS DO NOT FORFEIT THEIR RIGHT TO EXERCISE THEIR RELIGION IN THE WORKPLACE WHEN THEY SEEK THE BENEFITS OF INCORPORATION

The government contends, however, that individuals cannot exercise religion in their professional lives while acting on behalf of a corporation. Central to the government's position is the notion that human adherence to religious principles either does not occur or must be ignored in the context of corporate activity. Whichever way the idea is stated, it has no basis in the law or in reality.

A. A Corporation Can Only Act at the Direction of Human Beings.

A corporation "can act only through its agents"—*i.e.*, through the actions of individual human beings. Fletcher Cyclopedia § 5, at 3 (2013-2014 Supp.). To be sure, a corporation has separate legal status from the individuals who own and control it. But the very notion of corporate "personhood" is a "legal fiction." *Samantar v. Yousuf*, 560 U.S. 305, 315 (2010). This legal fiction is created to encourage economic activity—primarily by limiting the personal liability of individual investors.

And there is nothing in the concept of limited liability—or in the concept of corporate separateness generally—that excludes the human element in the direction of corporate affairs.

Indeed, the elements of human judgment are critical to the success of a corporation. In the real world, the acts of the fictional corporate "person" are rarely if ever viewed as wholly distinct from those of its flesh-and-blood owners and managers. This can be true even in the case of large multi-national corporations. Tom Keane, *Without Jobs, It Won't Be The Same*, The Boston Globe, Aug. 30, 2011 at 11 (remarking that Apple—currently the world's most valuable corporation—was personified by "real flesh-and-blood man" that was Steve Jobs). It is undoubtedly so in the case of closely held corporations like Hobby Lobby, Mardel, and Conestoga.

B. Individuals Often Engage in the Exercise of Religion When Managing Corporate Affairs.

The personal dimension of "corporate" activity is also why people feel compelled to conduct a corporation's affairs in accordance with their *individual* religious beliefs. Because (1) many religious individuals believe that their faith must align with their professional activities, and (2) an act on behalf of a corporation is also a personal act by an individual, it follows that many religious persons believe that they are *personally* restrained from taking certain actions through their corporations. Indeed, for many corporate owners, directors, and officers, "the corporation is the venue in which he or she will, in all likelihood, work out his or her fruition as a human being." Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 Wash. & Lee L. Rev. 3, 57 (2012). "It is at work, which will consume most of the waking hours of his life, that the [corporate] officer will most likely make the daily decisions that will form him into the person he will ultimately become." *Id.* at 57-58.

Again, this Court's case law is instructive. The Orthodox Jews in *Braunfeld* believed that their faith prevented them from opening their "places of business" on the Sabbath. It strains credulity to think that their religious beliefs would have been any different—or the constitutional protections for those beliefs less robust—had the businesses they owned been organized as corporations, rather than sole proprietorships. *See Braunfeld*, 366 U.S. at 601 ("Orthodox Jewish faith . . . *requires* the closing of . . . places of business and a *total* abstention from *all* manner of work from nightfall each Friday until nightfall each Saturday." (emphases added)). Similarly, the Jehovah's Witness in *Thomas* "claimed his religious beliefs prevented him from *participating* in the production of war materials." *Thomas*, 450 U.S. at 709 (emphasis added). Had the Jehovah's Witness controlled—rather than worked at—a steel-fabrication corporation, he presumably would have had the same obligation to prevent that company from producing weapons.

For the devout, faith may dictate the contours of a number of corporate activities. As an initial matter, many for-profit corporations exist for expressly religious purposes. Take, for example, a rabbi who "starts a business preparing kosher matzo," and thereafter chooses to "limit his personal liability . . . by converting it to a sole-shareholder corporation." *Hobby Lobby*, 723 F.3d at 1148 (Hartz, J., concurring). That rabbi would feel personally obligated to manufacture his product in accordance with kosher practices, even after incorporating his business. Similarly, faith informs the daily work of religious individuals who—through their corporations—sell halal meat, bake communion wafers, or manufacture any type of sacramental item.

Moreover, many religions impose rules and restrictions on business practices. The Islamic doctrine of *riba*, for example, prohibits "illegitimate gain" in a transaction, while *gharar* prohibits both "significant uncertainties in a contract" and "the sale of an item not currently in existence." Haider Ala Hamoudi, *Muhammad's Social Justice or Muslim Cant?: Langdellianism and the Failures of Islamic Finance*, 40 Cornell Int'l L.J. 89, 110, 114-15 (2007). A religious Muslim who controls a corporation may therefore feel personally obligated to avoid entering into corporate contracts that implicate *riba* or *gharar*. In a similar vein, the Book of Leviticus—sacred to both Jews and Christians—provides: "If you sell anything to your neighbor or buy anything from him, neither of you is to exploit the other." Leviticus 25:14. So a devout Christian or Jew would presumably strive to avoid entering into exploitative corporate transactions.

Faith may also dictate the *moral* decisions an individual makes on behalf of a corporation. Corporations regularly face moral choices—related to the products they make and sell, their honesty in advertising, and their competitive practices.[3] Perhaps most crucially, corporations must make moral decisions regarding their employees' "quality of life and quality of work." Daniel J.H. Greenwood, *Enronitis: Why Good Corporations Go Bad*, 2004 Colum. Bus. L. Rev. 773, 843-44 (2004). These decisions implicate wages, "health and safety, hours that allow for families . . . [and] support in sickness and old age and for dependents." *Id.* Such moral choices squarely implicate religious teachings. In a 1991 encyclical, for example, Pope John Paul II directed business "firms" to help ensure "that the basic needs of the whole of society are satisfied," instructing the faithful:

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[3] There is nothing inherent about the corporate form that prevents a for-profit corporation (which is to say, the individuals *controlling* the corporation) from making decisions based on ethical, rather than fiscal concerns. Indeed, the American Law Institute's Principles of Corporate Governance provide that a corporation "[m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business"—"*[e]ven if* corporate profit and shareholder gain are not thereby enhanced." American Law Inst., *Principles of Corporate*

> [T]he purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a *community of persons* who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society. Profit is a regulator of the life of a business, but it is not the only one; *other human and moral factors* must also be considered which, in the long term, are at least equally important for the life of a business.

Pope John Paul II, Centesimus Annus, *On The Hundredth Anniversary of Rerum Novarum*, ¶ 35 (1991) (emphasis in the original). Similarly, the Jewish Talmud is replete with teachings regarding a just and equitable employer-employee relationship. *See generally* Gordon Cohn & Hershey H. Friedman, *Improving Employer-Employee Relationships: A*

Governance: Analysis and Recommendations: § 2.01 The Objective and Conduct of the Corporation (1994) (emphasis added).

Biblical and Talmudic Perspective on Management, 40 Management Decision 955 (2002).

Indeed, it is inevitable that religion—which provides the guiding moral force in so many people's lives—will inform how corporate decision-makers address the various issues affecting their businesses. Recent examples abound:

- Chick-fil-A, a chain of fast-food restaurants, closes "all of its 1,700-plus restaurants on Sunday" at the direction of its founder and longtime CEO Truett Cathy. *See* Fact Sheets, *Chick-fil-A's Closed-on-Sunday Policy*, *available at* http://www.chick-fil-a.com/Pressroom/Fact-Sheets/sunday_2012 (last visited Jan. 23, 2014). Mr. Cathy—a devout Baptist—not only refuses to "deal with money on the 'Lord's Day,'" he believes it is important to give "employees Sunday off as a day for family, worship, fellowship or rest." *Id.*

- At the direction of its CEO and controlling shareholder Jeff Swartz, the apparel company Timberland severed ties with a Chinese factory owner "to remediate the violations to human dignity that underscore its business model." Mark Borden & Anya Kamenetz, *Timberland's Jeff Swartz on Corporate Responsibility*, FAST CO., September 1, 2008 at 129. Mr. Swartz, an observant Jew, attributed that decision to his faith, noting "[i]t says in the Hebrew Bible one time that you should love your neighbor as yourself, but it says dozens of times that you shall treat the stranger with dignity." *Id.*

- Under the management of founder and former CEO David Neeleman, JetBlue maintained a rigidly egalitarian structure. The airline offered

> no first-class seats, sold all tickets for the same price, and referred to all employees as "crew members." Mr. Neeleman himself donated his entire yearly salary to a fund for employees. Mr. Neeleman attributed these decisions to his Mormon faith and mission, explaining that his "missionary experience obliterated class distinction for me," teaching him "to treat everyone the same." Jeff Benedict, The Mormon Way of Doing Business: Leadership and Success Through Faith and Family 4 (2007) (internal quotation marks omitted).

Plainly, then, individuals who direct the affairs of a corporation do not check their beliefs at the boardroom door. And just as plainly, these individuals engage in the personal exercise of religion when they take an action they believe is compelled by faith. This is true even though (as a matter of legal fiction) their action is also attributed to the corporation.

All of this reinforces the notion that laws directed at corporations can constitute a "substantial[ ] burden" on an *individual's* exercise of religion under RFRA. *See* 42 U.S.C. § 2000bb-1(a)–(b). And while it is true that individuals—in a rigidly technical sense—are burdened only indirectly by laws binding their corporations, that is of no legal moment in the free exercise context, especially as it pertains to the closely held corporations whose cases are before the Court. It is well-established that "[w]hile . . . compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas*, 450 U.S. at 718.[4]

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[4] The fear that this logic would allow a corporate *employee* to raise a RFRA claim is specious. *See* Brief for Petitioner at 30,

C. There Is Nothing Inherent in the Corporate Form that Requires Denial of the Personal Freedom to Direct the Affairs of a Corporation in Accordance with the Religious Beliefs of Its Owners.

Corporations are created "for certain specific purposes." Fletcher Cyclopedia § 7, at 19. But it is not one of the purposes of a corporation to eliminate the constitutional rights of those who form it. Nor does it advance any of the purposes of incorporation to deny the individual constitutional rights of the corporation's founders and owners to apply their religious convictions in the direction of corporate affairs.

To be sure, a corporation has "legal rights, obligations, powers, and privileges *different from*" those who own the corporation and direct its affairs. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (emphasis added). But that does not mean that those who control the corporation have no rights and obligations at all. Individuals have obligations under the

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Sebelius v. Hobby Lobby, No. 13-354 (2014). When a corporate employer directs an employee to do something, it is the *corporation* that imposes that requirement. This is true even if a corporation instructs an employee to do something in response to a government mandate (e.g., "file these taxes" or "ready the premises for a safety inspection.").

If an employee objects to an instruction on religious grounds, the corporate employer can usually accommodate those objections—for example, by reassigning a particular duty to a different employee. Indeed, Title VII of the Civil Rights Act affirmatively *requires* employers to make reasonable accommodations for religious objections, *see* 42 U.S.C. § 2000e(j), thus protecting employees' free exercise rights. But the owner of a closely held corporation cannot reassign—or otherwise avoid—a mandate imposed on his business. As explained, such laws ineluctably require a corporate owner to act, and may therefore burden his personal free exercise rights.

law when they act in a corporate capacity. They can be charged, for example, with mail and wire fraud, 18 U.S.C. §§ 1341 & 1343, false statements, *id.* § 1001, and securities violations, 15 U.S.C. § 77*l*(a)(1), (2); *id.* § 77q.[5] They can be sued civilly as well—for libel and other personal injury, for example—based on statements made or actions taken in their corporate capacity. *See* Fletcher Cyclopedia § 4898. Individuals also have personal rights that penetrate the corporate form—including, for example, the right to invoke their personal privilege against self-incrimination when questioned about conduct undertaken on behalf of the corporation. *See Braswell v. United States*, 487 U.S. 99, 105, 118 (1988) (although "a corporation has no Fifth Amendment privilege," and a corporate custodian of documents must therefore produce incriminating documents on behalf of a corporation, "the Government . . . may make no evidentiary use of the '*individual* act' against the *individual*." (emphases added)).

There is simply no logical nexus between the secular purposes for which incorporation is permitted and the denial of the individual right to conduct corporate affairs in accordance with one's religious beliefs. There is, in short, no reason why a person who wishes to direct the affairs of his business in accordance with his religious beliefs should forfeit that right merely because he chooses to organize his business in the form of a corporation.

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[5] *See also* Robert Steinbuch, *The Executive-Internalization Approach to High Risk Corporate Behavior: Establishing Individual Criminal Liability for the Intentional or Reckless Introduction of Excessively Dangerous Products or Services into the Stream of Commerce*, 10 N.Y.U. J. Legis. & Pub. Pol'y 321, 350-53 & app. (2007) (surveying various state and federal laws imposing personal liability on individual corporate executives).

In fact, it would seriously undermine the individual and societal interests served by the laws of incorporation to impose a religious price on the act of invoking them. The Court recognized long ago that "[c]orporations are a necessary feature of modern business activity, and . . . ha[ve] become the source of nearly all great enterprises." *Hale v. Henkel*, 201 U.S. 43, 76 (1906). The advantages of the corporate form are well known—and essential to the ability of individuals meaningfully to participate in any complex commercial activity. By creating a corporate entity, its founders ensure that their personal assets are shielded from business losses. Fletcher Cyclopedia § 31. This gives entrepreneurs the freedom to enter new markets, to take needed commercial risks, and to expand their businesses without risking their own livelihood. Limited financial liability also helps corporations to raise capital, as investors—quite naturally—seek to shield their "personal asset[s] from the risk[] inherent in business." 1 William M. Fletcher Corporation Forms Annotated § 1:8 (5th ed. West 2014).

For these reasons, corporations have become "prominent and important in the business world." Fletcher Cyclopedia § 7.10, at 28. Indeed, the economy as we know it would not exist without the corporate form. As one economic historian puts it, corporations

> made it possible to build lasting institutions. Investments could be made in long-lived and specialized physical assets, in information and control systems, in specialized knowledge and routines, and in reputation and relationships, all of which could be sustained even as individual participants in the enterprise came and went. And these business

> institutions, in turn, could accomplish more toward the improvement of the wealth and standard of living of their participants in the long run than the same individuals could by holding separate property claims on business assets and engaging in a series of separate contracts with each other.

Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. Rev. 387, 454 (2003).

None of these individual and societal interests is advanced by forcing individuals to choose between the secular benefits of incorporation and their personal right to religious freedom.

D. RFRA Protects the Free Exercise of Religion in the Corporate Setting.

RFRA cannot be interpreted to apply only to the free exercise of religion in an unincorporated business setting, for at least two reasons. *First*, such an interpretation of RFRA is without support in the language or history of RFRA—and inconsistent with Congress's evident purpose to expand religious freedom. *Second*, there would be serious questions about the constitutionality of any law that purported to differentiate between the free exercise rights of those who seek the civil benefits of incorporation and the free exercise rights of those who do not.

1. There is no indication that Congress intended to restrict the forms of free exercise that it protects.

As an initial matter, the government points to nothing in the language or history of RFRA to suggest that individuals surrender their rights under the statute when they choose to incorporate a business. RFRA broadly, and without qualification, protects the "exercise of religion." 42 U.S.C. § 2000bb-1. And as demonstrated above, religion may be exercised in any business setting, corporate or otherwise.

In enacting additional protection for the "exercise of religion," Congress surely understood that religious people do not separate their personal and religious lives. Congress also surely understood that under this Court's decisions, free exercise rights extend to one's conduct in the workplace. Had Congress intended to cover only the exercise of personal religious freedom in unincorporated businesses, it presumably would have provided some indication of that intent.

Indeed, it would have been incongruous for a Congress that was expanding protection for free exercise rights to deny that expanded protection to rights exercised in a corporate setting. For such a scheme would place enormous pressure upon persons of faith to forgo the benefits of incorporation—benefits that are, as explained above, indispensable in the modern world.

If enjoyment of RFRA's protection of religious freedom were conditioned on the forfeiture of the benefits of incorporation, a devout businessperson would be faced with an untenable choice. On the one hand, she might incorporate—but risk being forced to engage in activity that contradicts her deeply held religious beliefs. Under such a regime, a religious businessperson would have to simply accept, *a priori*, that the government could compel her corporation to take action repugnant to her personal faith. A corporation founded and controlled by devout Muslims might be forced to engage in financial transactions that are *riba* or *gharar*. A corporation founded and controlled by a Jehovah's Witness might be compelled by the government to engage in the production of armaments. *Cf. Thomas*, 450 U.S. at 709. Or the government could force all incorporated bakeries to prepare their goods in a certain (non-kosher) manner—thus essentially saying to the matzo-baking rabbi: "'Since you have acted to reduce your personal financial risk, you can now be required to stop making kosher matzo.'" *Hobby Lobby*, 723 F.3d at 1148 (Hartz, J., concurring) (citation omitted). And because the religious founders of these corporations had—by hypothesis—relinquished their personal, work-related free exercise rights, they would be foreclosed from so much as raising a challenge to these government actions.

On the other hand, a religious entrepreneur might choose not to incorporate. In this scenario, she would stay true to deeply held religious principles and beliefs, and retain the ability to raise a free exercise claim against onerous government regulation. But the retention of these liberties would come at a steep price. Without limited liability, the entrepreneur's personal assets would be at risk. She would have greater difficulty raising capital. And in the end, the unincorporated business might be squeezed out by competitors—not based on merit, but based on the legal and tax advantages available to its corporate competitors.

There is simply no reason to assume that Congress intended to force individuals to choose between the benefits of civil incorporation and the full scope of religious freedom that RFRA enacted.

2. Interpreting RFRA to exclude free exercise rights in the corporate context would present serious constitutional questions.

Even if it were possible to read RFRA in a way that distinguishes between those who incorporate and those who do not, the Court should avoid that interpretation because it "would, at least, raise a grave and doubtful constitutional question" as to whether Congress has the power to draw such a distinction in the first place. *Missouri Pac. R.R.. v. Boone*, 270 U.S. 466, 471-72 (1926).

RFRA, of course, provides a layer of protection to free exercise rights beyond that required by the Constitution, as interpreted in *Employment Division v. Smith*, 494 U.S. 872 (1990). But that does not mean that the Constitution would permit Congress to distinguish the level of protection afforded actors in the corporate and non-corporate spheres. For such a law would be neither religiously "neutral" nor "generally applicable." *Id.* at 880. It would not be religiously neutral, because it would draw explicit distinctions in the level of protection offered to the free exercise of religion in different contexts. And it would not be generally applicable, because its benefits would only be available in the business context to those who maintain unincorporated enterprises.

The government has offered no compelling interest that would justify providing less robust protection to the free exercise rights of those who choose the benefits of civil incorporation. And in the absence of anything in the text or history of RFRA indicating that Congress intended that result, the Court should not invite the constitutional questions that such an interpretation would raise.

CONCLUSION

Free exercise rights are not absolute. But neither are they eradicated when individuals choose to organize their businesses in the form of a corporation. This Court should acknowledge, therefore, that compulsion directed at a corporation—in particular, a closely held corporation—can amount to a substantial burden on the free exercise rights of those who own the corporation and direct its affairs.

Respectfully submitted.

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In the

Supreme Court of the United States

KATHLEEN SEBELIEUS, *et. al.*, *Petitioners*,
v.
HOBBY LOBBY STORES, INC., *et al.*, *Respondents.*

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners
v.
KATHLEEN SEBELIUS, *et al.*, *Respondents.*

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

AMICI CURIAE BRIEF OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND ST. THOMAS MORE SOCIETY OF ORANGE COUNTY IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, *et al.*

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QUESTION PRESENTED

Do the Religion Clauses of the First Amendment permit the federal government to compel business owners to violate their religious beliefs in the absence of a compelling governmental interest?

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus Center for Constitutional Jurisprudence[1] was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that the Founders intended to protect religious liberties of all citizens and to encourage participation in religious activities as a civic virtue. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Van Orden v. Perry*, 545 U.S. 677 (2005); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

The Center is vitally interested in preserving the freedom of religion as one of the central liberties protected by the Constitution. The First Amendment prohibits interference with the free exercise of religion and was understood to prohibit government from compelling actions in violation of religious belief. The liberty recognized in the First Amendment is not limited activities taking place in churches and other houses of worship. The Founders understood that "religion" extended beyond mere private belief to encompass how citizens conducted themselves in every aspect of their daily lives.

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[1] Pursuant to this Court's Rule 37.3, a global consent to amicus curiae briefs was filed with the Clerk by petitioners; consent from respondents is being filed simultaneously with this brief.

Pursuant to Rule 37.6, amici curiae affirm that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Amicus St. Thomas More Society of Orange County is a not for profit California corporation, an association of more than 1,000 Roman Catholic California lawyers and judges. The Society is vitally concerned with the issue of religious liberty as the "first liberty," the predicate to the other liberties protected by civil government because religious liberty as historically understood is necessary for religious practice, religious practice necessary for a virtuous citizenry, and a virtuous citizenry is the only populace capable of self-government. The Society is vitally concerned that religious liberty, including freedom from governmental compulsion, is not limited to worship on Sundays, but indeed the Society Mission Statement urges integration of Christian virtue in every aspect of a member's life in the spirit of the organization's namesake, St. Thomas More of a "Man for All Seasons" fame.

SUMMARY OF ARGUMENT

The argument of the United States evinces a fundamental misunderstanding of religion. The Christian[2] religion, as understood by the Founders and as practiced today, is a way of life. Religion extends well-beyond a weekly worship service. Instead, religion informs our every action, both in business and private interactions. The Founders understood this and implemented laws and practices to forbid government action that compelled violation of religious belief. These early practices inform the original understanding of the Religion Clauses of the First Amendment. Based on this understanding, in the absence of a compelling governmental interest, the United States may not compel people of faith to take actions in violation of their religious beliefs.

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[2] Amici focus on the Christian religion since that was the belief system shared by the Founders. *See* Joseph Story, 2 COMMENTARIES ON THE CONSTITUTION §§ 1874-77 (Little, Brown & Co. 1858). Other religions, however, are similarly communal in practice and establish rules for a way of life. *See, e.g.*, Leviticus, THE NEW OXFORD STUDY BIBLE at Hebrew Bible 142 (Michael D. Coogan, ed.) (Oxford 2007).

ARGUMENT

I. Religion, as Understood By The Founders and This Court's Decisions, Is a Communal Activity Affecting the Way Citizens Conduct Their Lives

In the position it presses, the United States, proposes a new constitutional test holding that individuals lose their religious liberty when they operate a "secular, for-profit" company.[3] The qualifiers defeat the proposition under this Court's current precedents. The recognition that some corporations and groups are entitled to the First Amendment right of Free Exercise of religion defeats any argument that petitioners' family-owned corporation is not entitled to Free Exercise rights. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978). This

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[3] The Pilgrims who settled at Plymouth Rock helped form the for-profit Massachusetts Bay Company to accomplish their purposes in America. The Company Charter acknowledges that spread of the "Christian Fayth" was one of the express purposes of the venture. The Charter of Massachusetts Bay (1629) (http://avalon.law.yale.edu/17th_century/ mass03.asp)

Court has long recognized that organizations, including corporations, engaged in religious activity are protected by the First Amendment. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 525 (1993); *see Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 S. Ct. 694, 706 (2012).

This Court has not limited this recognition to purely religious operations. *See Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 330 (1987); *Bob Jones Univ. v. United States,* 461 U.S. 574, 579-580 (1983). The position urged by the government in these cases means that the hospital run by the Roman Catholic Church in *Bradfield v. Roberts*, 175 U.S. 291, 297-99 (1899), was not pursuing a religious mission protected by the First Amendment. It would mean that the Society of Sisters of the Holy Names of Jesus & Mary were not pursuing a religious mission protected by the First Amendment in the operation of their school which included "[s]ystematic religious instruction and moral training according to the tenets of the Roman Catholic Church." *Pierce v. Society of Sisters*, 268 U.S. 510, 531-32 (1925). This is a radical proposition that should be rejected by this Court.

This Court has looked to the "historic function" of a particular constitutional liberty to determine whether it was "purely personal" or could be exercised by a corporation. *See Bellotti*, 435 U.S., at 778 n.14. Even if one dismisses the statement in *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 365 (2012), that this "Court has recognized that First Amendment protection extends to corporations," the issue of whether religion was a purely personal liberty seems to have been laid to rest in *Roberts v. Jaycees*, 458 U.S. 609 (1984). There, this Court noted that an individual's right to worship could not be protected from state interference without the freedom to engage in group efforts. *Id.*, at 622.

Our history shows that religion has always been understood to be a communal, rather than a purely individual, activity. Further, the exercise of religion was never thought to be limited to what happens inside a house of worship. Instead, the Founders understood religion as shaping the citizen's way of life. This understanding continues today and is evidenced in companies like Conestoga Wood Specialties, Hobby Lobby, and organizations of business executives promoting religious values in their companies' activities.

The communal nature of the Christian Religion is shown first in its texts. In the Gospel of Matthew, Jesus is reported saying "For where two or three are gathered in my name, I am there among them." Matthew 18:20, THE NEW OXFORD STUDY BIBLE at New Testament 35 (Michael D. Coogan, ed.) (Oxford 2007). It should be no surprise then that the Founders encouraged group prayer and action as a means of both protest and thanksgiving.

Mercy Otis Warren reports that the colonies generally observed prayer and fasting on June 1, 1774 in protest of the Boston Port Bill. Mercy Otis Warren, 1 HISTORY OF THE RISE, PROGRESS, AND TERMINATION OF THE AMERICAN REVOLUTION at 133 (1808) (Liberty Fund 1988). President Washington proclaimed November 26, 1789 as a day of "public thanksgiving and prayer." George Washington, Thanksgiving Proclamation, in W.B. Allen, GEORGE

WASHINGTON, A COLLECTION at 479 (Liberty Classics 1988). In that same year, Congress authorized the appointment of paid chaplains so that it could open its session with prayer. *Marsh v. Chambers*, 463 U.S. 783, 788 (1983). This continued the practice of the Continental Congress to open each session with prayer. *Id.*, 787.

As this Court has noted "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The Founders understood this and relied on it in the design of government. During the ratification debates, there was concern over the ban on religious tests in Article VI. Religion (and the Christian Religion in particular), in the view of the objectors, was best "calculated ... to make good members of society." Caldwell, Debate in North Carolina Ratifying Convention, July 30, 1788, reprinted in 5 THE FOUNDERS' CONSTITUTION at 92 (Phillip B. Kurland and Ralph Lerner, eds. 1987). Thus, elements of the practice of religion were built in to the Constitution – specifically the requirement of an Oath. As James Iredell argued, an oath is a "solemn appeal to the Supreme Being, for the truth of what is said, by a person who believes in the existence of a Supreme Being and in a future state of rewards and punishments." *Id.*, at 91.

This understanding of the nature of an oath was applied in legal proceedings, with courts reminding witnesses of their religious duty to tell the truth. *See In re Williams*, 29 F. Cas. 1334, 1340 (E.D. Penn. 1839). The view was that the crime of perjury standing alone was not sufficient. The law required a belief by the witness that a violation of the oath would be punished by a Supreme Being. *United States v.*

Kennedy, 26 F. Cas. 761 (D. Ill. 1843). Exemptions from the oath were only granted if the individual's religion prohibited oaths. *See In re Bryan's Case*, 1 Cranch C.C. 151; 4 F. Cas. 506 (D.C. Cir. 1804).

Because citizens were expected to exercise their religion in their civic life, religious belief was important to the citizen's qualification to sit on a jury. In *Reason v. Bridges*, 1 Cranch C.C. 477; 20 F. Cas. 370 (D.C. Cir. 1807), the court was called on to decide whether a party challenging a juror could examine them on the religious doctrine of their faith or must present separate proof of that doctrine.

Other evidence that the Founders understood that exercise of religion took place outside houses of worship is found in state constitutions of the time. Maryland's Constitution of 1776 guaranteed religious liberty "to all people professing the Christian religion" and provided that no person should be molested "by law" in their belief or religious practice so long as they did not breach the peace, injure others, or violate laws of morality. Francis Newton Thorpe, 3 THE FEDERAL AND STATE CONSTITUTIONS at 1689 (Hein 1993). The New York Constitution of 1777 granted "liberty of conscience, but specified that this freedom was not to be construed to "excuse of acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." *Id.*, vol. 5 at 2637. Massachusetts' 1780 Constitution had similar provisions. *Id.*, vol. 3 at 1889.

These constitutions show that the founding generation understood that religion is practiced in public as part of our daily life. The early state constitutions were willing to protect those practices so long as they did not result in a breach of the peace.

This idea that religion is practiced in the way we conduct our lives, including the way we run our businesses, is not just a quaint notion from a bygone era. The families behind Conestoga Wood Specialties and Hobby Lobby are not alone in their belief that their religion should inform their way of life in all aspects, professional as well as personal. In addition to the many companies owned and operated by people with similar motivations, business executives gather to encourage each other to live their faith.

A broad-based organization of this type is The High Calling, an organization that provides resources for "[h]onoring God in our daily work."[4] The organization publishes articles and provides resources for implementing religion in our work life. CEO's and other top executives of the Catholic faith can participate in Legatus, an organization that seeks to help executives "To study, live and spread the Catholic faith in our business, professional and personal lives."[5]

Another example is found in interfaith prayer breakfasts where business leaders will share how they implement their religious values in the way they manage their company.[6] A national prayer breakfast has been held since members of Congress invited President Eisenhower to join them for the event in 1953.[7] Since that time, Presidents have annually attended the event and spoke about how their faith informs the way they carry out the duties of their office.[8]

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[4] http://www.thehighcalling.org/about (last visited October 17, 2013).

[5] http://www.legatus.org/mission (last visited October 17, 2013).

[6] *E.g.*, http://www.atlantarotary.org/2012-atlanta-interfaith-business-prayer-breakfast (Atlanta 2012 prayer breakfast) (last visited October 17, 2013).

People of faith do not leave their religion at the worship-house door. As the Founders understood, they live their religion in their daily civic life including in the manner in which they run their business. Historical practice demonstrates that the First Amendment's protection of religious liberty was not intended to be confined to individual activities inside a house of worship. It was meant to protect individuals and groups in all aspects of their daily lives.

II. The Founders Understood Free Exercise of Religion as Prohibiting Government Compulsion to Violate Religious Strictures.

The text of the Religion Clauses guarantees Free Exercise of Religion and prohibits federal Establishments. The text does not explain what was meant by "Free Exercise," however, and the Senate Debates (where the language was finalized) were not recorded. There are nonetheless important clues to the scope of the religious liberty that the Founders sought to protect in the 1787 Constitution as well as actual practices of state governments at the time of the founding.

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[7] http://thefellowshipfoundation.org/activities.html (last visited October 17, 2013).

[8] *E.g.*, http://www.whitehouse.gov/the-press-office/2013/02/07/remarks-president-national-prayer-breakfast (Remarks of President Obama) (last visited October 17, 2013).

A. The Oath and Religious Test Clauses support an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious strictures.

The 1787 Constitution contained an express recognition of religion, a protection for free exercise of religion for those situations where the Founders foresaw a potential conflict between federal practice and individual rights, and a provision designed to protect against establishments. All of this was contemplated by the Oath Clause and the Religious Test Clause.

The Oath Clause of Article VI provides:

> The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath *or affirmation*, to support this Constitution

U.S. Const., Art. VI (emphasis supplied). Similarly, Article II requires the President "[b]efore he enter on the Execution of his Office, he shall take the following Oath *or Affirmation*:--'I do solemnly swear (*or affirm*) ....'"

The exception for "affirmations" was an important addition to preserve religious liberty. As noted above, oaths were not sworn under penalty of secular punishment. The concept of an oath at the time of the 1787 Constitution was explicitly religious. To take an oath, one had to believe in a Supreme Being and some form of afterlife where the Supreme Being would pass judgment and mete out rewards and punishment for conduct during this life. James Iredell, Debate in North Carolina Ratifying Convention, *supra*; Letter from James Madison to Edmund Pendleton, 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, (John P. Kaminski, *et al.* eds. (Univ. of Virginia Press (2009)) at 125 ("Is not a religious test as far as it is necessary, or would operate, involved in the oath itself?"). Only those individuals that adhered to this religious belief system were allowed to swear an oath. The oath requirement was explicitly religious in nature and the exception provided for affirmations was to accommodate those who believed their religion prohibited them from "swearing an oath," but who still believe in an after-life that includes judgment.

The exception to the Oath Clause was for adherents of those religious sects that read the Gospel of Matthew and the Epistle of St. James as prohibiting Christians from swearing any oaths.[9] In the absence of an exception, then, Quakers and Mennonites would have been barred from state and federal office. Their choice would have been to forego public office or accept the compulsion to take an action prohibited by their religion. The Constitution, however, resolved this concern by providing public office holders could swear an oath or give an affirmation. This provision was specifically targeted at these religious sects. This religious liberty exception to the oath requirement excited little commentary in the ratification debates. The founding generation was already comfortable with this type of exception and many states had similar provisions in their state constitutions. These provisions did not create a specific, limited accommodation, but instead protected freedom of conscience in the instances the founding generation expected government compulsion to come into conflict with religious belief.

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[9] "'But I say to you, Do not swear at all, either by heaven, for it is the throne of God, or by the earth, for it is his footstool, or by Jerusalem, for it is the city of the great King. And do not swear by your head, for you cannot make one hair white or black. Let your word be 'Yes, Yes' or 'No, No'; anything more than this comes from the evil one.'" Matthew 5:34-37, THE NEW OXFORD STUDY BIBLE, *supra*, at New Testament 15. "Above all, my beloved, do not swear, either by heaven or by earth or by any other oath, but let your 'Yes' be yes and your 'No' be no, so that you may not fall under condemnation." James 5:12, THE NEW OXFORD STUDY BIBLE, *supra*, New Testament at 392.

This exception for "affirmations" included in the Oath Clause is significant for what it tells us about the scope of religious liberty that the Framers sought to protect with both the 1787 Constitution and the First Amendment. The accommodation did not simply welcome Quakers and Mennonites into state and federal government offices. It demonstrated recognition that an oath requirement would put members of these sects in a position of choosing whether to forgo government service or whether to violate the fundamental tenets of their religion. The Framers chose to protect people of faith from government compulsion to violate their religion.

The second protection of religious liberty contained in the 1787 Constitution was the prohibition on religious tests for office holders in Article VI. This was a departure from the law in a number of the states.

A number of state constitutions at the founding had some form of Free Exercise guaranty, but joined that guaranty with a religious test. For instance the

Maryland Constitution required office holders to subscribe "a declaration of [their] belief in the Christian religion." THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA (Rev. William Jackson ed., 2d ed. 1783) (reproducing the congressional resolution of December 29, 1780) at 246 (Md. Const. part A, art. XXXV (1776)). Members of the Pennsylvania Legislature were required to make a more detailed pledge: "I do believe in one God, the Creator and Governor of the Universe, the rewarder of the good, and the punisher of the wicked. And I do acknowledge the scriptures of the Old and New Testament to be given by divine inspiration." *Id.* at 191 (Pa. Const. ch. 2, § 10 (1776)). Delaware's oath of office required the profession of a Trinitarian belief while providing a right of free exercise and prohibiting the "establishment of any one religious sect in this State in preference to another." *Id.* at 229 (Del. Const. art. 22 (1776)), 233 (Del. Const. art. 29 (1776)). The Framers of the federal constitution rejected this dual approach of guarantying free exercise of religion on the one hand but requiring a religious test on the other. Instead, the Framers sought to maximize religious liberty.

By prohibiting religious tests the Framers accomplished two purposes. First, as Madison argued, this provision prohibited Congress from establishing a religion. Letter of James Madison to Edmund Randolph, 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* at 63; *see also* Rev. Backus, Convention Debates, 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION, *supra* at 1421-22 ("[I]t is most certain, that no way of worship can be established, without any religious test."). Although the Framers argued that Congress had no explicit power to establish a religion under any of the provisions in Article I, there was a concern that in creating new offices and defining the qualifications for those offices that Congress could limit those offices to members of a particular sect. Governor Randolph, Convention Debates, 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION, *supra*, at 1100. If only members of a particular sect could serve in government, the federal government would then take on the character of the English system where public officials had to be members of the state church in order to hold office. Michael McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2113 (2003). Such a system would, it was feared, ultimately lead to the type of coercion that led the original colonist to set out for America in search of the freedom to practice their faith. The ban on religious tests, however, prevented any one religious sect from capturing government. The combination of the ban on religious tests and the number or religious sects in America at the time of the Constitution was thought the best security against a federal establishment. Governor Randolph, Convention Debates in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION, *supra*, at 1100-01. The importance of avoiding a federal establishment was two-fold. First it left the issue in the hands of the states, allowing the states to maintain their own establishments and allowing citizens to continue to move between states if they were dissatisfied with a state's establishment. Second, and important for this case, the avoidance of a federal establishment offered the best protection of religious liberty, a protection later enshrined in the First Amendment.

Experience with the established church in England convinced the Framers of the need for this provision. In order to serve in government under the English system, one had to, among other things, receive the communion in the Church of England within a short period after taking office. McConnell, *supra* at 2176. As with the oath, one had the option of either not serving in office or foreswearing one's own religious beliefs. Recognizing the diversity of religious belief in America,[10] the Framers chose to avoid compelling the citizens of the new country to violate their religious beliefs. This freedom from government compulsion to foreswear one's religious beliefs lies at the core of religious liberty clauses in the First Amendment. Historical practice at the time of the founding confirms this analysis.

B. Historical practice at the time of the founding support an interpretation of the Free Exercise Clause as prohibiting government compulsion to violate religious strictures.

As noted above, even states that had a religious test also sought to guaranty free exercise of religion. State efforts to ensure religious liberty again focused on preventing government compulsion to violate one's religious beliefs. Thus, Delaware, New Hampshire, New York, and Pennsylvania included exemptions from militia service for Quakers in their state constitutions. Stephen M. Kohn, JAILED FOR PEACE, THE HISTORY OF AMERICAN DRAFT LAW VIOLATORS 1658-1985 (Praeger 1987). Statutes containing a similar exemption from militia service for Quakers were enacted in Georgia, Rhode Island, and Virginia. Margaret E. Hirst, THE QUAKERS IN PEACE AND WAR, (Garland 1972) at 331, 396-97. These early protections accepted that Quaker religious belief forbade the use arms and chose to honor religious liberty even at the expense of additional soldiers,

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[10] Admittedly, the Framers were mostly concerned with protecting the diversity of Christian/Protestant sects. *See* Joseph Story, . *supra* at §1877 (Little, Brown 1858)

This protection of religious liberty is most clearly illustrated during the Revolutionary War. If ever there was a "compelling governmental interest," certainly it was the muster of every able-bodied man to prepare to defend towns from the oncoming British army. Yet George Washington would not compel Quakers to fight. Even when some Quakers were forced to march into Washington's camp at Valley Forge with muskets strapped to their back, Washington ordered their release. *Id.* at 396.

Washington's commitment to this religious freedom was also demonstrated in his orders issued to towns that were in the path of the British army's march. In January of 1777 as the British army advanced on Philadelphia, Washington ordered "that every person able to bear arms (*except such as are Conscientiously scrupulous against in every case*) should give their personal service." George Washington Letter of January 19, 1777 in JAILED FOR PEACE, *supra* at 10 (emphasis added). The call for every man to "stand ready ... against hostile invasion" was not a simple request. The order included the injunction that "every person, who may neglect or refuse to comply with this order, within Thirty days from the date hereof, will be deemed adherents to the King of Great-Britain, and treated as common enemies of the American States." Proclamation issued January 25, 1777 in GEORGE WASHINGTON, A COLLECTION, *supra* at 85. Again, however, the order expressly exempted those "conscientiously scrupulous against bearing arms." *Id.* Even in most extreme need for militia to resist the British army, Washington's army would not compel Quakers and Mennonites to violate the commands of their religion.

After the Revolution, states continued to protect against compulsion to violate religious beliefs. State constitutions in Maryland and South Carolina, for example, included protection in their constitutions for adherents of religious sects that forbade the swearing of oaths. South Carolina's constitution of 1778 allowed people who were called as witnesses to affirm the truth of their statements "in that way which is most agreeable to the dictates of his own conscience." Thorpe, *supra* at vol. 6, 3255-56. Similarly, Maryland's constitution of 1776 explicitly acknowledged the religious nature of an oath and provided an exception from any oath requirement for "Quakers, those called Dunkers, and those called Menonists, holding it unlawful to take an oath on any occasion, ought to be allowed to make their solemn affirmation, in the manner that Quakers have been heretofore allowed to affirm." *Id.*, at vol. 3, 1690.

These examples demonstrate that the founding generation understood religious liberty to mean that government is not permitted to compel a citizen to violate his religious beliefs. That understanding of religious liberty should inform this Court's interpretation of the Religion Clauses of the First Amendment. Those clauses guaranty "free exercise" (freedom of action) and prohibit federal "establishments" (freedom from compulsion). Together they forbid the federal government from enacting regulations to compel the families who own Hobby Lobby and Conestoga from paying for contraception and abortifacients – an action contrary to their religious faith.

CONCLUSION

In these cases, the United States government seeks to compel citizens to act in violation of their religious beliefs. The stated government reason for this compulsion is relatively insignificant – certainly not as compelling as serving in the militia during the Revolutionary War.

The position of the United States is ignores the history of this country and the scope of religious liberties sought the founders sought to protect in the Constitution. Free Exercise of religion includes the freedom from government compulsion to foreswear one's religious principles – at least in the absence of an exceedingly compelling governmental interest. That interest is lacking in this case and the Court should rule in favor of Hobby Lobby and Conestoga in their challenges to the contraceptive mandate.

DATED: January, 2014.

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AMICUS
CURIAE
BRIEF

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IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF
HEALTH AND HUMAN SERVICES, *et al.*,
Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,

v.

KATHLEEN SEBELIUS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF *AMICI CURIAE* THE CENTER FOR INQUIRY, AMERICAN HUMANIST ASSOCIATION, AMERICAN ATHEISTS, MILITARY ASSOCIATION OF ATHEISTS AND FREETHINKERS, AND THE INSTITUTE FOR SCIENCE AND HUMAN VALUES, IN SUPPORT OF THE GOVERNMENT

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STATEMENT OF INTEREST[1]

This *amici curiae* brief in support of the Government is being filed on behalf of the Center for Inquiry ("CFI"), the American Humanist Association, American Atheists, the Military Association of Atheists and Freethinkers, and the Institute for Science and Human Values.

CFI is a nonprofit educational organization dedicated to promoting and defending reason, science, and freedom of inquiry. Through education, research, publishing, social services, and other activities, including litigation, CFI encourages evidence-based inquiry into science, pseudoscience, medicine and health, religion, and ethics. CFI believes that the separation of church and state is vital to the maintenance of a free society that allows for a reasoned exchange of ideas about public policy.

The American Humanist Association ("AHA") is a national nonprofit organization that advocates for the rights and viewpoints of humanists. Founded in 1941, its work is extended through more than 175 local chapters and affiliates across America. Humanism is a progressive philosophy of life that, without theism and other supernatural beliefs, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The mission of AHA's legal center is to defend the constitutional mandate of separation of church and state.

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[1] The Government and Conestoga Wood Specialties have given blanket consents to the filing of *amicus* briefs; their written consents are on file with the Clerk. Counsel of Record for Hobby Lobby has granted written consent for this brief to be filed; this consent is also on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

American Atheists, Inc. ("American Atheists") is a New Jersey educational, non-political, nonprofit corporation with members, offices, and/or meeting locations nationwide and in various municipalities. American Atheists is a membership organization dedicated to advancing and promoting, in all lawful ways, the complete and absolute separation of church and state and to preserving equal coverage for atheists under the protections found in the Bill of Rights, and, in particular, the First Amendment to the United States Constitution. American Atheists promotes the stimulation and freedom of thought and inquiry regarding religious belief, creeds, dogmas, tenets, rituals and practices. It seeks to collect and disseminate information and literature on all religions in order to promote a thorough understanding of them. It encourages the development and public acceptance of a humane, ethical system that stresses the mutual sympathy, understanding and interdependence of all people and the corresponding responsibility of each individual in relation to society.

The Military Association of Atheists and Freethinkers represents active duty and former military personnel in all branches of service who protect a nation that does not discriminate on the basis of belief and does not promote one type of belief to the exclusion of others.

The Institute for Science and Human Values is committed to protecting and advancing women's full equality and health, with a particular interest in ensuring that women receive all the benefits of access to paid contraceptive coverage, as provided in the Affordable Care Act, without regard to the religious views of their employer.

Amici thereby comprise a diverse array of secular and humanist organizations that advocate on behalf of the separation of church and state and offer a unique viewpoint concerning the importance of religious freedom in the United States. The granting of exemptions to religious groups from laws of general applicability at issue in this case jeopardizes amici's core humanist and secular interests in the separation of church and state. Amici are accordingly deeply invested in preserving appropriately stringent judicial scrutiny of exemptions from such generally applicable laws.

SUMMARY OF ARGUMENT

Both the government and the corporations seeking exemption focus their arguments on the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C. § 2000bb-1. The government correctly maintains that there is no substantial burden on the free exercise of religion of the owners of the corporations, or indeed on the rights of the corporations themselves, if this Court were to find that such rights exist. It is the position of *Amici* herein that the granting of the requested exemption is not only not required under RFRA, but is also unconstitutional, because it would violate the Establishment Clause.

First, there exists no First Amendment, Free Exercise Clause based right to an exemption from the Contraceptive Mandate ("Mandate"), 77 Fed. Reg. 8724, 8725 (Feb. 15 2012) of the Patient Protection and Affordable Care Act ("ACA"). Pub. L. No. 111-148, 124 Stat. 119 (2010). Under controlling Supreme Court precedent, Congress does not impinge on the right to free exercise of religion when it enacts a law of general applicability, even if that law impacts an individual's ability to practice her religion. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990). The only exception to this rule is where a law targets the practice of a religious group for discriminatory treatment, and so is not truly one of general applicability. *Church of Lukumi Balalu Aye v. City of Hialeah*, 508 U.S. 520, 536-37 (1993). As the Mandate is generally applicable, and does not target religion in general or any specific religion, any burden it creates on religious practice is not a violation of the Free Exercise Clause.

Congress responded to *Smith* by passing RFRA, imposing a compelling government interest standard for substantial infringements of free exercise. However, any exemptions granted under RFRA are legislative, not constitutional protections, so RFRA must withstand constitutional scrutiny, both facially and as applied. In particular, any protections given over and above *Smith* to religious exercise must not violate the Establishment Clause.

Second, this Court has held repeatedly that a permissive exception to a generally applicable law, such as that granted under RFRA, violates the Establishment Clause when a government created burden is shifted from the complaining individual to a third party. Such a burden shifting would occur, here, because in order to satisfy the religious concerns of business owners, individual employees would have their ability to obtain preventive health services, in the form of legally approved contraception, adversely affected.

Third, the burden on religious practice claimed by these employers is a minimal one, if it exists at all. Despite the ruling of the Tenth Circuit, courts may not simply take plaintiffs' allegations of a burden at face value. Any burden that exists here is a purely self-imposed one, created by the employer's decisions made for purely business reasons which are unprotected by any constitutional right. Moreover, the alleged burden in this case is contingent on the independent decisions of nongovernmental third parties, that is, the decisions of employees who may or may not decide to use the forms of contraception to which the employers object. As this Court has repeatedly found in Establishment Clause cases, actions of third parties cannot be attributed to the government. *E.g. Zelman v. Simmons-Harris*, 536 U.S. 639, 650-51 (2002).

Fourth, any such exemption granted here could not be controlled without violating the First Amendment by preferring one religion over another, or religious belief, generally, over nonbelief. Any exemption would be followed by a series of further exemptions, as almost any medical procedure could be seen as violating the religious beliefs of one or more religious groups or sects.

The exemption sought here by Hobby Lobby, Conestoga Wood, and their respective owners is therefore not required by the Free Exercise Clause, and, in fact, would violate the Establishment Clause. As such, it must be rejected by this Court.

ARGUMENT

I. THERE IS NO FREE EXERCISE CLAUSE RIGHT TO AN EXEMPTION FROM THE MANDATE

A. Generally applicable laws which indirectly affect religious practices do not violate the First Amendment

The various Circuits that have considered the Mandate have spent little to no time on the merits of the claims asserted under the First Amendment except to opine on whether the Free Exercise Clause even protects for-profit corporations as opposed to individuals and nonprofit religious corporations. The reason for this is clear. This Court has ruled that there is no violation of the Free Exercise Clause's protections when Congress enacts "a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that [a plaintiff's] religion prescribes (or proscribes)." *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 409 (E.D. Pa. 2013) (*citing Smith*, 494 U.S. at 879).

That laws applying to all will affect an individual's religious beliefs is an unavoidable part of living in a modern, diverse society with a functioning government. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988) ("[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires.") The rule as set out in *Smith* prevents such incidental burdens on religion, that may come with broad reaching legislation, from rising to the level of a constitutional violation. Where such a burden occurs, "it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs." *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

The Free Exercise Clause is implicated only when the *objective* of a law is to single out and impose a burden on a particular religion's practices. Legislation that specifically targets a religious practice, unless meeting the compelling interest test, would violate the First Amendment. *Smith*, 494 U.S. at 878. ("It would doubtless be unconstitutional . . . to prohibit bowing down before a golden calf.") Such a law targeted at a religious practice was struck down by this Court in *City of Hialeah*, 508 U.S., at 540-41, where a local ordinance was held to be written in a fashion such as to prohibit the killing of animals only by practitioners of Santeria. Significantly, even if the objective of a law is to burden a particular religious practice, it may still be upheld if it satisfies the compelling interest test. The ordinance in *City of Hialeah* was unconstitutional because the true purpose of the legislation, as evidenced by the ordinance's legislative history, was to push Santerians out of the city. 508 U.S. at 540-41.

There is no credible argument that such targeting of religion is occurring here with the Mandate. The Mandate applies to all employers covered by the Affordable Care Act, with the exception of a broad range of religious nonprofit corporations fully exempted or granted accommodations by executive action. Not only is the Affordable Care Act one of general applicability, it is a validly enacted law, as determined by this Court in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566, 2608 (2012).

B. Permissive religious exemptions to laws of general applicability are subject to Establishment Clause review

In his majority opinion in *Smith*, Justice Scalia noted that while the First Amendment did not *require* religious exemptions from laws of general applicability, they were *permissible*. 494 U.S. at 890. In response to that decision, Congress enacted RFRA, with the express purpose of making the compelling interest test the standard of review for government-imposed burdens on religion. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F. 3d 1114, 1133 (10th Cir. 2013).

This Court, in *Smith*, determined the extent to which the Free Exercise Clause protected individuals from burdens on their religious practice. RFRA, as a legislative enactment, granted protections *beyond* those constitutional rights. Such permissive rights granted by act of Congress are subject to constitutional scrutiny by this Court. When an exemption sought under RFRA violates the Establishment Clause, it is not permitted. Congress does not have the authority to violate the Constitution, nor can Congress overrule a Supreme Court determination of the extent of constitutional protections, short of the passage of an actual constitutional amendment. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (the Constitution is "superior, paramount law, unchangeable by ordinary means . . . [It is not] alterable when the legislature shall please to alter it.")

Any exemption claimed under RFRA, such as that sought by Hobby Lobby and Conestoga Wood Specialties here, must, therefore, pass constitutional review under the Establishment Clause. RFRA was ruled unconstitutional as applied to the states by this Court in *City of Boerne*, 521 U.S. at 536. However, it has been treated as facially constitutional regarding the federal government.[2] Facial constitutionality does not end the scrutiny, as laws may still be applied in ways which violate the constitution.

The Establishment Clause "mandates government neutrality between religion and religion, and between religion and non-religion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The granting of an injunction to Hobby Lobby and Conestoga Wood Specialties, exempting those profit-making corporations from obeying a generally applicable law on religious grounds, would be a breach of such neutrality, burdening the employees of those corporations in order to further the religious interests of the corporate entities and their owners.

II. GRANTING A RELIGIOUS EXEMPTION HERE VIOLATES THE ESTABLISHMENT CLAUSE BY IMPOSING A BURDEN ON THIRD PARTIES

A. An exemption would shift a burden to the employees of Hobby Lobby and Conestoga Wood Specialties

The express purpose of RFRA is to defend the freedom to practice religion against restrictions imposed by the government. Where RFRA has traditionally been applied, the government can remove the burden on religious practice through the creation of an exemption that affects only the complaining party. For example, in *Gonzales v. O Centro Espirita Beneficente Unaio do Vegetal*, 546 U.S. 418, 423 (2006), members of a Brazilian church located in New Mexico were denied permission to use a tea brewed from plants unique to the Amazon Rainforest, because the tea contained a hallucinogen controlled under federal law. Noting the government already provided exemptions to such drug laws for sacramental purposes, 546 U.S. at 436-37, a unanimous court ruled in favor of the church. No burden was placed on third parties through the grant of an exemption to the church.

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[2] *Amici* do not concede the constitutional validity of RFRA, as it grants privileges to religion which violate the Establishment Clause. *See The Religious Freedom Restoration Act is Unconstitutional, Period*, Marci A. Hamilton, 1 U. Pa. J. Const. L. 1, 19 (1998-99). As Justice Stevens noted in his concurrence in *City of Boerne*, "Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." 521 U.S. at 537 (Stevens, J., concurring). However, for purposes of this brief, *amici* assume the facial constitutionality of RFRA.

The case presented here is wholly different. Unlike the members of the Brazilian church, Hobby Lobby and Conestoga Wood Specialties seek an exemption that will have a direct adverse impact on third parties, namely the employees of those companies. The rights and interests of these employees must also be considered in ruling on the companies' RFRA claims. Under the ACA, these employees are legally entitled to health insurance through their employers that covers a range of "preventive healthcare services" without copay or extra cost. 42 U.S.C. § 300gg-13(a). These services have been defined by executive agencies to include contraception. 45 CFR § 147.130(a)(1)(iv)(A). The ACA has been passed by Congress, signed by the president and ruled constitutional by this Court. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2608. It is now in effect. The employees of these companies, like employees of all other covered companies, are therefore legally entitled to this coverage and any exemption would negatively affect them by removing that entitlement.[3]

B. This Court has found permissive religious exemptions that burden third parties to be unconstitutional

As explained, *supra*, Hobby Lobby and Conestoga Wood Specialties are seeking a permissive accommodation. As found in *Smith*, Congress has the power to grant such an accommodation, but only when it is consistent with other constitutional requirements. 494 U.S. at 890. This Court has held that when granting such a religious accommodation imposes burdens on third parties, it violates the Establishment Clause and is, therefore, unconstitutional.

This can be seen most clearly in cases dealing with Sabbath observance. When presented with a Connecticut law requiring businesses to honor requests from their employees not to work on their Sabbath day, this Court held that the law violated the Establishment Clause. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).[4] This Court noted that it was the absolute nature of the requirement that made it unconstitutional, as it took "no account of the convenience or interests of the employer *or those of other employees who do not observe a Sabbath*." 472 U.S. at

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[3] As courts have stressed, such a removal would be tantamount to a reduction in wages. "But consider that health insurance is an element of employee compensation." *Grote v. Sebelius*, 708 F. 3d 850, 861 (7th Cir. 2013). An exemption for the company can therefore truly be characterized as a reduction in compensation for the affected employees.

[4] While *Thornton* predates the enactment of RFRA, this Court has repeatedly noted that RFRA seeks to return jurisprudence to the pre-*Smith* standard, and prior precedent is therefore applicable. *E.g. Gonzales*, 546 U.S. at 424, 431.

709 (emphasis added). Accommodating the religious interests of those who sought to take their Sabbath off would create a burden on those who did not share those religious beliefs. Such a rule could not stand, as it "would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers." *Id.* at 709-10.

This Court has reached the same conclusion in Title VII employment discrimination cases. 42 U.S.C. § 2000e *et seq.* When a Sabbatarian airline employee claimed the right to an accommodation of his religious requirement for Saturdays off work, this Court rejected his claim. *T.W.A. v. Hardison*, 432 U.S. 63, 85 (1977). While this Court did not dispute the sincerity of the employee's religious convictions, it noted that there was no requirement to provide such an accommodation, as the effect would have been "to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath." *Id.* at 81.

An identical standard to that in RFRA is applied to alleged burdens on the religious exercise of prisoners under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[5] 42 U.S.C. § 2000cc. In applying that standard, this Court has confirmed that permissive accommodations will be held to be unconstitutional if they create burdens on third parties. When incarcerated members of minority religions sued the Ohio Department of Corrections claiming a right to accommodations under RLUIPA, this Court upheld their claims, but noted that "[p]roperly applying RLUIPA, courts must take adequate notice of the burdens a requested accommodation may impose on non-beneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Where such requests for accommodation would "impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution," *id.* at 726, they are not only not required under RLUIPA, they could violate the Establishment Clause. "In that event, adjudication in as applied challenges would be in order." *Id.*

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[5] *See Hobby Lobby Stores, Inc.*, 723 F. 3d at 1138 n.13.

In the case with claims most analogous to those presented by Hobby Lobby and Conestoga Wood Specialties, *United States v. Lee*, 455 U.S. 252 (1982), this Court unqualifiedly enforced the rule that religious accommodations which impose burdens on third parties would not be permitted. In *Lee*, an Amish employer sought an exemption permitting him to avoid paying required social security contributions for his employees. This Court refused, noting that granting such an exemption "operates to impose the employer's religious faith on the employees." 455 U.S. at 261. This Court acknowledged that Congress had exempted self-employed Amish from paying social security contributions for themselves, but refused to extend the exemption to contributions for employees, who might not share the same religious convictions. *Id.* Importantly, this Court stressed that if religious individuals enter the world of business, they voluntarily accept that some regulations may conflict with their religion. "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.*

Similarly, this Court has denied exemptions to religious organizations from minimum wage laws, stating that their religious character does not justify depriving employees of minimum wage protection. *Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 306 (1985). This Court also found that exempting religious materials from sales tax, thereby increasing the tax burden on secular materials, violated the Establishment Clause. *Texas Monthly v. Bullock*, 489 U.S. 1, 14 (1989).[6]

This Court's decision in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), is not inconsistent with this analysis. In *Amos*, this Court upheld Section 702 of Title VII, 42 U.S.C. § 2000e *et seq.*, which exempts religious organizations from that statute's ban on employment discrimination based on religion. In upholding this exemption, this Court made clear that religion was not a constitutional *carte blanche* for demanding exemptions. "At some point, accommodation may devolve into 'an unlawful fostering of religion.'" 438 U.S. at 334-35 *citing Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 145 (1987). Moreover, the concurrences by Justices Brennan and O'Connor stress the importance of permitting the church leeway in determining how it fulfills its nonprofit community service role. *Amos*, 483 U.S. at 344 (Brennan, J., *concurring*) ("The risk of chilling religious organizations is most likely to arise with respect to *nonprofit* activities.") (emphasis in original); *Univ. of Great Falls v. NLRB*, 278 F. 3d 1335, 1344 (D.C. Cir. 2002) (stressing the importance of nonprofit status for the holding in *Amos*). The instant case, involving for-profit corporations, does not raise the same concerns.

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[6] For a more complete analysis of these cases, *see* Frederick M. Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. ___ (2014), at 19-20, 27-28 available online at http://papers.ssrn.com/sol3/papers.cfm?Abstract_id=2328516 or http://dx.doi.org/10.2139/ssrn.2328516 (last visited Jan. 21, 2014).

C. The burden shifted to third parties here is substantial

The baseline from which we must consider whether a burden has been imposed on a third party is the situation that would exist absent the exemption. *Locke v. Davey*, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting) ("When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured.").[7] For instance, in *Thornton*, 472 U.S. at 709-10, the baseline was a situation prior to the Sabbath leave law, where nonreligious employees were not required to bear the burden of covering for their co-workers' religiously motivated days off. In the instant case, the baseline would be that the employees of Hobby Lobby and Conestoga Wood Specialties are covered under the Mandate, and are able to obtain these prescription contraceptive services without co-payment. The burden can therefore be seen as the harm done to employees of these corporations in not receiving the full benefits granted to them under the ACA, a burden created as a direct result of the religious exemption sought by their employer.

It may be difficult to quantify such a burden precisely, but there can be no doubt that the burden is substantial. Studies by Planned Parenthood have shown that the cost of an intrauterine device (IUD), including the fees for the required medical examination, insertion, and ongoing follow up visits, ranges from $500 to $1,000.[8] While Hobby Lobby and Conestoga Wood Specialties claim no religious objection to covering oral contraceptives, the most commonly used drug covered under the Mandate, the Tenth Circuit in *Newland v. Sebelius*, 2013 U.S. App. LEXIS 20223, at *7 (10th Cir. Oct. 3, 2013), affirmed a district court injunction allowing a for-profit corporation to exclude all forms of contraception from its health plan.[9] For these forms of contraception, the annualized cost is between $180 and $960, with the cheaper, generic contraceptives often being reported as causing unpleasant side effects. *See* Gedicks and Van Tassell, *supra* note 6, at 38-43.

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[7] *See also* Gedicks & Van Tassell, *supra* note 6, at 34-35.

The direct costs of purchasing contraception which the Mandate provides as free would therefore place a significant burden on many employees. A religiously based exemption for employers could realistically cost female employees, who do not share their employers' religious convictions, around $1,000 a year. But this monetary amount, while significant, underestimates the true burden of such exemptions. The determination not to cover emergency contraception may place women in a situation where they cannot afford the out-of-pocket payment for necessary drugs, leading either to unwanted pregnancy or a more expensive later abortion. Employees who desire such coverage would be presented with the dilemma of leaving their jobs and seeking employment elsewhere or paying for the religious predilections of their employer. When Hobby Lobby and Conestoga Wood Specialties present this case as a matter of the alleged rights of the for-profit corporation to be free from government interference in religion, they are presenting a distorted view of the dispute. What is truly at stake is the right of individual workers not to have their health care benefits determined by the religious beliefs of their employer.

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[8] *See* Planned Parenthood, *IUD: Where can I Get an IUD? How much does an IUD Cost?*, http://www.plannedparenthood.org/health-topics/birth-control/iud-4245.htm (last visited Jan. 21, 2014).

[9] Attempts by for-profit corporations to be completely exempt from coverage of all forms of contraception can also be seen in cases before other Circuits. *E.g. Korte v. Sebelius*, 735 F. 3d 654, 662-63 (7th Cir. 2013); *Gilardi v. United States Dep't of Health & Human Servs.*, 733 F. 3d 1208, 1210 (D.C. Cir. 2013); *Autocam Corp. v. Sebelius*, 730 F. 3d 618, 621 (6th Cir. 2013).

As controlling precedent of this Court shows, where such a substantial burden will be imposed on a third party, granting an exemption violates the Establishment Clause. *Thornton*, 472 U.S. at 709-10; *T.W.A.*, 432 U.S. at 81. While the individual owners of Hobby Lobby and Conestoga Woods Specialties undoubtedly have deeply felt and sincere religious beliefs,[10] these beliefs do not grant them the right to shift the burden of a law of general applicability onto their workforce, who do not share the same convictions. To do so would be to privilege religion, and the religion of the particular owners, over the rights of those who do not share those beliefs. Such discrimination has no place in the United States.

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[10] *Amici* note, however, that the idea of a for-profit corporation being held to possess such beliefs, and thereby having Free Exercise Clause rights, is one which has no support in case law. But this issue is adequately addressed in other briefs before this Court and will not be discussed further here.

III. THE MANDATE IMPOSES NO SUBSTANTIAL BURDEN ON THE RELIGIOUS FREEDOM OF HOBBY LOBBY AND CONESTOGA WOOD SPECIALTIES

As shown, *supra*, this Court has never allowed religious exemptions from laws of general applicability where such accommodation would create a burden on a third party. However neither Hobby Lobby and Conestoga Wood Specialties, nor their respective owners, the Greens and the Hahns, will suffer any legally significant injury if the injunction sought here is denied. This is true even if the for-profit corporations concerned are required to fulfill the requirements of the ACA and provide insurance coverage to their employees for a full range of preventive medical care.

A. The finding of a burden by lower courts is based on flawed reasoning

The Tenth Circuit, in *Hobby Lobby*, renounced any role for the court system in determining whether a burden is a real or an imagined one. In summarily dismissing the government's claim that no burden existed because the employee's independent decision in conjunction with a doctor's prescription triggered the offending act – the payment for and use of certain types of contraceptive – that court held that its "only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief." 723 F. 3d at 1137. Such a definition of substantial burden essentially removes *any* limit on claims of religious based exemptions to laws of general applicability. However attenuated or counterfactual the burden alleged may be, the Tenth Circuit found that, provided a belief in its effects was genuine, then, under RFRA, the government would be required to show that it acted in the furtherance of a compelling governmental interest, and, moreover, used the least restrictive means possible to further that interest.

When the decisions of this Court are examined, however, it becomes clear that the Tenth Circuit erred in using such a broad definition of religious harm to dismiss the government's defense of the Mandate. It is not permissible for an individual, let alone a for-profit corporation, to define its own reality. If evidence, as here, demonstrates that a law of general applicability does not in any way directly involve a person in the action which they believe, however sincerely, is religiously forbidden, then it cannot create the kind of burden required for a RFRA case to succeed. A belief, however sincere, that the government is requiring one to consume pork does not create a burden on one's religious practices of eschewing pork if the government can demonstrate that it does not, in fact, force one to consume pork. In *Hobby Lobby*, the Tenth Circuit erred by refusing to consider the government's argument that no burden existed on the corporation (that it was not, in essence, required to eat pork), and by instead taking the word of the allegedly injured party that such an injury had occurred. 723 F. 3d at 1138-40.[11]

As the government noted in *Hobby Lobby, id.*, the Mandate does not require owners or corporations to use contraceptives, nor does it require them to purchase contraceptives for their employees. Instead, the Mandate requires that the health insurance plan offered by the corporation covers a range of preventive health services, including FDA approved contraceptives, without copayment, which contraceptives may or may not be utilized by employees. The conceptual distance over which any burden has to travel is, therefore, vast. For instance, the first step is for the individual Christian employers to inform their for-profit corporation that it must provide a health care plan that conforms with the law of the land. This corporate entity, established to earn profits, and which acts as a shield against liability for the individual owners, then chooses whether to offer a third party provided health plan, such as from Blue Cross or Blue Shield, or to self-insure, providing health coverage through the corporation, with the plan administered by a third party administrative service. It is that third party, either administrator or insurance company, that informs the employee of their coverage. The employee, then, acting independently, chooses whether to visit a doctor, whether to request and receive a prescription for a particular type of contraceptive method, whether to fill that prescription at a pharmacy, and whether to use the prescribed contraceptive.

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[11] The spread of such a standard would lead to an uncontrollable expansion of claims for religious exemptions under RFRA. *See, infra* IV A-B.

It strains credibility that this possible independent action by an employee can be considered an infringement on the religious free exercise rights of the individual owners, let alone any as-yet-to-be-discovered free exercise rights of the corporation. A burden under RFRA cannot be created by the fear that some third party may act in a way that the objecting party would not itself act.

Indeed, this Court has repeatedly decided cases where it has observed that the greater the conceptual distance, and greater the number of independent decisions that occur in a chain of causation, the less plausible is the claim of causation, especially in matters of religious entanglement.[12] For example, in *Mitchell v. Helms*, 530 U.S. 793 (2000), this Court found constitutional a program permitting government aid to private schools that aided both secular and parochial education. Holding that such a program did not constitute an unconstitutional endorsement of religion, Justice Thomas' majority opinion noted that as the aid was "neutrally available, and, before reaching or benefiting any religious school, first pass[ed] through the hands . . . of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any support of religion." 530 U.S. at 816 (internal citations omitted). If a single private decision by a single family is sufficient to prevent taxpayers' money from being characterized as government support for a religious school, then surely the attenuated path of decision-making involved in the process at issue here must remove any connection between the individual employer, or profit-making corporate entity, and the final decision of an employee to use contraception.

Two years later this Court again held that intervening independent decisions as to where money was spent removed any suggestion that the initial source of funding, the government, was responsible for its final use, which was providing support for parochial schools. *Zelman*, 536 U.S. at 654-55 ("[W]e have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement.")

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[12] This principle is a basic cornerstone of tort law in the United States – liability attaches only when proximate cause can be demonstrated.

B. Any burden that exists for the employer is voluntarily undertaken

Despite claims by Hobby Lobby and Conestoga Wood Specialties to the contrary, the fact that those corporations choose to self-insure, rather than provide their employees with the option of purchasing an insurance policy through a third party, to remove any possible link between the owners and the contraception decision, is of no significance in determining whether an actionable burden on religious expression exists. Such a decision is one wholly within the universe of choices of the corporation. It "is a decision made by the employer, likely in part or in whole for economic reasons." *Grote*, 708 F. 3d at 863. As noted by the Third Circuit, "the purpose – and only purpose – of the plaintiff Conestoga [and Hobby Lobby] is to make money!" *Conestoga Wood Specialties Corp. v. Sec'y of the United States HHS*, 2013 U.S. App. LEXIS 2706, at *15 (3d Cir. Feb. 7, 2013) (Garth, concurring).

Such a voluntary, economic based decision cannot be the basis of a violation of free exercise rights. *E.g. Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) (denial of deduction for monies paid for auditing by a Scientologist was not a free exercise violation as "[a]ny burden imposed on auditing or training . . . derives solely from the fact that, as a result of the deduction denial, adherents have less money available to gain access to such sessions."); *see also* Andy G. Olree, *The Continuing Threshold Test for Free Exercise Claims*, 17 Wm. & Mary Bill of Rights J. 103, 112 (2008) (*discussing Prince v. Mass.*, 321 U.S. 158 (1944). "In essence, the threshold test requires that when such a path is open [complying with both religious convictions and child labor laws without significant inconvenience], the believer must take [that path].")

If the choice of self-insurance or third party insurance does not impact whether a burden exists, where then is its source? This burden also cannot be found in any subsidy given to employees to purchase insurance, whereby corporate money, through private decision making, would end up paying for such coverage. Once again, there is no requirement in either the Constitution or the ACA for an employer to subsidize an employee's health care benefits. Any choice to do so is an economic one, made by a profit-making entity on business grounds. Hobby Lobby and Conestoga Wood Specialties could simply remove any subsidy, and replace it with a pay increase to permit the employees to purchase their own insurance at the same cost. Once the money leaves the coffers of the corporation, there can be no plausible claim that the corporation is responsible in any cognizable sense for how it is spent – to find otherwise would suggest that a corporation could prevent its employees from spending their salaries on items which the owners felt were religiously objectionable. An Islamic owner of a corporation cannot claim that a religious burden was imposed by the government if, for example, his employees choose to purchase pork and alcohol with their salaries, when the government allows such products to be legally sold.[13]

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[13] As the Seventh Circuit noted in *Grote*, health insurance is very much a part of an American employee's package of compensation, and "how an employee independently chooses to use that insurance arguably may be no different in kind from the ways in which she decides to spend her take-home pay." 708 F. 3d at 861.

C. This case does not involve a burden on religious liberty, but rather a complaint about government policy

The source of the religious burden allegedly imposed by the Mandate can then neither be the voluntary decision to self-insure, nor the voluntary decision to contribute financially to the purchase of insurance. This case does not involve any real burden on religious beliefs at all. Rather, this case is no more than a complaint about government policy. Simply put, Hobby Lobby and Conestoga Wood Specialties do not want to participate in a scheme established by the government for the provision of certain types of health care services. The history of the United States has seen many such attempts by individuals and corporations to avoid participation in government schemes on religious grounds, but this Court has repeatedly concluded that such claims have no merit, finding individual religious disapproval of government policy to be entitled to no more deference than political disapproval.

It has never been found that a corporation has the right not to participate in government policy based on the religious concerns of its owners. In many situations, even individuals are expected to place their religious convictions aside, when the participation required in an activity is sufficiently attenuated. While conscientious objectors may not be compelled to serve in the military, a similarly sought exemption from paying taxes to support the military has been repeatedly denied, even to Quakers whose sincere religious belief in pacifism is unquestioned. *Adams v. Commissioner*, 170 F. 3d 173 (3d Cir. 1999), *cert. denied* 528 U.S. 1117 (2000). In, *Adams*, the Third Circuit found that, despite the feasibility of exempting individuals from tax payments, the government had a compelling interest in uniform collection of taxes, and refused to permit the sincere beliefs of Adams to excuse her from participation in societal responsibilities such as tax payments. 170 F.3d at 180-82.

Most commonly, this Court has faced these questions in the area of Social Security Administration. As described, *supra*, while Congress chose to grant an exemption from such taxes to self-employed Amish, whose religious beliefs required them to take care of their communities' elderly, such an exemption was not provided for Amish business owners to refuse to pay for the contributions to Social Security for their employees, *Lee*, 455 U.S. at 257, noting that "not all burdens on religion are unconstitutional." This Court denied the exemption, because "to maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." *Id.* at 259. There, as here, the government instituted a scheme of general applicability and carved out certain exemptions on religious grounds. This Court recognized that the government was entitled to draw a line and limit the exceptions. *Id.* at 260. ("Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it is a violation of their faith to participate in the social security system.") Congress here has provided generous exemptions for churches and nonprofits with religious missions. It is not required to exempt everyone who desires to be exempted.

Participation in a government scheme to which a plaintiff had religious opposition was also required by this Court in *Bowen v. Roy*, 476 U.S. 693 (1986). Native American parents claimed that obtaining a social security number for their daughter, Little Bird of the Snow, would violate their religion, and they should be able to continue receiving welfare benefits on her behalf without such a number. 476 U.S. at 695. Chief Justice Burger was dismissive of the idea that actions undertaken by the government, even when attached to the plaintiff's name, could create a religious burden. *Id.* at 700. ("Roy may no more prevail on his religious objection to the Government's use of a Social Security number for his daughter than he could on a sincere religious objection to the size or color of the Government's filing cabinets.") The use of the number by the government "d[id] not itself in any degree impair Roy's freedom to believe, express, and exercise his religion." *Id.*

Like Roy, Hobby Lobby and Conestoga Wood Specialties seek an exemption from a generally applicable legal requirement. Like Roy's, their involvement in the allegedly religiously burdensome activity can only be seen as *de minimis*. Roy was required to provide his daughter's social security numbers on forms to claim food stamps. Hobby Lobby and Conestoga Wood Specialties are required to make available a third party insurance program where employees may spend their own wages and benefits, which may, at an indeterminate future date, result in a doctor issuing, and a pharmacist filling, a prescription for contraception methods opposed by the corporation's owners. If a burden on religion was not created in *Bowen, id.*, despite the undisputed sincerity of the religious beliefs, it is very difficult to see how, in this more attenuated situation, an actionable burden can be found. As Justice Stevens noted, "the Free Exercise Clause does not give an individual the right to dictate the Government's method of recordkeeping." 476 U.S. at 716-17 (Stevens, J., concurring). Nor does it give the right to dictate what legal products one's employees may purchase with their salaries, or to refuse to participate in a scheme where employees may make that choice.

IV. ANY EXEMPTION GRANTED WOULD BE IMPOSSIBLE TO CONTAIN WITHOUT FURTHER VIOLATIONS OF THE ESTABLISHMENT CLAUSE

A. The rationale of the Tenth Circuit would make all claimed religious burdens substantial

The Tenth Circuit dramatically shifted the burden of proof for cases under RFRA when it reinterpreted the meaning of the phrase "substantial burden." It created a false dichotomy when it described the alternative definitions that could apply: either a theological inquiry into whether a person's religion required or prohibited an activity; or an examination of "the intensity of the coercion applied by the government contrary to those beliefs." *Hobby Lobby*, 723 F. 3d at 1137. This arbitrary and unnecessary dichotomy creates major problems for analysis.

These are not the only two routes of investigation a court can undertake. While the Tenth Circuit was correct in its assertion that it is not the role of the judicial system to investigate the inherent truth or falsity of religious claims, this does not permit the logical leap that the only role for the court "is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure . . . to violate that belief." 723 F.3d at 1138. What the Court of Appeals here ignores, and what the government requested, is that the judicial system must investigate whether the belief is actually affected by the government's action. As explained, *supra*, it is not. Limiting the court's investigation of 'substantial pressure,' as here, to a look at the penalties involved, 723 F.3d at 1141, while refusing to examine whether the government action at stake actually does involve the plaintiff in behavior that violates the asserted belief, is a recipe for chaos. Any and all government prohibitions would face challenge, and courts would be unable to reject such claims as long as the beliefs were found to be sincere, regardless of whether an objective observer would see any connection between the government's actions and the religious burden alleged.

Equally erroneous is the Tenth Circuit's analysis that "the interest here cannot be compelling because the [Mandate] presently does not apply to tens of millions of people." 723 F. 3d at 1143. This creates a Catch 22 for the government. On the one hand, RFRA requires it to create exemptions where substantial religious burdens are affected. Moreover, this Court has made clear that Congress has the authority to create such exemptions. *Smith*, 494 U.S. at 890. On the other hand, the creation of such an exemption for one group, according to the Tenth Circuit, indicates that the government never had a strong interest in the first place. A plaintiff could argue that similarly placed individuals were granted an exemption, thereby entitling that plaintiff to one. The Tenth Circuit, however, opens the door for that plaintiff to argue that because other, differently situated individuals and corporations (non-profits, small employers, those grandfathered in) have been granted an exemption, everyone is entitled to the same exemption.

B. Exemptions would abound throughout health care

The interaction between health care and religious beliefs is a common theme. As medical science and its techniques have developed, the areas where they can come into conflict with long standing religious tenets have expanded. Religious beliefs about the origin of personhood and end-of-life matters frequently come into conflict with rapidly changing medical capabilities. If this Court were to find a right under RFRA to an exemption for the profit-making corporations and their owners, here, the areas which will be impacted in health care are potentially unlimited.

This is particularly the case if, as the Tenth Circuit suggests, courts should look only to the sincerity of the individual's claimed belief. There is no doubt as to the sincerity of the beliefs that cause opposition to a wide range of medical treatment for people of varying religions. Jehovah's Witnesses, for example, have strong doctrinal opposition to blood transfusions. Under the same argument advanced by Hobby Lobby and Conestoga Wood Specialties, a business owner of that faith could request that his corporation be exempt from providing insurance that covers such transfusions. While, as here, the government could argue a compelling interest in the provision of insurance for such treatment, as it indeed has, it is hard to see how such an interest differs from the one in this case. Contraception and blood transfusions both provide a critically important role in overall health care, and individual employees would be equally put to the expense of obtaining private insurance policies were their employers' insurance not to cover them.

The list of potential exemptions to medical care does not stop with blood transfusions and contraceptives.

Adherents of the Church of Scientology oppose the use of psychiatry and many psychotropic medications, and could therefore seek exemptions to being required to cover such treatments. Many different religions oppose the use of all or some vaccines. While currently, the law frequently permits religious exemptions for individuals and their families from compulsory vaccine laws, a decision for Hobby Lobby and Conestoga Wood Specialties would permit corporations to refuse to cover such treatments for their employees. In areas where such vaccinations are compulsory, this would require employees to pay out of pocket for vaccinations in order to stay within the law. A Jewish or Islamic employer could seek to deny coverage for all medications containing pork-based gelatin products, provided the belief was sincere, regardless of the fact that Jewish and Islamic authorities have declared such medication to be religiously acceptable. As a most extreme possibility, a Christian Scientist employer could use any precedent set here to refuse to cover almost any medical care. As exemption after exemption piles up, the entire purpose of the ACA – reducing the number of underinsured and uninsured Americans – would be drastically undercut.

The sole defense the Tenth Circuit would grant the government to such a patchwork quilt of religious based exemptions is a case-by-case defense of compelling government interest. However, granting an exemption to anti-contraceptive Christian employers, and not to members of other religions or sects, for their personal religious based objections to health care, would itself fall foul of the Establishment Clause. It would be prioritizing one set of beliefs over others, the very behavior that the constitution forbids the government to undertake. To avoid such constitutional violations, courts would be compelled to recognize any and all religious based objections to the provision of health insurance, leaving coverage for employees at the whim of their employers' chosen religion.

If the Tenth Circuit's argument on existing exemptions were taken to its logical conclusion, any religious group could point to the existing exemptions for any type of treatment, and use them to justify any exemption for any sincere religious belief whatsoever.

CONCLUSION

For the above reasons, this Court should affirm the judgment of the U.S. Court of Appeals for the Third Circuit and reverse the judgment of the U.S. Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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No. 13-354, 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS, et al.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., et al.,
Respondents.
CONESTOGA WOOD SPECIALTIES CORP., et al.,
Petitioners,
v.
KATHLEEN SEBELIUS, et al.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

BRIEF OF THE CHRISTIAN BOOKSELLERS ASSOCIATION, DESERET BOOK COMPANY, FELDHEIM PUBLISHERS, AND TYNDALE HOUSE PUBLISHERS, INC., AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA

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QUESTION PRESENTED

Amici will address only the following question of law:

Whether for-profit corporations are categorically excluded from protection for free exercise of religion under the Religious Freedom Restoration Act.

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INTERESTS OF *AMICI CURIAE*[1]

Amicus Christian Booksellers Association (CBA) is the leading trade association for producers, distributors, and marketers of Christian content and of products that align with the Christian faith and lifestyle, in the United States and worldwide. Most of CBA's members are for-profit enterprises that serve expressly religious aims. CBA furthers those twin purposes through its mission "to serve Jesus Christ by equipping those called to share the Good News and make disciples through Christian retail excellence."[2] CBA helps its members pursue their commercial goals and their religious callings by providing business solutions, contacts, industry news and research, and other services.

Amicus Deseret Book Company (Deseret Book) is a for-profit Utah corporation that exists primarily to publish books and create and distribute other media that are of specific interest to members of The Church of Jesus Christ of Latter-day Saints (the LDS Church), especially works that explore and reinforce the Church's religious beliefs and doctrines.[3]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Besides *amici curiae* and their counsel, no party has made a monetary contribution to this brief's preparation and submission. The parties have consented to the filing of this brief.

[2] *See* "About CBA," http://cbaonline.org/about-cba/ (visited Jan. 27, 2014).

[3] *See* "About Deseret Book Company," http://deseretbook.com/about/5110611 (visited Jan. 27, 2014).

Although separately incorporated, Deseret Book is ultimately controlled by the ecclesiastical leadership of the LDS Church. "Deseret Book" is also an established brand name closely associated with the LDS Church in the public mind, and Deseret Book owns retail stores under that name in various states. Deseret Book endeavors to make a profit, and those profits are ultimately used to support and advance the LDS Church's religious mission and purposes.

Amicus Feldheim Publishers (Feldheim) is a leading Orthodox Jewish publisher of Torah books and literature.[4] Its extensive catalogue of titles includes books on Jewish Law, Torah, Talmud, Jewish lifestyle, Shabbat and Jewish holidays, Jewish history, biography, and kosher cookbooks. It is headquartered in New York, with publishing and sales divisions in Jerusalem, Israel. Feldheim is incorporated as Philipp Feldheim, Inc., a for-profit corporation.

Amicus Tyndale House Publishers, Inc. (Tyndale House) is one of the Nation's foremost publishers of Christian books. Founded in 1962 for the purpose of publishing The Living Bible, a translation of the Bible designed to combine up-to-date scholarship with expression accessible to modern readers, Tyndale House has expanded to include other Bibles as well as devotional literature, nonfiction, fiction, and children's books. Tyndale House's express mission is to "[m]inister to the spiritual needs of people, primarily through literature consistent with biblical principles." Among its stated corporate goals is not only "Honor God," but "Excel in business," and "Operate profitably."[5] Tyndale House is a plaintiff in *Tyndale House Publishers, Inc. v. Sebelius*, No. 1:12-CV-1635 (D.D.C. filed Oct. 2, 2012), a pending case raising substantially the same issue presented to the Court here.

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[4] *See* "About Feldheim," http://www.feldheim.com/about-feldheim (visited Jan. 27, 2014).

Even as *amici* and their affiliates seek to run profitable businesses, faith pervades their operations, supplies them with purpose, and guides their business decisions—ranging from selection of titles and merchandise, to hiring staff who share their religious convictions, to setting prices and business hours. *Amici*'s religious and business purposes, in other words, inseparably complement each other. *Amici* therefore have an interest in ensuring that they, their affiliates, and similar businesses receive protection of their rights under the Religious Freedom Restoration Act and the Free Exercise Clause of the First Amendment.

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[5] *See* "The Tyndale Purpose," http://www.tyndale.com/50_Company/tyndale_purpose.php (visited Jan. 27, 2014).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Solicitor General of the United States proposes to categorically exclude for-profit corporations from protection under both the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act (RFRA), legislation designed by Congress to establish broad security for religious practice. That exclusion has no support in the text, history, and traditional understanding of free exercise of religion, and would substantially reduce the protections long accorded to that vital freedom under the Constitution and laws of the United States. This Court should roundly reject the novel argument that closely-held corporations lack the capacity to assert free exercise claims either on their own behalf or as representatives of their owners, and should evaluate their RFRA claims on the merits.

In *First National Bank of Boston v. Bellotti*, this Court held that the "proper question" was "not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons." 435 U.S. 765, 776 (1978). "Instead, the question must be whether [the challenged statute] abridges [rights] that the First Amendment was meant to protect." *Id.* The Free Exercise Clause was originally understood to protect acts of religious exercise by institutions as well as individuals. That understanding flows from the words themselves, from the conception of religious practice that prevailed at the time of the founding, and from the drafting history of the First Amendment, in which Congress deliberately replaced protection for individual "conscience" with the concept of free "exercise" of "religion." Indeed, this Court's first case touching on free exercise squarely rejected the argument—resurrected here by the government—that corporate status is inconsistent with the free exercise of religion. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815) (Story, J.). There is no reason to reverse that longstanding interpretation.

The modern business corporation, true, had not come into being at the time the First Amendment was framed. But from the very founding of the colonies, it had been well understood that a corporate charter can combine religious and profitable purposes. The colonial charters themselves, which the Declaration of Independence referred to as the nation's "most valuable laws," *see* The Declaration of Independence para. 23 (U.S. 1776), created companies intended to combine profitmaking and religious purposes. Some of the earliest cases addressing protections for freedom of conscience and exercise of religion recognized that for-profit businesses were entitled to protection for the exercise of religion. *See Specht v. Commonwealth*, 8 Pa. 312 (1848); *Commonwealth v. Wolf*, 3 Serg. & Rawle 48 (Pa. 1817). There is no evident reason to believe that the institutions capable of exercising religion for purposes of the First Amendment should not include for-profit corporations.

Nor can modern free exercise doctrine under RFRA and the First Amendment be squared with the government's assertion that for-profit corporations are categorically excluded. In recent years this and other courts have applied free exercise protections to non-profit corporations without ever suggesting that corporate status is of any significance, *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), and this Court has addressed the religious rights of for-profit businesses without ever suggesting that for-profit status is a disqualifying fact, *see United States v. Lee*, 455 U.S. 252, 257-60 (1982); *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). It is a puzzle why the *combination* of these two constitutionally irrelevant factors—corporate form and profit motive—would strip an entity's exercise of religion of protection. This Court has also recognized that for-profit corporations can engage in other types of expressive or religiously motivated conduct, *see, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971), and raise religious freedom claims under the Establishment Clause, *see Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985). It is another puzzle why the free exercise of religion should be *uniquely* outside a for-profit corporation's capacity.

The government cites no real authority for its position on the inapplicability of religious exercise protections to for-profit corporations. And the government's position is not only inconsistent with modern doctrine, but it would create serious problems of its own. Most obviously, it would replace modern free exercise doctrine's straightforward focus on religiously motivated acts with a web of theoretically inexplicable distinctions between different types of corporate actors performing essentially identical acts, and among different purposes that might animate a corporation.

For example, two incorporated book publishers with the same religious mission statement, the same religious ownership, and the same religious audience would be treated differently simply because the profits of one inure to shareholders and those of the other support a foundation or cause. Another anomaly raised by the government's position is that a for-profit corporation could be treated as acting with religious animus, *see Fischer v. Forestwood Co., Inc.*, 525 F.3d 972 (10th Cir. 2008), but not with religious intent. It is late in the day for the government, which regularly prosecutes corporations for intent crimes, to claim that corporations cannot form an intent.

Whether the government has a compelling interest in enforcing the contraceptive coverage regulation may be a matter of debate—though we think the challengers have the better of the argument. It also may well be that the exercise of religion by for-profit corporations is relatively rare (confined, as a practical matter, to closely held corporations and to businesses, like *amici*, with religious purposes), and that proving the sincerity of religious belief is sometimes more difficult in the case of groups (whatever their legal form) than natural persons. But there is no colorable basis for categorically excluding all exercise of religion by for-profit corporations from constitutional or statutory protection.

ARGUMENT

THE RELIGIOUS FREEDOM RESTORATION ACT AND THE FIRST AMENDMENT PROTECT THE EXERCISE OF RELIGION WITHOUT REGARD TO CORPORATE FORM OR PROFIT MOTIVE.

A. The Text, History, and Traditional Understanding of the First Amendment Confirm That Free Exercise Protects all Exercise of Religion.

RFRA, 42 U.S.C. § 2000bb *et seq.*, protects "a person's exercise of religion," but provides no definition of "person." The Tenth Circuit therefore correctly turned to the Dictionary Act, which informs us that the statutory term "person" ordinarily includes corporations, unless "the context indicates otherwise." 1 U.S.C. § 1. The perambulatory clauses of RFRA, 42 U.S.C. § 2000bb, state that its purpose is to restore the full range of protection for free exercise of religion "as an unalienable right, secured ... in the First Amendment to the Constitution." To supply the "context" to understand RFRA's protections for "exercise of religion," it is therefore necessary to start with the First Amendment's injunction against any law "prohibiting the free exercise [of religion]." U.S. Const. amend. I. The text, history, and traditional understanding of the First Amendment's language provide no support for the view that for-profit corporations are unable to exercise religion. There is no call to read RFRA's protection more narrowly.[6]

1. Constitutional text and drafting history

In *Bellotti*, this Court held that the "proper question" was "not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons." 435 U.S. at 776. "Instead, the question must be whether [the challenged statute] abridges [rights] that the First Amendment was meant to protect." *Id.* The government's approach in this case is precisely the opposite. Proper analysis requires that we ask whether the challenged regulation is one that abridges "the free exercise of religion." We begin with text, history, and longstanding interpretation.

As originally understood, the phrase "exercise of religion" referred to *action*, without any limitation on the *actor* who might engage in it. Public worship, which is conducted by groups, was at its historic core, no less than individual exercises of conscience. The phrase referred to "public religious action," including "religious publication" and "religious education," which necessarily were a corporate rather than individual activity. John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 395 (1996); *see also* Michael W.

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[6] If anything, RFRA's definition of religious exercise is likely to be broader than that of the First Amendment. *See Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1084-85 (9th Cir. 2008) (W. Fletcher, J., dissenting).

McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1459 & n.246 (1990) ("The key word 'exercise' ... was defined in dictionaries of the day to mean 'action.'").

It was undoubtedly understood that protections for religious exercise should extend to institutions rather than individual persons alone. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012) (observing that the Free Exercise Clause "protects a religious group's right to shape its own faith and mission"). Documents that provided important philosophical background to the First Amendment, such as John Locke's *Letter Concerning Toleration* and James Madison's *Memorial and Remonstrance Against Religious Assessments*, referred not only to natural persons, but also to "churches," to "religious societies," and even to "Religion" in the abstract. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 5 *The Founders' Constitution* 82 (Philip B. Kurland & Ralph Lerner eds. 2000). According to Madison, the right of religious freedom is "unalienable" precisely because it involves the discharge of the "duty towards the Creator." *Id.* This duty, he wrote, "is precedent, both in order of time and degree of obligation, to the claims of Civil Society." *Id.* Locke similarly considered "religion" as having independent interests on which "civil government" could not properly intrude. John Locke, *A Letter Concerning Toleration*, in *Two Treatises of Government and A Letter Concerning Toleration* 215, 218 (Ian Shapiro ed., 2003). For both Madison and Locke, the focus was not on the nature of the actor—whether natural person, group, church, society, or other form of association—but on the authority to whom the religious duty is due. Early advocates of disestablishment and free exercise therefore asked whether the civil magistrate was treading into matters touching *religion*, without regard to the identity or juridical status of the person or group involved.

Two provisions of the First Amendment—the rights of petition and assembly—are termed "right[s] of the people," but the freedoms of religion, speech, and press are worded more abstractly, presumably because the framers of the First Amendment were concerned that the government not invade those spheres. It would be contrary to the very text to impose on the Free Exercise Clause a limitation to natural persons.

The history of the First Amendment's drafting supports this interpretation of the text. The Free Exercise Clause, as originally drafted by James Madison, protected "the rights of conscience." *See* 1 *Annals of Congress* 434 (J. Gales ed. 1834). In using that language, Madison followed the free exercise protections enacted by several of the states at the time, which often were directed toward individual religious "profession," "conscience," or "worship." *See* McConnell, 103 Harv. L. Rev. at 1456-58 & n.242 (listing and quoting the applicable state provisions in force in 1789). Protection for "religion," however, appeared early. At one point the House of Representatives voted for a version of the First Amendment that forbade all laws "touching religion," without any hint of limitation based on the identity or legal status of the plaintiff. 1 *Annals of Congress*

731. Without recorded discussion, the House later substituted a version protecting both "rights of conscience" and "free exercise of religion," suggesting the two terms were not regarded as synonymous or redundant. *Id* at 766.

In the Senate, whose Journal recorded only motions and votes, there were votes on a series of versions, some protecting only "the rights of conscience," some protecting only "the free exercise [of religion]," and some protecting both. *See* 1 *Documentary History of the First Federal Congress of the United States of America* 151, 166 (L. De Pauw ed. 1972) (Senate Journal). The Senate ultimately settled on "free exercise [of religion]" alone, *id.* at 166, and a Conference Committee preserved that decision, 3 *id.* at 228.

There are many subtle differences between "conscience" and "religion," *see* McConnell, 103 Harv. L. Rev. at 1489-90; Nathan S. Chapman, *Disentangling Conscience from Religion*, 2013 U. Ill. L. Rev. 1457 (2013), but the most pertinent difference for present purposes is that "conscience" tends to refer to the inward conviction of right and wrong, while "religion" extends as well to "the corporate or institutional aspects of religious belief," McConnell, 103 Harv. L. Rev. at 1489-90.

It would have been clear to the framers, furthermore, that institutional religion implied corporations specifically. Blackstone's *Commentaries on the Laws of England* listed "the advancement of religion" as the first of several purposes for which a corporation might be formed. *See* William Blackstone, 2 *Commentaries* *455. Religious bodies formed corporations in the early Republic as well, *See, e.g., Barnes v. First Parish in Falmouth*, 6 Mass. 400 (1810) (interpreting Massachusetts law as authorizing payments to ministers only of incorporated churches).

As it happens, the first question ever addressed by this Court regarding free exercise was whether corporate status was disqualifying. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815). Justice Story's Opinion for the Court in *Terrett* rejected the view that corporate status was inconsistent with the exercise of religion protected by Virginia state law. On the contrary, the Court observed that the legislature may "enact laws more effectually to enable all sects to accomplish the great objects of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns." *Id.* at 49. The Court said that "any person who has attended to the difficulties which surround all voluntary associations" would appreciate that "the free exercise of religion" and other religious purposes would "be *better secured and cherished by corporate powers*." *Id.* (emphasis added). In short, the Court concluded that "in our judgment it *would make no difference* whether the Episcopal church were a voluntary society, *or clothed with corporate powers*; for in equity, as to objects which the laws cannot but recognize as useful and meritorious, the same reason would exist for relief in the one case as in the other." *Id.* at 45-46 (emphasis added). The free exercise not only protects corporations as well as individuals, in other words, but its corporate protections *complement* the right of individuals.

2. *Traditional understanding*

The government and its *amicus* supporters profess to think that there is something incongruous or even oxymoronic about the idea that a profit-making corporation might also pursue "a religious values-based mission." U.S. Br. at 19 (quotation marks omitted). Without any actual historical evidence, they project their narrow vision of religious exercise onto the framers, and so into the protections of RFRA. But the framers were intimately familiar with corporations and other business forms that combined religious with profit-making purposes.

Most conspicuously, religion and profit were enshrined together in charters of the American colonies. The 1606 Charter of the Colony of Virginia issued by King James I incorporated a joint stock company, called the Virginia Company,[7] granting it the right "to dig, mine, and search for all Manner of Mines of Gold, Silver, and Copper, as well within any Part of their said several Colonies ... And to HAVE and enjoy the Gold, Silver, and Copper, to be gotten thereof[.]" Charter of Virginia (1606), Thorpe at 3786. But the primary stated purpose of the enterprise was the "propagat[ion] of Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God[.]" *Id.* at 3784. Subsequent charters retained the corporate form and the religious purpose, while expanding the territory. *See* Charter of Virginia (1609) *in* Thorpe at 3790; Charter of Virginia (1611) *in* Thorpe at 3802. The 1609 Charter congratulated the first settlers for "accomplishing so excellent a Work, much pleasing to God and profitable to our Kingdom." *Id.* at 3790. Pleasing God and making a profit obviously were not considered incompatible purposes.

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[7] Joint stock companies were early antecedents of the modern business corporation, and used cognates of the term. The 1609 Charter of Virginia stated that the members of the Virginia company "shall be known, called and *incorporated by* the name of The Treasurer and Company of Adventurers and Planters of the City of London for the first Colony in Virginia." Charter of Virginia (1609), *reprinted in* 7 Francis Newton Thorpe, *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America Compiled and Edited Under the Act of Congress of June 30, 1906* 3795 (1909) (hereafter "Thorpe") (emphasis added).

The 1629 Massachusetts Bay Charter likewise incorporated a joint stock company, the Massachusetts Bay Company, to which it granted rights to "all Mynes and Myneralls as well Royall Mynes of Gould and Silver and other Mynes and Myneralls whatsoever, in the saide Landes and Premisses[.]" Charter of Massachusetts Bay (1629) *in* Thorpe at 1847-48. The Charter also stated that the colony was to be governed such that the "good Life and orderlie Conversacon" of the colonists "maie wynn and incite the Natives of Country, to the Knowledg and Obedience of the onlie true God and Sauior of Mankinde, and the Christian Fayth[.]" *Id.* at 1857. Again, the goals of profit and evangelization went hand in hand.

The framing generation revered these early charters: The Declaration of Independence itself cited King George III, among other acts, with "taking away our Charters," which the colonists considered "our most valuable Laws[.]" *See* The Declaration of Independence para. 23 (U.S. 1776). In light of the significance the charters held for the framers, it is inconceivable that the framers would have shared the government's view that combining pursuit of profit and a religious purpose created inconsistency.

Similarly, many of the founders attended such colleges as Harvard, Yale, or William & Mary, which were chartered as corporations with purposes that were both secular and religious. M.G. Robertson, ***Religion in the Classroom***, 4 Wm. & Mary Bill Rts. J. 595, 600 (1995).

The government's cramped view of the purposes of for-profit corporations also flies in the face of the ordinary practice of the Christian and Jewish religions, the faiths most familiar to the framers of the First Amendment. Contrary to the government's anachronistic assumptions, these religions do not concern themselves only with worship on specified occasions, but encourage or require their members to adhere to the commands of God in their daily lives, including in the conduct of their businesses. Within those traditions, business is ideally a vocation, to be conducted to the glory of God and in conformity to His commandments.

The framers likely would have been aware of Solomon's maxim that "[a] false balance is abomination to the LORD: but a just weight is his delight," *Proverbs* 11:1 (King James), and of St. Paul's admonition that "whatsoever ye do, do it heartily, as to the Lord, and not unto men," *Colossians* 3:23. Revealingly, the Puritans in New England often headed their business ledgers with the phrase "In the name of God and profit"—and did not see those purposes as a contradiction. John Steele Gordon, *An Empire Of Wealth: The Epic History Of American Economic Power* 27 (2004). The framers may also have known that dozens of commandments of Judaism involve business and employment practices ranging from avoidance of work on the Sabbath, *Exodus* 20:10, to security for debts, *see Deuteronomy* 24:10, to timely payment of workers, *see Leviticus* 19:13. Jews are required, moreover, to ensure that their businesses are conducted in accordance with Jewish law, and in fact "[e]conomic activities" are regarded as "a means toward building a just and caring society in which the best of human and spiritual values might flourish." *See* Moses L. Pava, *Developing a Religiously Grounded Business Ethics: A Jewish Perspective*, 8 Business Ethics Quarterly 65, 81 (1998). The notion that religion and business conduct are separable, in contrast, is a modern notion entailing questionable preconceptions about the role of religion, which the framers would not likely have found plausible.

Although these *amici* are not aware of any free exercise litigation in the early decades of the Republic specifically involving a for-profit corporation, there is an obvious reason for that: The business corporation as we know it did not exist at the time. Before independence and in the Nation's first half-century, there were relatively few business corporations at all, and most corporations that did exist were quasi-public entities such as universities, state banks, canals, turnpikes, and the like, which were specially chartered by the legislature for a public (not an exclusively private) purpose. *See* John Micklethwaite & Adrian Wooldridge, *The Company: A Short History of a Revolutionary Idea* 43-44 (2003).

It was only in the early 19th Century, partly as a result of the Supreme Court's decision in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), that the corporate form was increasingly adopted for private business and associational purposes. Only with the advent of general incorporation laws did the corporation become a genuinely private form of association. *See* Micklethwaite & Wooldridge at 45-46. Today, in contrast, it is commonplace for corporations of all stripes to invoke all common law, statutory, and constitutional rights that they are capable of exercising—which would have included religion all along.

Nonetheless, some of the earliest free exercise cases under state constitutions *did* involve for-profit businesses. If the government were correct, one would expect some indication that such enterprises enjoyed lesser free exercise protections, but the historical record shows no such thing. In *Specht v. Commonwealth*, 8 Pa. 312 (1848), and *Commonwealth v. Wolf*, 3 Serg. & Rawle 48 (Pa. 1817), Seventh Day Baptist and Jewish business owners challenged Sunday closing laws on the ground that the requirement of closing on Sunday imposed an indirect economic burden on their ability to remain closed on Saturday, which is the Sabbath of their faiths. The court concluded that the requirement of being closed on Sunday did not prevent sabbatarians from remaining closed on Saturday, and so did not burden religious conscience. *See Wolf*, 3 Serg. & Rawle at 50; *Specht*, 8 Pa. at 325-326. Yet the courts did not question the right of for-profit businessowners to seek protection for their business activities. The fact that the individuals involved were engaged in profitable enterprises was not treated as disqualifying, or even relevant to the legitimacy of the free exercise issues they presented.

Indeed, the court suggested in dictum that if state law *had* compelled the businessowners to engage in business conduct that violated their religious consciences—*i.e.*, if the law required their businesses to stay open on Saturdays, or if their religious observance required six days of work per week—they would have been entitled to relief. "[The Sunday closing law] says not to the Jew or Sabbatarian, You shall desecrate the day you esteem as holy, and keep sacred to religion that *we* deem to be so. ... It detracts not one hour from any period of time they may feel bound to devote to [Sabbath observance]." *Specht*, 8 Pa. at 325. Likewise, if the businessowners were "as fully bound to attend to [their] secular affairs upon the first six days of the week, as to cease from labour on the seventh," the court noted, "the law ... might well be regarded as an invasion of his conscientious convictions[.]" *Id.* at 326. Although the businesses involved in these early cases appear to have been proprietorships rather than corporations, they contradict the government's view that business activities enjoy lesser free exercise protections. This Court followed the same line of logic in *United States v. Lee*, 455 U.S. 252, 257-60 (1982), and *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).

Early practice, both before and after independence, thus shows (1) that religious and profitable motives were combined without contradiction, both by chartered organizations and by individuals, and (2) that religious activities were treated as protected even when performed by profitable enterprises. The government's distinction between religious and profit-making activity for purposes of the modern business corporation would appear to be of recent vintage and should not be imposed on the First Amendment or on RFRA.

B. This Court has Likewise Recognized that Corporations Can Invoke the Free Exercise of Religion.

As this Court has noted, "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *See Monell v. Department of Soc. Servs. of City of New York*, 436 U.S. 658, 687-688 (1978). The only exception is for "'purely personal' guarantees, such as the privilege against compulsory self-incrimination[.]" *Bellotti*, 435 U.S. at 778 n.14 (1978). As discussed below, and consistent with early practice, exercise of religion is plainly not such an exception. Under modern legal doctrine, it would be anomalous to hold that corporations cannot "exercise" religion for purposes of RFRA or the First Amendment.

The term "exercise of religion" as used in RFRA, *see* 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7), and in free exercise caselaw both before and since RFRA's enactment, has been held to extend to the conduct of corporations. Religious congregations and denominations routinely incorporate—as they have a constitutional right to do, *see Falwell v. Miller*, 203 F. Supp. 2d 624 (W.D. Va. 2002)—and this Court has repeatedly recognized their free exercise rights. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694 (2012); *Church of the*

Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 525 (1993); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006).[8] A number of cases from the lower courts likewise appear to have treated incorporated churches themselves, and not merely their members, as exercising religion. *See Paul v. Watchtower Bible & Tract Soc. of New York, Inc.*, 819 F.2d 875, 883 (9th Cir. 1987) (discussing religious conduct by defendant corporations); *Peyote Way Church of God, Inc. v. Smith*, 742 F.2d 193, 201 (5th Cir. 1984) (referring to "ritual use of peyote by the Peyote Way Church").

It matters little whether corporations that exercise religion can sue in their own name or on behalf of their constituents. *Compare Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), *with Gilardi v. United States Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013) (en banc); *see Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009). The government is contending that *no one* has the capacity to sue to vindicate the free exercise right of corporate employers not to be forced to provide coverage for abortion-inducing drugs, which is at issue in this case. It is beyond the scope of this brief to address whether the government has a sufficiently compelling rationale for insisting upon such coverage, but the notion that this exercise of religious scruple may be raised by *no one* is plainly untenable.

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[8] The corporate status of the plaintiff in *Lukumi*, is evident from its name. The religious groups involved in *Hosanna-Tabor* and *O Centro* were both corporations. *See E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 597 F.3d 769, 772 (6th Cir. 2010); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1236, 1238 (D.N.M. 2002).

Protections for the exercise of religion by corporations are not limited to religious bodies that are engaged in prayer and worship. Rather, this Court has held that corporations can also exercise religion even when engaging in other kinds of functions. In *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), the Court presupposed that a church-owned gymnasium could suffer a "burden[] [on] the exercise of religion," even when it was hiring for "nonreligious jobs" and engaging in a "secular" activity with little or no intrinsic religious significance. *Id.* at 336, 338; *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 604 (1983) (addressing free exercise arguments of a college); *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985) (addressing free exercise arguments involving for-profit businesses run by a religious entity). To be sure, in both *Bob Jones* and *Alamo Foundation*, the Court concluded that a compelling governmental justification overrode the entities' free exercise right, but not because of their corporate status or profit-making purpose.

Lower courts have routinely entertained and often upheld Free Exercise Clause challenges by corporations providing religious services. In *Tenafly Eruv Association, Inc. v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002), the Third Circuit granted preliminary injunctive relief on a Free Exercise claim alleging discrimination against a corporation's "religiously motivated conduct"—specifically, maintaining an *eruv*, a physical boundary with "religious significance," around the homes of

Orthodox Jews. *Id.* at 152, 168. That protection extends to activities that could be performed in a secular fashion as well. In *Sherwin Manor Nursing Ctr., Inc. v. McAuliffe*, 37 F.3d 1216, 1222 (7th Cir. 1994), the Seventh Circuit reversed dismissal of a free exercise claim by "a licensed long-term nursing care facility, owned and operated by orthodox Jews and serving a primarily Jewish clientele," and preparing kosher food, without any hint that its corporate or profitmaking status could be relevant.

These treatments of the exercise of religion by corporations are not aberrations. As the Court explained in *Smith*—consistently with the original meaning of "exercise" discussed above—"the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). In other words, the essence of religious *exercise*—consistent with the original meaning of the term—is not just subjective belief, but *religiously motivated conduct. See Lukumi*, 508 U.S. at 524 (Free Exercise Clause protects "conduct motivated by religious beliefs"). Corporations as well as individuals engage in religious conduct.

There is little doubt as a matter of law that religion can in principle be one of the many factors that "motivate" corporate action. In the context of associational protections under the First Amendment, a corporation is protected when it engages in "private" expressive conduct to promote sincerely held "private viewpoints" based on moral principle. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). In the employment context, corporations can be motivated by religious animus. *See Fischer v. Forestwood Co., Inc.*, 525 F.3d 972 (10th Cir. 2008); *Ollis v. Hearthstone Homes, Inc.*, 495 F.3d 570 (8th Cir. 2007). In criminal law, it is well understood that corporations and similar entities can act with criminal intent. *See Arthur Andersen LLP v. United States*, 544 U.S. 696, 706-07 (2005) (reversing criminal conviction for failure to instruct jury in element of intent); *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1059 n.2 (9th Cir. 2004) ("[W]e have long allowed criminal intent to be imputed to corporations."). Given that corporations can engage in expression of moral principles, take religiously motivated action, and act with morally evaluable intent, it is almost inescapable that they can exercise religion as well under at least some circumstances.

C. There Is no Basis to Exclude For-Profit Corporations From RFRA's Protection.

Because *corporations* can exercise religion for purposes of RFRA and the Free Exercise Clause, the only question is whether *for-profit* corporations can do so as well, or whether this Court should categorically exclude such corporations from RFRA's protections.

The government has offered no principled reason for treating for-profit corporations differently from non-profit corporations (or other for-profit businesses, *see Lee*, 455 U.S. 252; *Braunfeld*, 366 U.S. 599). The historical evidence discussed above does not support either distinction, and the government itself cites no binding authority for it. The government's *only* authority arising outside the context of the specific issue presented here is Justice Brennan's concurrence in *Amos*, and even Justice Brennan noted that "some for-profit activities could have a religious character[.]" 483 U.S. at 345 n. 6 (Brennan, J., concurring in the judgment). He simply said that "nonprofit organization[s]" are an easier case. *Id.*[9] The government's omission bears out Judge Jordan's apt observation in his dissent in *Conestoga Wood Specialties Corp. v. DHS* that "the Constitution nowhere makes the 'for-profit versus non-profit' distinction invented by the government[.]" 724 F.3d 377, 398 (3d Cir. 2013).

It may well be that *few* for-profit businesses exercise religion, but far greater incongruities arise from the government's categorical exclusion. Free exercise protections apply to acts, *see Smith*, 494 U.S. at 877, yet the government's theory would lead to seemingly arbitrary distinctions such that the very *same* act, conducted in accordance with the very same religious rules and for the benefit of the same people, counts as religious exercise in some cases but not others. For example, the government's position implies that preparation of kosher food by a nonprofit nursing home would qualify as religious observance, while that performed by an otherwise identical for-profit nursing home, operated in the same way by a closely-held family corporation, or a kosher restaurant, would not. The Seventh Circuit rightly did not draw any such artificial distinction. *See Sherwin Manor Nursing Ctr.*, 37 F.3d 1216.[10]

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[9] It also bears emphasis that the issue in *Amos* was whether the Establishment Clause forbids statutory protection for activities that go beyond the scope of free exercise protection, by virtue of the religious status of the claimant. There was no occasion to consider the reach of the Free Exercise Clause itself.

Applying the government's theory to the activities of these *amici*, religious publishing, it would imply that book publishing by the LDS Church itself qualifies as religious exercise, but the same publishing by Deseret Book, its for-profit publishing organ, might not; nor would publishing by Feldheim, a for-profit publisher that serves the needs of the Jewish public. The government has not explained how these technical distinctions have any bearing on the purpose of the First Amendment and RFRA to prevent the government from interfering unnecessarily in the practice of religion. For the government to court that result at all is peculiar; for it to do so without any citation to precedent is simply astonishing.

The government may find "strange" the notion that faithful business owners might obey the dictates of their religion even when they operate their business in corporate form, but that is nothing unusual. Not only can some acts that obviously count as religious exercise be performed *either* by non-profit or for-profit entities, but it is easy to identify kinds of religious exercise that are performed routinely—and perhaps even most effectively—on a for-profit basis. *Amici* provide ready examples of for-profit corporations intended to serve religious communities: Deseret Book is both a for-profit corporation intended to generate a return for the LDS Church and an instrument of the Church itself. Religious publishers and booksellers such as Feldheim, Tyndale House, and CBA's members are for-profit businesses, but they also must select which books and other items are consistent with their religious persuasions, and a retailer typically needs to hire sales staff with compatible religious views. Other for-profit corporations exist precisely to serve religious communities with specific religious needs—such as kosher butchering, Islamic finance, or pagan supply stores. For these corporations, following religious practices dictated by religious law is essential. At a minimum, corporations can refrain from engaging in activities that their owners and officers consider religiously prohibited.

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[10] A search of public records indicates that the Sherwin Manor Nursing Center *is* a for-profit entity. *See* Sherwin Manor Nursing Center Financial and Statistical Report (Fiscal Year 2010) (available at http://www2.illinois.gov/hfs/medicalprovider/costreports/2010longtermcarecostreports/documents/sherwin_manor_nursing_center_2010_0046102.pdf) (visited Jan. 27, 2014).

Including protections for for-profit corporations is also a better fit with religious protections in other contexts. Courts do not hesitate to protect the right of individuals to adhere to religious principles even when they are engaged in secular or professional conduct. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004) (addressing a refusal by a Mormon actress to perform roles involving the speaking of obscenities); *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007) (addressing pharmacy's practice of refusing to fill prescriptions for emergency contraceptives; being held on appeal for this Court's decision). There is no reason that the parties in these cases, Hobby Lobby Stores and Conestoga Wood Specialties, should not be able to do the same. The government's view that the conduct of business cannot be governed by religious principle is contrary not only to legal precedent but to the common experience of many Americans.

Amici's position is similarly consistent with how for-profit corporations are treated under the rest of the First Amendment. The government's theory that corporations lack expressive rights or give them up when they enter commerce is obviously not true as a general matter. U.S. Br. at 19. For-profit corporations can engage in protected speech. *See Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 8 (1986); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010) (citing cases involving both non-profit and for-profit corporations). They can exercise freedom of the press. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *New York Times Co. v. United States*, 403 U.S. 713 (1971). They can petition the government. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). They even have rights protected under the Establishment Clause. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). If for-profit businesses are protected from the imposition of religious requirements that they do not share, why should they not be protected symmetrically from burdens on religious practices that they would otherwise engage in?

The government professes to think that it is impossible to discern religious motives, intentions, or beliefs of for-profit corporations, U.S. Br. at 17-19, 23—but it has no difficulty attributing intentions and other states of mind to corporations in criminal cases, *see Thinket Ink Info. Res.*, 368 F.3d at 1059 n.2, or in cases involving the intent to discriminate on the basis of religion or other invidious characteristics, *see Fischer*, 525 F.3d 972; *Ollis*, 495 F.3d 570. If a for-profit corporation can be motivated *against* religion, it would be incongruous to hold that a for-profit corporation cannot also be motivated *by* religion. By the same token, only natural persons belong to a race, but we are not aware of the government objecting to attribution of the race of the owners to a corporation for purposes of enforcing the Equal Protection Clause. *See Thinket Ink*, 368 F.3d at 1058-59 (discussing attribution of "imputed racial identity" to corporations).

It may be that a for-profit corporation does not "pray," as the district courts below repeatedly intoned, *see Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012); *Conestoga Wood Specialities Corp. v. Sebelius*, 917 F. Supp. 2d 394, 408 (E.D. Pa. 2013), but it most assuredly may close its doors on the Sabbath, publish and disseminate materials spreading the gospel, conform its conduct to religious commandments, and refrain from facilitating what it regards as the taking of human life.

If, on the government's reasoning, those activities do not count as religious exercise, it is not at all clear on what theory religious exercise can be ascribed even to an incorporated congregation or other religious body. *See Lukumi*, 508 U.S. at 525 ("The Church and its congregants practice the

Santeria religion"). The government's only evident basis for treating incorporated religious bodies differently, the arbitrary presumption that for-profit businesses necessarily lack religious missions, U.S. Br. at 19, is blatantly contrary to fact, as every one of these *amici* can attest. The membership of churches have been known to disagree about the content of beliefs. ***E.g., Watson v. Jones***, 80 U.S. 679 (1871). This may present difficulties of determining which beliefs control, but it is no reason to deny them the right to determine their beliefs and act on them. The government's argument thus threatens not only to strip for-profit activities of free exercise protection, but to undermine the doctrinal basis of free exercise protections for religious bodies themselves.

The government and its *amicus* allies have offered no principled basis for excluding the otherwise protected exercise of religion by for-profit corporations from constitutional or statutory protection. The American colonies were founded by joint stock companies expressly dedicated to pursuing *both* profit and religion. And the pursuit of profit and religion has gone hand in hand ever since. This is the nature of the human enterprise: we need to support ourselves materially, but at the same time to obey the moral and religious precepts that we recognize as authoritative. It is not *amici*'s position that corporations enjoy free exercise (or any other) rights in every case and every context. But if an entity is seeking to exercise religion in a way that would otherwise be protected, we submit that corporate form or a profit motive does not categorically nullify the constitutional protection.

CONCLUSION

The Court should affirm the judgment of the United States Court of Appeals for the Tenth Circuit and reverse the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

Nos. 13-354 & 13-356

Supreme Court, U.S.
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In The
Supreme Court of the United States

◆

KATHLEEN SEBELIUS, et al.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., et al.,

Respondents.

CONESTOGA WOOD SPECIALTIES CORP., et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, et al.,

Respondents.

◆

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Tenth Circuits

◆

BRIEF OF CHRISTIAN LEGAL SOCIETY, AMERICAN BIBLE SOCIETY, ANGLICAN CHURCH IN NORTH AMERICA, ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ASSOCIATION OF GOSPEL RESCUE MISSIONS, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, THE LUTHERAN CHURCH – MISSOURI SYNOD, PRISON FELLOWSHIP MINISTRIES, AND WORLD VISION, INC. AS AMICI CURIAE SUPPORTING HOBBY LOBBY AND CONESTOGA WOOD, ET AL.

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QUESTION PRESENTED

This brief addresses the question whether the public meaning of the Religious Freedom Restoration Act covers for-profit corporations and their owners.

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INTEREST OF AMICI CURIAE[1]

Amici are religious and civil liberties organizations who are concerned that the Religious Freedom Restoration Act be accurately interpreted and fully enforced. Several of these amici actively participated in the effort to pass RFRA and related legislation and in the debates reviewed in this brief. Individual amici are described in the Appendix.

◆

SUMMARY OF ARGUMENT

The Religious Freedom Restoration Act provides universal coverage. It applies to "all" federal law and to "all" cases where the free exercise of religion is substantially burdened.

The legislative history confirms the universality of the statutory text. The sponsors resisted all efforts to add exceptions to coverage. A definition in an early version of the bill, limiting coverage to "natural persons" and religious organizations, was eliminated in all later drafts.

After this Court invalidated RFRA as applied to the states, Congress sought to re-enact RFRA's standard, in substantively identical language, for application to cases that could be reached under the Commerce and Spending Clauses. The debates on this bill, the Religious Liberty Protection Act (RLPA), reveal the public meaning of the nearly identical language in RFRA. The RLPA debate is highly probative because it was a serious fight on a live issue. It was not in any sense an attempt to make post-enactment legislative history about RFRA, but it clearly demonstrates the public meaning of RFRA's language.

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[1] No counsel for a party authored any part of this brief. No person, other than amici curiae, their members, and their counsel, made a monetary contribution to fund the preparation or submission of this brief. Written consents of all parties to the filing of this brief are on file with the Clerk or accompany this brief.

RLPA was delayed for more than a year by demands for a civil-rights exception. This debate culminated in the Nadler Amendment, which would have prevented all but the very smallest businesses from invoking RLPA in response to civil-rights claims. In the debate on the Nadler Amendment, both sides agreed that the language copied from RFRA protected corporations. One side thought that desirable; the other side thought it desirable in some cases but objectionable in civil-rights cases. But there was no disagreement on what the language of RFRA and RLPA meant. The debate, conducted by the leaders on both sides, was extensive and unambiguous.

RLPA was never enacted, but neither was RFRA's coverage reduced. In the wake of this debate, Congress amended the relevant language of RFRA to further strengthen its protections.

The claims in these cases are clearly covered by the public meaning revealed in RFRA's text and history and more specifically in the RLPA debates. Apart from civil-rights claims, both sides recognized the need to cover incorporated religious businesses (Mardel) and corporations with religious owners where regulation of the corporation would substantially burden the owners' exercise of religion (Hobby Lobby and Conestoga Wood).

The RLPA debate also confirms that RFRA applies to suits by private plaintiffs. The whole debate was about religious defenses to claims by individuals alleging discrimination.

Protecting for-profit corporations is consistent with larger traditions of religious liberty. State and federal conscience legislation has often protected for-profit businesses. The most relevant example here is the widely enacted conscience legislation with respect to abortion.

The plaintiffs in these cases object only to drugs and devices believed to sometimes cause abortions. And the protection for conscientious refusals to kill is especially well settled in our tradition.

Our moral tradition holds corporate owners and leaders morally responsible for the wrongdoing of their corporations. The government often imposes criminal responsibility on individuals for corporate wrongdoing. That it has not done so in the Affordable Care Act does not change the basic point; it is entirely normative for the individual plaintiffs to feel morally responsible for the acts of the corporations they control.

Finally, excluding religious minorities from significant businesses or occupations is a time-honored means of religious persecution, well known to the Founders. If the individual plaintiffs refuse to violate their conscience, the government would exclude them from any business that grows to fifty employees and to incorporated status. Such exclusions must be covered by the Free Exercise Clause, and when accomplished by allegedly neutral and generally applicable laws, covered by RFRA.

◆

ARGUMENT

I. Congress Explicitly Understood RFRA to Protect For-Profit Corporations and Their Owners.

The government argues that incorporated for-profit businesses, and the owners of such businesses with respect to any claim arising in the course of operating the business, are categorically excluded from the protections of the Religious Freedom Restoration Act. Pet. Br. 15-31, No. 13-354.

This view is demonstrably mistaken. It is inconsistent with the statutory text. It is inconsistent with the drafting history. And it is inconsistent with a substantial and hard-fought debate over legislation *in pari materia* with RFRA and worded identically with RFRA in every relevant respect.

A. The Text and History of RFRA Show That All Claims Are Covered, Including Claims by For-Profit Corporations.

1. The Statutory Text Provides Universal Coverage.

Congress repeatedly emphasized that RFRA would provide universal coverage, applying a single standard to all cases. Excluding corporate cases at the threshold, instead of evaluating them under RFRA's substantive standard of exercise of religion, substantial burden, compelling interest, and least-restrictive means, is inconsistent with this commitment to uniform coverage of all claims.

RFRA explicitly "applies to *all* Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. 2000bb-3(a) (emphasis added).[2] RFRA's stated purpose is "to restore the compelling interest test . . . and to guarantee its application in *all* cases where free exercise of religion is substantially burdened." §2000bb(b)(1) (emphasis added). RFRA protects "*a person's* exercise of religion" – not a natural person's, or a not-for-profit person's. §2000bb-1(a) (emphasis added). And of course "person" in federal legislation includes natural persons and every form of artificial person, including for-profit corporations, unless the context indicates otherwise. 1 U.S.C. 1. The universality of persons covered and the universality of government actions covered are of a piece: Congress enacted a single standard and applied it universally.

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[2] This section originally said that RFRA "applies to all Federal and State law." Pub. L. 103-141, §6(a), 107 Stat. 1488, 1489 (1993). The words "and State" were deleted by the Religious Land Use and Institutionalized Persons Act, Pub. L. 106-274, §7(b), 114 Stat. 803, 806 (2000).

2. The Legislative History Confirms the Statutory Text.

This universal coverage was further emphasized in the committee reports. The House Report said that RFRA would apply to "[*a*]*ll* governmental actions which have a substantial external impact on the practice of religion," that "the definition of governmental activity covered by the bill is meant to be *all inclusive*," and that RFRA's "test applies *whenever* a law . . . burdens a person's exercise of religion." H.R. Rep. 103-88, at 6 (1993) (emphasis added). The test applies to "*all* cases." *Id.* at 7 (emphasis added). The Senate Report said that the bill was needed to "assure that *all* Americans are free to follow their faiths free from governmental interference." S. Rep. 103-111, at 8 (emphasis added).

This emphasis on universal coverage was not just political rhetoric. The bill was supported by Democrats and Republicans, liberals and conservatives, secular groups and religious groups.[3] Universal coverage by a single standard was a key to holding this broad coalition together: no one could have an exception for his favorite cause, because that would lead other groups to ask for other exceptions. Many groups requested many different exceptions; the sponsors repeatedly said no. Had exceptions proliferated, the bill would have become a list of approved and disapproved religious-liberty claims. As the original lead sponsor in the House testified:

> If Congress succumbs to the temptation to pick and choose among the religious practices of the American people, protecting those practices the majority finds acceptable or appropriate, and slamming the door on those religious practices that may be frightening or unpopular, then we will have succeed [sic] in codifying rather than reversing *Smith*.[4]

Congress of course recognized that judges would and should consider the facts and context of individual cases, but the Act "would establish one standard for testing claims of Government infringement on religious practices." S. Rep. at 9. That "one standard" would apply to prisoner cases, *id.*; a floor amendment to exclude prisoner claims was rejected in the Senate, 58-41.[5] "[T]he unitary standard set forth in the act" would apply to military cases. *Id.* at 12. A competing bill, which was not enacted, would have excluded all abortion claims. H.R. 4040, 102d Cong. It was principally the fight over an abortion exception that held the bill up for three years. See, e.g., the two-day hearing cited in note 4, which was dominated by the abortion issue. The sponsors held firm to their commitment to no exceptions.

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[3] See, e.g., 139 Cong. Rec. 26,190 (Oct. 26, 1993) (Sen. Hatch) (listing 27 organizations and stating that there were 40 more in the Coalition for the Free Exercise of Religion).

[4] *Religious Freedom Restoration Act of 1991:* Hearings on H.R. 2797 Before the Subcommittee on Civil & Constitutional Rights of the House Committee on the Judiciary 124 (1992) (Mr. Solarz). Sponsors are listed on bills as originally introduced. See H.R. 5377, 101st Cong., and H.R. 2797, 102d Cong.

Had anyone demanded an exception for claims by for-profit corporations or their owners, the response would have been the same. We know this with unusual clarity, for two reasons, each explained below. First, an early draft did exclude corporate claims; that provision was deleted. Second, in the next round of legislation on the subject, powerful forces sought to exclude some corporations with respect to some kinds of claims. The sponsors again said no. RFRA enacted a single standard for all cases, and there were no exceptions.

3. Congress Eliminated a Definition That Would Have Codified the Government's Interpretation.

RFRA was first introduced in the 101st Congress as H.R. 5377 and S. 3254. Each bill contained a definition of "person," "[a]s used in this Act." These definitions were omitted when the bills were introduced in the 102d Congress as H.R. 2797 and S. 2969, and again when the bills were introduced in the 103d Congress as H.R. 1308 and S. 578. When the drafters delete a definition of a term that is also defined in the Dictionary Act, the natural inference is that they chose to rely on the Dictionary Act instead of creating a more specific definition for a particular statute. But there is more.

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[5] 139 Cong. Rec. 26,407-14 (Oct. 27, 1993).

Section 4(4) of H.R. 5377 would have explicitly stated the government's view of this case: "the term 'person' includes both natural persons and religious organizations, associations, or corporations." That provision, with its reference to natural persons, was omitted from later drafts and from the bill as enacted.[6]

The limited definition in H.R. 5377 was inconsistent with the commitment to universal coverage in later versions of the bill. It may also be that the lead sponsor, who represented "the largest Orthodox Jewish community in the entire country,"[7] realized that Orthodox businesses needed the bill's protections. The statutory text, the legislative history, the refusal to create any exceptions, and the elimination of this narrow definition of "person" all point in the same direction. RFRA protects all persons, including for-profit corporations and their owners. The statutory text repeatedly says "all," because that is what Congress meant.

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[6] The definition in S. 3254 was slightly different: "[T]he term 'person' includes natural persons, religious organizations, associations, and corporations." Because there is no "and" after "persons," to make a separate series of what follows, "religious" modifies only "organizations." All corporations are literally included. But this was probably an attempt to duplicate the definition in the House bill. Either way, this definition and its reference to "natural persons" were dropped from later bills.

[7] House Hearing, *supra* note 4, at 119 (Mr. Solarz).

B. The RLPA Debates Confirmed the Understanding That RFRA Applies to For-Profit Corporations and Their Owners.

1. The RLPA Debates Are Relevant to Show the Public Meaning of RFRA.

As enacted in 1993, RFRA applied to "all Federal and State law, and the implementation of that law." See *supra* note 2. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court held RFRA unconstitutional as applied to the states.

Congress attempted to respond with the proposed Religious Liberty Protection Act (RLPA).[8] RFRA's substantive standard – the language that either does or does not include for-profit corporations – is found in Section 2 of the original RFRA bills, now 42 U.S.C. 2000bb-1.[9] Section 2 of RLPA tracked this language verbatim, except for stylistic tweaks that could not possibly affect meaning, and would have applied this language to the states in all cases that Congress could reach under the Commerce Clause or the Spending Clause.[10] When Congress discussed the

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[8] This bill was H.R. 4019 and S. 2148 in the 105th Congress and H.R. 1691 and S. 2081 in the 106th Congress. These bills sometimes mysteriously fail to appear in searches on Thomas, but they are available from other official sources. H.R. 1691, which generated the debate and vote discussed in this brief, is available at http://beta.congress.gov/106/bills/hr1691/BILLS-106hr1691ih.pdf and at http://www.gpo.gov/fdsys/pkg/BILLS-106hr1691eh/pdf/BILLS-106hr1691eh.pdf.

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[9] RFRA provided, and still provides:

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. 2000bb-1.

[10] RLPA would have provided:

(a) GENERAL RULE. – Except as provided in subsection (b), a government shall not substantially burden a person's religious exercise [in Commerce or Spending Clause cases] even if the burden results from a rule of general applicability.

(b) EXCEPTION. – A government may substantially burden a person's religious exercise if the government

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meaning of Section 2 of RLPA, it was necessarily also discussing the meaning of Section 2 of RFRA. Everyone agreed on what this section of RLPA meant – and therefore on what RFRA meant.

RLPA was not enacted in its original form, but parts of it were enacted in the Religious Land Use and Institutionalized Persons Act, including amendments to strengthen RFRA. We will return to these amendments after reviewing the debate.

This debate is not "post-enactment legislative history" of RFRA. Nobody on either side offered to explain RFRA for the record. Rather, this was a hard-fought debate about whether to amend a pending bill that was not just *in pari materia* with RFRA, but on the issues presented here, substantively identical to RFRA. Everyone agreed on the meaning of the unamended language and on the meaning of a proposed amendment. The leaders on both sides of this debate were consulting the interest groups who cared about the bill. This is not a case where the interest groups

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> demonstrates that application of the burden to the person –
>
> > (1) is in furtherance of a compelling governmental interest; and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.

H.R. 1691 §2 (106th Cong.). The committee report said, with the slightest of imprecision, that "Section 2(b) is taken verbatim from RFRA." H.R. Rep. 106-219, at 28 (1999).

on one side got to draft the committee report; the two sides agreed on what the bill meant. This debate shows the public meaning of RFRA's text as of 1999.

This debate is not at all like the post-enactment history rejected in *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081-82 (2011). That "history" was an explicit and self-conscious attempt to explain the meaning of a prior law; this was not. In the RLPA debates, Congress discussed the public meaning of an existing statute for the purpose of further legislation. Moreover, application of the history offered in *Bruesewitz* to the issue in the case depended on attenuated inferences; here, the leaders for the two sides squarely addressed the central issue now presented in this case.

The RLPA debates are like the evidence of what the Second Amendment was understood to mean, which the Court considered in *District of Columbia v. Heller*, 554 U.S. 570 (2008): "'[P]ostenactment legislative history' . . . most certainly does not refer to the examination of a variety of legal and other sources to determine *the public understanding* of a legal text in the period after its enactment or ratification." *Id.* at 605 (original emphasis). The RLPA debates showed public understanding both because the interest groups were involved, and because the legislators involved were acting like readers of statutes. They were *not* attempting to explain in 1999 what they had been thinking in 1993. They were taking the statutory text at face value, and in light of RFRA's no-exceptions principle, and attempting to legislate against that background.

The RLPA debates are also, for those who consider legislative history, pre-enactment history of the amendment strengthening Section 2 of RFRA.

2. RLPA Became Entangled in a Debate Over Its Effect on Civil-Rights Claims.

Between the enactment of RFRA in 1993, and the critical debate on RLPA in 1999, state and federal courts decided a series of cases in which religious landlords refused to rent to unmarried couples. The couples sued for marital-status discrimination. The cases went both ways,[11] but they suggested a potential

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[11] See *Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999) (ruling for landlord on federal free-exercise grounds), *vacated on other grounds*, 220 F.3d 1134 (2000) (en banc); *McCready v. Hoffius*, 586 N.W.2d 723 (Mich. 1998) (finding compelling interest and noting that landlords could get out of the rental business), *vacated in part*, 593 N.W.2d 545 (1999); *Smith v. Fair Employment & Housing Commission*, 913 P.2d 909 (Cal. 1996) (finding no substantial burden on religious exercise, because landlords could get out of the rental business); *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994) (finding compelling interest in uniform enforcement of non-discrimination laws); *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (holding that government must show compelling interest to override landlords' state-law free-exercise rights); see also *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) (interpreting state's ban on marital-status discrimination not to apply, and also relying on state constitution's free-exercise clause). The landlord-tenant cases

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for conflict between religious liberty and other civil rights and for religious-liberty claims by for-profit investors. This conflict quickly became a serious obstacle to the passage of RLPA. The House and Senate held a total of nine hearings in a futile effort to work out the disagreements.[12] (Hearings are cited hereafter by House or Senate and date.) The Court has recognized that these hearings on RLPA are part of the legislative history of RLUIPA, the bill that emerged from these debates. *Cutter v. Wilkinson*, 544 U.S. 709, 716 & n.5 (2005).

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are reviewed in the committee report on RLPA. H.R. Rep. 106-219, at 14.

[12] *Protecting Religious Freedom After Boerne v. Flores:* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary (July 14, 1997); *Protecting Religious Freedom After Boerne v. Flores (Part II):* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary (Feb. 26, 1998); *Protecting Religious Freedom After Boerne v. Flores (Part III):* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary (March 26, 1998); *Religious Liberty Protection Act of 1998:* Hearings Before the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 4019 (June 16 and July 14, 1998); *Religious Liberty Protection Act of 1999:* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 1691 (May 12, 1999); *Religious Liberty Protection Act of 1998:* Hearing Before the Senate Committee on the Judiciary on S. 2148 (June 23, 1998); *Religious Liberty:* Hearing Before the Senate Committee on the Judiciary on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure (June 23 and September 9, 1999).

In February 1998, the landlord in one of the marital status cases testified about RLPA before the House Subcommittee on the Constitution.[13] Americans United for Separation of Church and State responded, urging legislators to disavow any intention to "broadly protect religious claims against federal and state anti-discrimination laws."[14] The dispute escalated from there.

Mr. Scott, then the ranking Democrat on the subcommittee, said in his opening statement at the next hearing that the bill "will have to steer clear of any disruption of any Civil Rights laws."[15] (Committee and subcommittee members are listed in hearing records at p. ii). In this and later hearings, witnesses supporting the bill argued that there were many kinds of civil-rights claims, that religious conscientious objectors should and would lose most civil-rights cases but that they should win some, and that RFRA's general standard should be applied in this context as in all others.[16] They again invoked the no-exceptions

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[13] House Hearing 25-29 (Feb. 26, 1998) (Evelyn Smith).

[14] *Id.* at 69 (Barry Lynn, Americans United).

[15] House Hearing 2 (March 26, 1998).

[16] See, e.g., *id.* at 5, 13 (Marc Stern, American Jewish Congress); House Hearing 32 (June 16, 1998) (Prof. Thomas Berg, an advocate of religious-liberty legislation); *id.* at 56-57, 62-65 (Marc Stern); House Hearing 184-85 (July 14, 1998) (Steven McFarland, Christian Legal Society); *id.* at 236-38 (Prof. Douglas Laycock, an advocate of religious-liberty legislation); House Hearing 55, 58 (May 12, 1999) (Brent Walker, Baptist Joint Committee on Public Affairs); *id.* at 91-95 (Rabbi David

(Continued on following page)

principle, both on principle and to prevent the bill from unraveling amid multiple demands for special exceptions.[17] This testimony came in prepared statements and also in response to active questioning on the issue from committee members.

Opponents mostly worked behind the scenes until a landlord won a high-profile case in the Ninth Circuit early in 1999.[18] Then opponents appeared at hearings and testified that civil-rights claimants should not have to litigate an uncertain religious-liberty defense, that every civil-rights claim serves a compelling interest by the least-restrictive means, and that the bill should be rejected unless amended to exclude all civil-rights claims.[19]

Saperstein, Religious Action Center of Reform Judaism); *id.* at 103, 118-20 (Prof. Douglas Laycock); *id.* at 131-33 (Oliver Thomas, National Council of Churches); Senate Hearing 287-93 (June 23, 1998) (Marc Stern); Senate Hearing 12-14, 60-61 (June 23, 1999) (Steven McFarland); *id.* at 34, 36 (Elliot Mincberg, People for the American Way); *id.* at 59 (Michael Farris, Home School Legal Defense Association); Senate Hearing 76, 99-101, 148-49, 155-58 (Sept. 9, 1999) (Prof. Douglas Laycock); *id.* at 171 (Gene Schaerr, Religious Institutions Practice Group at Sidley & Austin); *id.* at 182 (Oliver Thomas).

[17] See, e.g., House Hearing 56 (June 16, 1998) (Marc Stern); House Hearing 92, 94-95 (May 12, 1999) (Rabbi David Saperstein); *id.* at 119-20, 129-30 (Prof. Douglas Laycock); Senate Hearing 5, 13-14, 61 (June 23, 1999) (Steven McFarland); Senate Hearing 100-01 (Sept. 9, 1999) (Prof. Douglas Laycock).

[18] *Thomas*, 165 F.3d 692 (Jan. 15, 1999).

[19] See, e.g., House Hearing 81-90, 122-24 (May 12, 1999) (Christopher Anders, American Civil Liberties Union); *id.* at

(Continued on following page)

The bill's lead sponsor in the House described the resulting fight this way: "I think what all of this is about, if we get right down to the facts of what is motivating this, was a 9th Circuit case in which a small religious landlord challenging a housing law was granted an exemption from compliance." 145 Cong. Rec. 16,236 (July 15, 1999) (Mr. Canady).

3. This Debate Confirmed That the Public Meaning of RFRA's Language Protects For-Profit Corporations and Their Owners.

The demand for a civil-rights exception culminated in the Nadler Amendment. We quote extensively from the debate on this amendment, to give the full views and context. These are not scattered quotations from possibly marginal legislators. These are the considered views of the leaders on both sides after grappling with the issue for seventeen months.

Mr. Nadler had been a lead sponsor of RFRA (H.R. 1308 in the 103d Congress) and initially, one of the two original bipartisan sponsors of RLPA (H.R. 4019 in the 105th Congress). He drafted his amendment "in consultation with both religious and civil

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96-100 (Prof. Chai Feldblum, an advocate of gay rights); Senate Hearing 41-51, 58 (June 23, 1999) (Christopher Anders); *id.* at 51-53, 57-58 (State Rep. Scott Hochburg [sic; should be Hochberg], who had sponsored the Texas RFRA); Senate Hearing 163-64 (Sept. 9, 1999) (Prof. Chai Feldblum); *id.* at 199-200 (letter from multiple civil-rights groups).

rights groups." H.R. Rep. 106-219, at 41 (dissenting views of Mr. Nadler and three others). He offered his amendment in the subcommittee and again in the full committee. *Ibid.* Committee discussion of his amendment occurred in markup sessions, which are not published. While he discussed his amendment with interest groups, *ibid.*, and probably shared the text with some of them, the text of his amendment became public only in the floor debate.

Mr. Nadler cast his amendment not as an exception for certain kinds of claims, but as a limitation on *who* could invoke RLPA in response to those claims. In his dissent from the committee report, he described his amendment in terms much like the government's argument in this case:

> [I]t sought to clarify that religious liberty is an individual right expressed by individuals and through religious associations, educational institutions and houses of worship. It would have made clear that the right to raise a claim under RLPA would have applied to that individual right, but that non-religious corporate entities could not seek refuge in a religious claim under RLPA to attack civil rights laws.

Ibid.

The committee majority referred only to an "issue," not to an amendment, and it affirmed its understanding that business corporations would be protected by the bill:

> One issue raised during the Subcommittee Markup was whether a business corporation could make a claim under H.R. 1691. The requirement of H.R. 1691 that the claimant demonstrate a substantial burden on religious exercise is equally applicable whether a claimant is a natural person or a corporation. Most corporations are not engaged in the exercise of religion, but religious believers, such as people in the Kosher slaughter business, *should not be precluded from bringing a claim under H.R. 1691 simply because they incorporated their activities pursuant to existing law.*

H.R. Rep. 106-219, at 13 n.49 (emphasis added).

It is true that most corporations are not engaged in the exercise of religion, but as the committee report recognized, it is equally true that some corporations, or their owners, *are* engaged in the exercise of religion. By allowing corporations to make a claim, the committee majority allowed for these cases.

The Nadler Amendment, as offered on the floor, was a limitation on the persons who could assert RLPA defenses to civil-rights claims. It would have excluded all but the tiniest corporations from invoking RLPA in such cases, by adding the following language to Section 4 of the bill:

> (e) PERSONS WHO MAY RAISE A CLAIM OR DEFENSE – A person who may raise a claim or defense under subsection (a) is –

(1) an owner of a dwelling described in section 803(b) of the Fair Housing Act (42 U.S.C. 3603(b)), with respect to a prohibition relating to discrimination in housing;

(2) with respect to a prohibition against discrimination in employment –

(A) a religious corporation, association, educational institution (as described in 42 U.S.C. 2000e-2(e)), or society, with respect to the employment of individuals who perform duties such as spreading or teaching faith, other instructional functions, performing or assisting in devotional services, or activities relating to the internal governance of such corporation, association, educational institution, or society in the carrying on of its activities; or

(B) an entity employing 5 or fewer individuals; or

(3) any other person, with respect to an assertion of any other claim or defense relating to a law other than a law –

(A) prohibiting discrimination in housing and employment, except as described in paragraphs (1) and (2); or

> (B) prohibiting discrimination in a public accommodation.

145 Cong. Rec. 16,233-34.

The housing exception in subsection (1) is limited to buildings with four or fewer units, one of which is occupied by the owner, and to certain private sales or rentals of single-family residences. 42 U.S.C. 3603(b). The statutory reference in subsection (2)(A) is to one of Title VII's exemptions for religious employers.

Supporters of the Nadler Amendment argued that without it, Section 2 of RLPA – the language copied from Section 2 of RFRA – would protect for-profit corporations. This was a recurring theme of the debate. Mr. Conyers, who was the ranking Democrat on the House Judiciary Committee and who managed the debate for supporters of the Nadler Amendment,[20] began by describing the landlord-tenant cases:

> "Now, none of these claims involve owner-occupied housing. All of the landlords owned many investment properties that were outside of the State laws [sic] exemptions for small landlords. These landlords are companies. And they all sought to turn the shield of religious exercise protection into a sword against civil rights prospective tenants." [quoting a letter from the ACLU].

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[20] 145 Cong. Rec. 16,223.

> . . .
>
> So the bill is so sweeping that this new defense will not only apply to religious institutions themselves *but to companies and corporations as well.*

145 Cong. Rec. 16,220 (emphasis added). The government uses the same sword and shield metaphor here. Cert. Pet. 16.

Mr. Nadler agreed with Mr. Conyers:

> The bill as drafted would enable *the CEO of a large corporation* to say, "my religion prohibits me from letting my corporation hire a divorced person or a disabled person or a mother who should be at home with her children and not at work or a gay or lesbian person. And my religion prohibits me from letting my hotel rent a room to any such people. And never mind the State's civil rights laws that prohibit that kind of discrimination."

Id. at 16,225 (emphasis added).

Mr. Conyers spoke again:

> The right is so sweeping it will apply not only to religious institutions, *but to large corporations.*
>
> . . .
>
> This means that under the bill, businesses will be free to discriminate against gay and lesbian employees, and large landlords

> will be able to justify their refusal to rent to single parents or gays and lesbians.

Id. at 16,226 (emphasis added).

Mr. Frank, a member of the committee and subcommittee and an original sponsor of RFRA in the 101st Congress (H.R. 5377), made the same point. He noted that the recently enacted Texas RFRA had excluded all civil-rights claims,[21] but that the Nadler Amendment did not go so far: "I think that is a very reasonable accommodation the gentleman has offered. *He has said you do not give it to corporations*, et cetera." *Id.* at 16,229 (emphasis added).

Mr. Nadler resumed the floor, again previewing the arguments in this case:

> The amendment recognizes that religious rights are rights that belong to individuals and to religious assemblies and institutions. General Motors does not have sincerely held religious beliefs, by its nature. My amendment protects individual [sic] and religious institutions.
>
> In order to protect civil rights laws against the person who would say, "*My religion prohibits me from letting my corporation* hire a divorced person or a disabled person, . . . in order to protect civil rights laws against that sort of religious claim, *the*

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[21] Tex. Civ. Prac. & Remedies Code §110.011 (Vernon's 2011).

> *amendment places some limits on who may raise a claim* under this bill against the application of a State or local law.

Id. at 16,234-35 (emphasis added).

"Some limits." Without his amendment, Mr. Nadler plainly understood that there were no limits on who could raise a claim or defense – that "person" had its full Dictionary Act meaning.

Mr. Nadler emphasized that his amendment merely created "narrow exceptions" to the parties who could invoke the Act. *Id.* at 16,235. Subject only to

> these exceptions, *businesses of any size could bring any free exercise claims.* This is important for the mom and pop store that has difficulties with Sunday closing laws, or with laws allowing malls requiring stores to remain open 7 days a week, as well as for large firms that, for example, produce kosher meat or other products.

Ibid. (emphasis added). And this statement described what the law would be if his amendment were *adopted*. "Businesses of any size" could still bring RLPA claims, except in discrimination cases. The claims in *Hobby Lobby* and *Conestoga Wood*, seeking exemption from regulations under the Affordable Care Act, could still have been brought *even if the Nadler Amendment had been added to RFRA*.

Those who opposed the Nadler Amendment agreed that businesses and corporations could assert claims and defenses under the bill as drafted. They had explicitly affirmed that proposition in the committee report. H.R. Rep. 106-219, at 13 n.49, quoted *supra* 20. They stuck to their position that these claims should be evaluated under the same standard as all other claims. And they emphasized that the language of the bill had already been approved in RFRA. Mr. Canady, Chairman of the Subcommittee on the Constitution and the bill's lead sponsor, who managed the floor debate for the bill's supporters,[22] summed up:

> *Like the Religious Freedom Restoration Act*, the Religious Liberty Protection Act is intended to provide a uniform standard of review for religious liberty claims. H.R. 1961 [sic] employs the "compelling interest/least restrictive means" test for all Americans who seek relief from substantial burdens on their religious exercise.
>
> Under the amendment offered by the gentleman from New York, only a preferred category of plaintiffs are granted this protection. The gentleman can describe it as a "carve in" or a "carve out," but the fact is *some people are not going to get the protection that the bill would otherwise afford them.*

145 Cong. Rec. 16,235 (emphasis added).

Mr. Canady denied that General Motors would have a claim, but *not* because General Motors was not a "person" protected by the Act. Rather, General Motors would lose on the merits:

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[22] 145 Cong. Rec. 16,223.

> The argument that General Motors would have such a claim ignores the requirement of the bill that a claimant prove that his religious liberty has been substantially burdened by the government.
>
> I do not think that General Motors or Exxon Corporation or any other such large corporation that the gentleman wants to bring forward could come within a mile of showing that anything that was done would substantially infringe on their religious beliefs. They do not have a religious belief. They do not have a religious practice. It is not in the nature of such large corporations to have such religious beliefs or practices.

Id. at 16,235-36.

Mr. Canady said that large corporations such as General Motors and Exxon did not have religious beliefs or practices, but he did not say that smaller corporations, or closely held corporations, or their owners, could not have religious beliefs and practices. Rather, he said that all claims should be evaluated under RLPA's general standard:

> H.R. 1691 will continue in this [RFRA's] tradition weighing and balancing competing interests based on real facts before the Court. Religious interests will not always prevail, nor will those of the government. But the Nadler amendment would determine in

> advance that the interest of the Government will always prevail in certain cases. This is not what this Congress intended when it passed RFRA unanimously here in the House and is not the type of law I believe the American citizens want their Congress to enact.

Id. at 16,236.

He reminded members that Congress had already approved the unamended language:

> [T]he groups that urge adoption of this amendment did not find similar fault with the Religious Freedom Restoration Act. And I know that is not something that the proponents of this amendment want to hear about. That was then and this is now. *But all the arguments related to civil rights that have been advanced today were equally applicable to the Religious Freedom Restoration Act.*

Ibid. (emphasis added). Nobody disputed that.

Mr. Frank said the unamended bill would protect the religious-liberty interests of stockholders and leave it to the courts to decide whether the government's interest was compelling. Speaking first of potential civil-rights claimants, he said:

> [I]f they are an unmarried couple seeking to live together, it will be up to the Federal Government to judge whether or not they can rent an apartment *from a corporation,*

> *the stockholders of which said it is their religious objection.*

Id. at 16,240 (emphasis added).

Mr. Conyers argued that even with the Nadler Amendment, the bill would still protect very small businesses, even in discrimination cases:

> My colleagues, as the bill presently stands, whenever a parties [sic] brings suit claiming discrimination, the defendant will be able to claim that this is inconsistent with their religious beliefs.
>
> We are creating a huge disparity here. The Nadler amendment responds to the problem, thank goodness, by specifying that the bill's protections only apply to individuals, religious institutions, and small businesses.

Id. at 16,241.

Ms. Jackson Lee, a member of the Judiciary Committee, also previewed the government's argument in these cases:

> The amendment, crafted in consultation with both religious and civil rights groups clarifies the fact that religious liberty is an individual right expressed by individuals and through religious associations, educational institutions and houses of worship. It also makes clear that the right to raise a claim under RLPA applies to that individual. A non-religious corporate entities [sic] could

> not use a RLPA for a claim or defense to attack civil rights laws.
>
> Individuals, under this amendment, could still raise a claim based on their sincerely held religious beliefs which are substantially burdened by the government, whether *in the conduct of their businesses* [or anywhere else].

Id. at 16,242 (emphasis added).

There were other statements to similar effect, but these quotations cover the essential arguments. Members on both sides believed that the bill as drafted protected everyone, including large corporations if they could show a religious practice that was substantially burdened. The language creating that protection was copied directly from Section 2 of RFRA. Supporters of the Nadler Amendment knew they needed an amendment to exclude corporate claims, and they knew that they had not gotten such an amendment to RFRA.

The Nadler Amendment would have left RFRA's language in place, and applicable to most claims, but it would have confined RLPA protection with respect to civil-rights claims to the very smallest businesses. There was no disagreement about what the bill meant or what the amendment meant; the disagreement was over whether to adopt the amendment.

Thus informed, the House rejected the Nadler Amendment on a roll-call vote, 234-190. *Id.* at 16,244.

It then passed the unamended bill, also on a roll-call vote, 306-118. *Id.* at 16,245.

4. The Ensuing Senate Debate Led to the Enactment of RLUIPA and the Strengthening of RFRA.

RLPA died without a recorded vote in the Senate, where the civil-rights objection could not be overcome and the sponsors still refused to make exceptions. But Senators Kennedy and Hatch created a new bill, S. 2869, from the parts of RLPA that had sufficient support. This bill became law as the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc *et seq.*

Section 7 of RLUIPA amended RFRA in ways that both strengthened and reaffirmed it. First, Congress deleted all references to state law, making clear its commitment to keeping RFRA in effect as to federal law.[23] Second, Congress incorporated into RFRA the stronger, more protective, definition of "exercise of religion" drafted for RLPA and enacted in RLUIPA. That definition, responding to certain lower court cases, clarified that "any" exercise of religion is protected, "whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A); 42 U.S.C. 2000bb-2(4). This definition further strengthened Section 2 of RFRA, the section that had caused all the trouble – the section that everyone agreed already protected for-profit corporations even before it was strengthened.

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[23] Sections 7(a)(1) and (2), 7(b), 114 Stat. 803, 806 (2000); 42 U.S.C. 2000bb-2(1) and (2), 2000bb-3(a).

5. This Debate Shows the Meaning of RFRA.

Summing up: the relevant language of RLPA was substantively identical to the relevant language of RFRA. Both sides agreed that that language protected for-profit corporations and their owners. The public meaning of this language was not disputed. But the policy embodied in this meaning had become controversial as applied to civil-rights claims. Congress could not agree on whether to make that language, with that meaning, broadly applicable to the states.

But Congress did agree to keep that language in place as applied to the federal government, to reaffirm that application, and even to broaden its scope by emphasizing that the "exercise of religion" means "any" exercise of religion.

Even the supporters of the amendment sought to exclude corporate claims only with respect to civil-rights laws. Apart from civil-rights laws, both sides agreed that religious-liberty claims arising in for-profit businesses, including businesses conducted in corporate form, should be protected under the general standard that RLPA had copied from RFRA. This is a much clearer and far more specific demonstration of statutory meaning than anything offered by the government. And it is entirely consistent with the emphasis on a single standard, universally applicable to all claims, in the statutory text and legislative history of RFRA.

The government says that if RFRA had been intended to apply to claims by for-profit corporations, "there would surely have been some express mention of that intent." Pet. Br. 21, No. 13-354. In fact there was ample discussion of a broadly shared understanding of that very point.

6. The Claims in These Cases Are Covered by RFRA as Both Sides Understood It.

Apart from their disagreement over civil-rights claims, both sides agreed that the language copied from RFRA did, and should, cover corporations engaged in intrinsically religious businesses, such as kosher slaughterhouses. See *supra* 20 (committee report); *id.* at 25 (Mr. Nadler). Mardel is engaged in such a business.

Both sides also agreed that the language copied from RFRA covered incorporated businesses with religious owners whose personal religious practices were burdened by regulation of their corporation. See *supra* 20 (committee report) (believers should not lose rights by incorporating); *id.* at 24-25 (Mr. Nadler) ("my corporation," "mom and pop stores"); *id.* at 28-29 (Mr. Frank) (stockholders). Mr. Nadler added that the CEO would be covered. *Id.* at 23. Apart from their disagreement over civil-rights claims, both sides thought that this coverage was important to the bill.

Realistically, only closely held corporations could show a substantial burden on their owners' religious exercise. Large corporations with religiously diverse owners are covered "persons," but they could not show a substantial burden.

The Greens and the Hahns *can* show a substantial burden, and they are clearly protected under the public understanding reviewed here. There is no reasonable dispute that they have a sincere and deeply held religious objection to paying, through their corporations or otherwise, to provide drugs and devices that they believe may cause abortions. The government's argument that RFRA does not even apply is based entirely on the formalisms of incorporation. Congress rejected those formalisms. Hobby Lobby, Mardel, and Conestoga Wood are protected because their owners are protected.

C. This Debate Also Confirms That RFRA Applies to Suits by Private Plaintiffs.

This debate also refutes the government's suggestion that RFRA might not apply to suits between private parties. Pet. Br. 43-45, No. 13-354. The entire debate about a civil-rights exception and the Nadler Amendment was conducted on the basis of a shared public understanding that RFRA applied, and that the same language in RLPA would apply unless amended, to suits by private plaintiffs alleging discrimination.

In addition, the language on which the government relies for this point ("obtain appropriate relief against a government") was included for reasons going to sovereign immunity. The drafting history of RFRA is very clear that this language was never intended to preclude a RFRA defense in suits by private plaintiffs. See Shruti Chaganti, Note, *Why the Religious Freedom Restoration Act Provides a Defense in Suits by Private Plaintiffs*, 99 Va. L. Rev. 343, 348-55 (2013).

II. Protecting For-Profit Corporations Is Consistent with Larger Traditions of Religious Liberty.

A. Congress and the States Have Often Protected Conscientious Objectors Operating For Profit.

The government cites one of the Title VII exemptions for religious employers as illustrating a tradition of statutory protection confined to not-for-profit religious corporations. Pet. Br. 20, No. 13-354, citing 42 U.S.C. 2000e-1(a). This and similar statutes are not in point here; they provide a very different kind of exemption.

The Title VII exemption protects the autonomy of religious organizations. It permits religious organizations to prefer fellow believers with respect to any employee hired "to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." *Ibid.* The exception applies even if an employee's duties are not "'even tangentially related to any conceivable religious belief or ritual.'" *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 332 (1987) (quoting the district court in that case). The exemption does not require proof of a substantial burden on religious exercise. It does not require proof that hiring nonbelievers would be a violation of conscience.

Far more relevant here are the state and federal conscience statutes protecting medical providers from performing or assisting abortions. These provisions do protect conscience, and they protect every "individual or entity," 42 U.S.C. 300a-7, or "any health care entity," 42 U.S.C. 238n. Nearly every state has similar legislation.[24] These statutes protect doctors operating for profit, even if they incorporated their medical practice, and they protect incorporated for-profit hospitals. These statutes reflect a judgment by American legislatures that conscientious objectors to abortion should not be required to participate in one.

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[24] Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, in *Same-Sex Marriage and Religious Liberty* 77, 299-310 (Douglas Laycock *et al.* eds. 2008) (appendix collecting these statutes as of 2008).

B. The Tradition of Protecting Conscientious Objectors Is Especially Broad and Deep with Respect to Taking Human Life.

These abortion-conscience statutes are especially relevant here because the plaintiffs in these two cases object *only* to drugs and devices believed to sometimes cause abortions. Just as a for-profit hospital cannot be required to passively allow its facilities to be used to perform an abortion, 42 U.S.C. 300a-7(b)(2), so a for-profit employer should not be required to actively pay for what its owners believe to be abortions.

More generally, conscientious scruples against taking human life have gotten the highest protection throughout our history. American exemptions from military service date at least to 1673.[25] This Court stretched the statutory exemption to military service to protect conscientious objectors who were not religious in any traditional sense. *Welsh v. United States*, 398 U.S. 333 (1970). All the abortion-conscience statutes appear to protect secular as well as religious conscientious objectors.[26]

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[25] Act of Aug. 13, 1673, in 2 *Records of the Colony of Rhode Island and Providence Plantations in New England* 488, 498 (John Russell Bartlett ed., Providence, Crawford Green & Bro., 1857). For this and other early conscientious objection legislation, see Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1803-25 (2006).

The two states with legislation authorizing assisted suicide provide that no health-care provider can be required to participate or to allow the suicide to occur on its premises. Or. Rev. Stat. 127.885(4), (5)(a) (West Supp. 2013); Wash. Rev. Code 70.245.190(1)(d), (2)(a) (2012). These provisions plainly protect for-profit physicians, hospitals, nursing homes, and hospices.

It appears that no one has ever been required to participate in executions, and Congress and eleven of the capital-punishment states have now enacted express conscience protections. See Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 137-38 (2012).

The RLPA debates make clear that for-profit corporations and their owners are protected by RFRA. But any residual doubts should be resolved in favor of protection in this context, where the plaintiffs are being asked to pay for what they believe to be the killing of an innocent human being. The government does not think that that is what it is asking, but there is no dispute that the plaintiffs sincerely understand it in just that way.

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[26] See Wilson, *supra* note 24.

The government's argument has no limits. If the Greens and the Hahns forfeited their rights to religious liberty when they incorporated their businesses – and that is the government's position with respect to any regulation of the corporations – then it would not matter if the government required coverage for all abortions, by any method, in any trimester. It would not matter if the government required coverage for partial-birth abortions, or assisted suicides, or unconsented euthanasia. The government's argument cuts off all claims at the threshold, without regard to the weight of competing interests. Congress more wisely provided that all claims should be assessed under RFRA's uniform statutory standard.

The government's position appears to be that once they incorporate, the Greens and the Hahns have no religious rights that a government is bound to respect. The corporation can be required to do absolutely anything, and the individual owners who carry out the corporation's work have no religious-liberty right to complain.

This level of formalism is not our tradition with respect to the moral responsibility of corporate owners and managers. If Mardel sold child pornography instead of Christian books, the government would not allow the Greens, actively involved as shareholders, directors, officers, and managers, to defend on the ground that "It wasn't me; the corporation did it." See *Alexander v. United States*, 509 U.S. 544 (1993). Alexander was convicted of obscenity and RICO offenses because corporations he owned sold obscene films. The government can, and in some contexts does, impose criminal liability on corporate officers who failed to prevent corporate wrongdoing of which they had no knowledge. *United States v. Park*, 421 U.S. 658, 670-73 (1975).

It is no answer for the government to say that it has not imposed such liability here. Pet. Br. 27, No. 13-354. Widely shared moral beliefs hold those who control or manage corporations responsible for corporate wrongdoing. The government often shares those beliefs when enforcing the criminal law. There is nothing unusual about the Greens and the Hahns believing that they would be morally responsible for causing their corporations to pay for abortifacients. And it would be a shocking omission if their claims were wholly excluded from RFRA.

It is entirely consistent with our tradition of religious liberty to read RFRA as Congress wrote it, and as Congress understood it in the RLPA debates – as protecting all persons, including for-profit corporations and their owners, when the owners can show a substantial burden on their exercise of religion.

C. Excluding Religious Minorities from Businesses and Professions Is an Historic Means of Persecution That Must Be Covered by RFRA.

In eighteenth-century Ireland, it was generally illegal for a Catholic to keep more than two apprentices.[27] If your business grew to where you needed three apprentices, you were out of luck. Other laws imposed similar disabilities somewhat less directly. Anyone holding a civil or military office, or receiving pay by reason of a royal grant, or any school-master, barrister, solicitor, or notary, was required to take an anti-Catholic oath.[28] These and other examples were recent history to the Founders.

If you take seriously the belief that a new human life begins at conception, and if your business grows to the point where you need to incorporate it, the government says you are similarly out of luck in this country. Violate your faith, or sell your business. The exclusion is imposed one step less directly than the English anti-Catholic oaths; it is imposed by a law that is claimed to be neutral and generally applicable. But that is no distinction; the very purpose of RFRA was to address substantial burdens on religious exercise imposed by neutral and generally applicable laws.

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[27] An Act for explaining and amending An Act intituled, An Act to Prevent the further Growth of Popery, 8 Anne, c.3, §37 (1709), in 4 *Statutes at Large, Passed in the Parliaments Held in Ireland* 190, 214 (Dublin, George Grierson, 1786). There was an exception for "the hempen and flaxen manufacture."

[28] An Act for preventing Dangers which may happen from Popish Recusants, 25 Car. II, c.2, §2 (1673), in 5 *Statutes of the Realm* 782, 783 (Hein 1993); An Act for Enlarging the Time for taking the Oath of Abjuration, 1 Anne, stat. 2, c.21, §5 (1702), in 8 *id.* 218, 219.

The Free Exercise Clause must be understood at least to address historically familiar means of religious persecution. And RFRA must be understood at least to address the same substantial burdens when imposed by neutral and generally applicable laws. The government's position is inconsistent with these premises. It says that once a business incorporates, the owners lose all religious-liberty rights with respect to that business. For the devout, the result may be that the owners are forced out of the business, or here, forced out of *any* business that grows to fifty employees and needs to incorporate. Fifty employees is a more generous limit than two apprentices, but the principle is the same. Limiting the size of business that can be owned by religious minorities is an historic wrong. Enforcing RFRA according to its universal language, as all understood it in the RLPA debates, will prevent the repetition of that historic wrong.

◆

CONCLUSION

The Court should hold that for-profit corporations and their owners are protected by the Religious Freedom Restoration Act and its generally applicable standards of exercise of religion, substantial burden, compelling interest, and least-restrictive means. The judgment in *Hobby Lobby* should be affirmed; the judgment in *Conestoga Wood* should be reversed.

Respectfully submitted,

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APPENDIX

DETAILED STATEMENTS OF INTEREST OF AMICI CURIAE

The **Christian Legal Society** ("CLS") is an association of Christian attorneys, law students, and law professors, with student chapters at approximately 90 public and private law schools. CLS believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs, expression, and assembly.

As a key member of the Coalition for Free Exercise of Religion, CLS was instrumental in passage of the Religious Freedom Restoration Act (RFRA) and the subsequent defense of RFRA's constitutionality and proper application in the courts. In the wake of *City of Boerne v. Flores,* 521 U.S. 507 (1997), CLS again played a leading role in a coalition formed to attain new religious freedom legislation, initially through the Religious Liberty Protection Act that passed the House of Representatives in 1999 and is a focus of this brief, and subsequently through the passage of the Religious Land Use and Institutionalized Persons Act. See, e.g., *Protecting Religious Freedom After Boerne v. Flores (Part III):* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary 26-37 (1998) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society);

Religious Liberty Protection Act: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 1691 at 151-59 (1999) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society); *Religious Liberty:* Hearing Before the Senate Committee on the Judiciary on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure 4-18 (1999) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society).

For two decades, RFRA has been the preeminent protection for Americans' religious freedom. Religious liberty is among America's most distinctive contributions to humankind. But it is fragile, too easily taken for granted and too often neglected. The HHS Mandate represents a serious attempt by the government to minimize Americans' religious liberty. By sharply departing from our nation's historic, bipartisan tradition of respecting religious conscience, the HHS Mandate poses a grave threat to religious liberty and pluralism.

Headquartered in Manhattan, the 196-year-old **American Bible Society** exists to make the Bible available to every person in a language and format each can understand and afford, so all people may experience its life-changing message. As one of the nation's oldest nonprofit organizations, American Bible Society partners with hundreds of individuals, organizations, and businesses to provide interactive, high- and low-tech resources enabling first-time readers and seasoned theologians alike to engage with the best-selling book of all time. As advocates for the Bible, the Society and its partners are committed to operating their institutions consistent with their reading of the Bible, and to ensuring that the religious freedoms which entitle them to do so continue to be preserved for all.

The **Anglican Church in North America** ("ACNA") unites some 100,000 Anglicans in nearly 1,000 congregations across the United States and Canada into a single Church. It is a Province in the Global Fellowship of Confessing Anglicans, initiated at the request of the Global Anglican Future Conference (GAFCon) in June 2008 and formally recognized by the GAFCon Primates – leaders of Anglican Churches representing 70 percent of active Anglicans globally – in April 2009. The ACNA is quickly growing, through efforts such as its "Anglican 1000" initiative, to rapidly catalyze the planting of Anglican congregations and communities of faith across North America. The ACNA is determined by the help of God to hold and maintain the doctrine, discipline, and worship of Christ as the Anglican Way has received them. The ACNA is also determined to defend the inalienable human right to the free exercise of religion as given by God and embodied in the First Amendment to the United States Constitution and the Religious Freedom Restoration Act of 1993.

The **Association of Christian Schools International** (ACSI) is a nonprofit, non-denominational, religious association providing support services to 24,000 Christian schools in over 100 countries. ACSI serves 3,000 Christian preschools, elementary, and secondary schools and 90 post-secondary institutions in the United States. Member-schools educate some 5.5 million children around the world, including 825,000 in the U.S. ACSI accredits Protestant pre-K – 12 schools, provides professional development and teacher certification, and offers member-schools high-quality curricula, student testing, and a wide range of student activities. ACSI members advance the common good by providing quality education and spiritual formation to their students. Our calling relies upon a vibrant Christian faith that embraces every aspect of life. This gives ACSI an interest in ensuring expansive religious liberty with strong protection from government attempts to restrict it by policies such as the HHS Mandate or other means.

The **Association of Gospel Rescue Missions** ("AGRM") was founded in 1913 and has grown to become North America's oldest and largest network of independent crisis shelters and recovery centers offering radical hospitality in the name of Jesus. Last year, AGRM-affiliated ministries served nearly 42 million meals, provided more than 15 million nights of lodging, bandaged the emotional wounds of thousands of abuse victims, and graduated over 18,000 individuals from addiction recovery programs. The ramification of their work positively influences surrounding communities in countless ways.

The first U.S. gospel rescue mission was founded in New York City in the 1870s and has continuously operated as a Christian ministry to the poor and addicted in the Bowery for 134 years. During that time, generations of men and women have followed their Christian "calling" to found gospel rescue missions and minister to the needs of the hungry, homeless, abused, and addicted in cities and small communities across America. This "calling" is inseparable from and an outward sign of their faith, as *James* 2:14-17 teaches:

> What good is it, my brothers, if someone says he has faith but does not have works? Can that faith save him? If a brother or sister is poorly clothed and lacking in daily food, and one of you says to them, "Go in peace, be warmed and filled," without giving them the things needed for the body, what good is that? So also faith by itself, if it does not have works, is dead.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with over 14 million members worldwide. Headquartered in Salt Lake City, Utah, the Church conducts its temporal and spiritual affairs through a variety of corporate entities, including for-profit entities that advance its religious mission and message in vital ways. Religious liberty is a fundamental Church doctrine: "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." *Article of Faith 11*.

Accordingly, in coalition with many other faith communities, the Church was significantly involved in drafting and advocating passage of the Religious Freedom Restoration Act. It was also involved, again with many others, in the effort to pass the Religious Liberty Protection Act and in the ultimate passage of the Religious Land Use and Institutionalized Persons Act. See, e.g., *Religious Liberty Protection Act of 1998:* Hearings Before the Senate Committee on the Judiciary on S. 2148 at 6-17 (1998) (testimony of Dallin Oaks, Member, Quorum of the Twelve Apostles, Church of Jesus Christ of Latter-day Saints); *Protecting Religious Freedom After Boerne v. Flores (Part III):* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary 51-85 (1998) (testimony of Von Keetch, Counsel, The Church of Jesus Christ of Latter-day Saints); *Religious Liberty Protection Act:* Hearing on H.R. 1691 Before the Subcommittee on the Constitution of the House Committee on the Judiciary 22-54 (1999) (testimony of Von Keetch, Counsel, The Church of Jesus Christ of Latter-day Saints).

Based on direct experience in the passage of RFRA, the Church confirms that RFRA was intended to apply broadly, including to for-profit corporations. Such protections are vital to the Church and its religious mission.

The Ethics & Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 16 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as freedom of speech, religious freedom, marriage and family, the sanctity of human life, and ethics. Religious freedom is an indispensable, bedrock value for Southern Baptists. The Constitution's guarantee of freedom from governmental interference in matters of faith is a crucial protection upon which SBC members and adherents of other faith traditions depend as they follow the dictates of their conscience in the practice of their faith.

The ERLC supported passage of the Religious Freedom Restoration Act and the Religious Liberty Protection Act, legislation that this brief discusses in detail. See, e.g., *Religious Liberty Protection Act of 1998:* Hearings Before the Senate Committee on the Judiciary on S. 2148 at 17-22 (1998) (testimony of Dr. Richard Land, President, Ethics & Religious Liberty Commission of the Southern Baptist Convention); *Religious Liberty Protection Act:* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary on H.R. 1691 at 6-10 (1999) (testimony of Dr. Richard Land, President, Ethics & Religious Liberty Commission of the Southern Baptist Convention).

Based on direct experience in the passage of RFRA, the ERLC confirms that RFRA was intended to apply broadly, including to for-profit corporations. Such protections are vital to our churches and their religious mission.

The Lutheran Church – Missouri Synod ("the LCMS") is a nonprofit corporation organized under the laws of the State of Missouri. It is the second largest Lutheran denomination in North America, with approximately 6,150 member congregations which, in turn, have approximately 2,400,000 baptized members. The LCMS has a keen interest in protecting religious liberty generally, and in particular supporting the Free Exercise Clause of the First Amendment and full enforcement of the Religious Freedom Restoration Act.

Prison Fellowship Ministries is the largest prison ministry in the world, partnering with thousands of churches and tens of thousands of volunteers in caring for prisoners, ex-prisoners, and their families. Founded over 30 years ago by Chuck Colson, who served as special counsel to President Nixon and went to prison in 1975 for Watergate-related crimes, Prison Fellowship Ministries carries out its mission both in service to Jesus Christ and in contribution to restoring peace to our communities endangered by crime. As founder Chuck Colson explained, "God has given us a vision and a ministry to go to the last, the least, and the lost of our society and bring hope to them." *Foundations for Life: Prison Fellowship Annual Report 2004-2005.*

Religion has an unmistakable influence on prisoners' lives because it motivates them to make good choices that benefit themselves and our communities, bringing greater peace and security. Prison Fellowship Ministries is composed of three complementary divisions. First, the program arm of Prison Fellowship: (i) provides in-prison seminars and special events that expose prisoners to the Gospel, teach biblical values and their application, and develop leadership qualities and life skills; (ii) develops mentoring relationships that help prisoners mature through coaching and accountability; and (iii) supports released prisoners in a successful restoration to their families and society.

Justice Fellowship, the public policy and advocacy arm of Prison Fellowship Ministries, works to reform the criminal justice system based on biblical principles so communities are safer, victims are respected, and lives are restored. Finally, the Chuck Colson Center for Christian Worldview works to revive the Church and renew the culture by proclaiming truth, training Christian leaders, and catalyzing collaboration.

Prison Fellowship Ministries thus has a strong interest in the correct interpretation and application of laws such as the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA). Justice Fellowship supported RFRA's passage in Congress and proper interpretation in the courts. It also supported passage of RLUIPA and the predecessor legislation to RLUIPA, the Religious Liberty Protection Act, to protect religious liberty at the state and local level. See, e.g., *Protecting Religious Freedom After Boerne v. Flores:* Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary 3-9 (1997) (testimony of Charles Colson, President, Prison Fellowship Ministries).

World Vision, Inc. is a nonprofit Christian humanitarian organization that, for 64 years, has been dedicated to working with children, families and their communities in nearly 100 countries to reach their full potential by tackling the causes of poverty and injustice. Motivated by their faith in Jesus Christ, World Vision's employees serve alongside the poor and oppressed as a demonstration of God's unconditional love for all people. World Vision serves all people, regardless of religion, race, ethnicity or gender. World Vision has a significant stake in this case as it may affect who can invoke the Religious Freedom Restoration Act and when, if at all, that Act protects religious conscientious objection.

AMICUS
CURIAE
BRIEF

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IN THE
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KATHLEEN SEBELIUS ET AL., *Petitioners*
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP., ET AL., *Petitioners*
v.
KATHLEEN SEBELIUS, ET AL., *Respondents*

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND TENTH CIRCUITS

BRIEF OF CHURCH OF THE LUKUMI BABALU AYE, INC., THE INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., AVE MARIA UNIVERSITY, COLORADO CHRISTIAN UNIVERSITY, EAST TEXAS BAPTIST UNIVERSITY, CRESCENT FOODS, THE INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, AND THE QUEENS FEDERATION OF CHURCHES AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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INTEREST OF *AMICI CURIAE*[1]

Amici are diverse religious organizations with a common and profound interest in robust constitutional protections for the free exercise of religion. In our experience, many lower courts misapprehend and thus misapply this Court's free exercise jurisprudence, concluding that all manner of laws and regulations that should fail *Smith*'s requirements of general applicability and neutrality nevertheless get a near-automatic pass under rational basis review. Because we lack sufficient power to protect our interests in the political arena, the result is that the religious exercise of our people and faith communities is often abridged. Proper understanding and application of this Court's free exercise jurisprudence, which is addressed in this brief, is therefore essential to these *amici*. Individual statements of interest are contained in the Appendix.

SUMMARY OF THE ARGUMENT

This brief suggests a rubric or framework for applying this Court's established Free Exercise jurisprudence. *Smith* and *Lukumi* set a clear standard: a law will be subject to strict scrutiny unless it is both (1) "generally applicable," and (2) neutral. *Smith* announced the rule and *Lukumi* applied it, noting that the ordinances there fell "well below" the standard. Unfortunately, however, many lower courts misapprehend and thus misapply these nuanced decisions. It is not enough that a law does not target religion on its face. The Free Exercise clause is not a watered-down equal protection clause for religion.

---

[1] No counsel for a party authored this brief in whole or in part. No party, party's counsel, or other person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties' written consents to the filing of this brief are on file with the Clerk or included with this brief.

1. The framework we suggest synthesizes *Smith*, *Lukumi*, and other precedent into a comprehensive, easy-to-administer test. The framework is vital to address the Free Exercise claim directly before the Court in *Conestoga Wood Specialties Corp.* v. *Sebelius*, No. 13-354 (Sep. 19, 2013) ("*Conestoga*"), but also for the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), claims presented in both *Conestoga* and *Sebelius* v. *Hobby Lobby Stores, Inc.*, No. 13-356 (June 27, 2013) ("*Hobby Lobby*"). RFRA and Free Exercise claims pose common questions, and the Court should address these questions consistently.

There are seven independent ways that a regulation may violate *Smith's* generally applicable, religion-neutral standard. A regulation may not:

(1) provide categorical exemptions for secular conduct but not analogous religious conduct;
(2) give the government discretion to make individualized exemptions based on the reasons for the underlying conduct;

(3) be selectively enforced against religious conduct;

(4) be enacted "because of" hostility toward religion;

(5) be gerrymandered to apply almost exclusively to religious conduct;

(6) impose gratuitous restrictions on religious conduct*; or*

(7) apply differently to different types of religious conduct.

We demonstrate below that violating *any* of the seven categories will subject a religion-burdening regulation to strict scrutiny, which requires the regulation to "advance interests of the highest order" (*i.e.*, "compelling" governmental interests), and "be narrowly tailored in pursuit of those interests." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546 (1993).

2. The HHS Mandate is not generally applicable, is not neutral, and fails strict scrutiny. Among other reasons, the Mandate already categorically exempts millions of Americans, undermining the government's goals at least as much as religious conduct and conveying a value judgment in favor of the secular. The Mandate also accomplishes a religious gerrymander by treating different types of religious conduct differently.

ARGUMENT

I. A BROAD RANGE OF CASES FALL BETWEEN THE EXTREMES OF *SMITH* AND *LUKUMI*, BUT TAKEN TOGETHER THEY PROVIDE A COMPREHENSIVE FREE EXERCISE FRAMEWORK.

For more than 20 years, two cases have defined the landscape of Free Exercise jurisprudence: *Employment Division* v. *Smith*, 494 U.S. 872 (1990) and *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). *Smith* held that a law burdening religious exercise is subject to strict scrutiny unless it is both "generally applicable" and "neutral." 494 U.S. 872, 880-81 (1990). *Smith* was an easy case for this test: it involved "an across-the-board criminal prohibition" with no exceptions. 494 U.S. at 884. *Lukumi* was at the opposite end of the factual spectrum. The ordinances at issue in *Lukumi* were so riddled with exceptions that they burdened a particular religious group "but almost no others." 508 U.S. at 536.[2]

In *Lukumi*, the Court explained that it "need not define with precision the standard used to evaluate whether a prohibition is of general application" because the law at issue there "f[e]ll well below the minimum standard necessary to protect First Amendment rights." *Id.* at 543. This case presents the Court an opportunity to further explicate the neutrality necessary to protect First Amendment rights and reiterate that it meant what it said in *Smith*: only laws that are truly neutral and generally applicable escape strict scrutiny.

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[2] See *Ward* v. *Polite*, 667 F.3d 727, 740 (6th Cir. 2012) (holding that a law riddled with exceptions is "the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny").

Recently, this Court unanimously rejected the government's assertion that churches have no right to be treated more favorably under the First Amendment than labor unions. *Hosanna-Tabor Evangelical Lutheran Church & School* v. *EEOC*, 132 S.Ct. 694, 706 (2012). Such a position was "untenable" and "remarkable," the Court said, in light of the "text of the First Amendment itself, which gives special solicitude to the rights of religious organizations." *Id.*; see also *Thomas* v. *Review Board*, 450 U.S. 707, 713 (1981) (stating that the Free Exercise Clause "gives special protection to the exercise of religion"). Thus, *Hosanna-Tabor* reaffirms that the First Amendment requires more than mere equal treatment for religious exercise.

Still, many lower courts remain uncertain about when a regulation is truly neutral and generally applicable. Further guidance from this Court will be useful not only for deciding these pending cases, but to equip lower courts and litigants with much-needed coordinates to navigate the broad range of challenged laws and facts that fall somewhere between *Smith* and *Lukumi*.

We emphasize that explicating the Free Exercise framework in detail is vital here if the Court directly addresses the Free Exercise claim presented in *Conestoga*.[3] But explication is also important to resolving the RFRA claims presented in both *Conestoga* and *Hobby Lobby*. While Free Exercise and RFRA standards differ in certain respects, both address similar concepts: what constitutes religious exercise, who may engage in it, when a regulation burdens that exercise, and whether the regulation is generally applicable and neutral. Thus, what the Court says about these concepts in one context (a RFRA claim) will necessarily implicate the analysis in the other (a Free Exercise claim).[4] Prudence and consistency suggest the need for a broad-picture perspective of Free Exercise jurisprudence whenever deciding RFRA claims.

---

[3] The Third Circuit directly considered Conestoga's Free Exercise claim, *Conestoga Wood Specialties Corp.* v. *Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 383-88 (3d Cir. 2013), and petitioners have appealed that portion of the decision.

[4] Indeed, in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435-37 (2006), the Court's compelling interest RFRA analysis made numerous references to the concept of general applicability. *Id.* at 431 (indicating that the Court will look "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants"); *id.* at 435-36 (reasoning that "slippery-slope" concerns with regard to the interest in uniformity "could be invoked in response to any RFRA claim for an exception to a generally applicable law").

These *amici* set out a rubric for determining when a law is generally applicable and neutral based on this Court's jurisprudence and subsequent application of that precedent by lower courts. We then apply this rubric to the HHS Mandate at issue in these cases.

II. *SMITH* AND *LUKUMI* PROVIDE A RUBRIC FOR DETERMINING WHETHER A REGULATION IS GENERALLY APPLICABLE AND NEUTRAL.

A. *Smith* and *Lukumi* applied the same standard but dealt with facts on opposite ends of the spectrum.

Smith involved a criminal ban on possession of peyote. Two Native Americans lost their jobs and were denied unemployment benefit compensation because they violated that law as part of a religious ceremony. 494 U.S. at 874. The question before this Court was "whether that prohibition [on possession of Peyote] is permissible under the Free Exercise Clause." *Id.* at 876. The Court upheld the law as generally applicable and neutral because it was an "across-the-board," exception-less ban. *Id.* 884.

In *Lukumi*, a Santeria priest challenged four municipal ordinances that restricted the killing of animals. In a unanimous decision, the Court struck down the ordinances, holding that they were not "neutral" because they accomplished a "religious gerrymander"—that is, they were riddled with exceptions to the extent that they burdened "Santeria adherents but almost no others." 508 U.S. at 535-38. Further, the ordinances were not "generally applicable" because they failed to prohibit nonreligious killing "that endanger[ed] [the government's] interests in a similar or greater degree" than Santeria sacrifice did. *Id.* at 543-44.

Although some view *Lukumi* as an exception to *Smith* that applies only when the government targets a minority religion, that is not the case. *Lukumi* and *Smith* apply the same standard: a law will be subject to strict scrutiny if it is *either* (1) not "generally applicable," or (2) not neutral—both of which can occur even when there is no explicit governmental targeting of religion on the face of the statute. *Smith* and *Lukumi* merely represent easy cases on opposite ends of a factual spectrum: a quintessential blanket criminal prohibition is clearly generally applicable *and* neutral, while a religious gerrymander that targets religious adherents is clearly *neither* generally applicable *nor* neutral.

While *Smith* was the first case to clearly articulate the "[g]enerally applicable, religion-neutral" standard within the context of the Free Exercise Clause, 494 U.S. at 866 n.3, this standard is not inconsistent with pre-*Smith* Free Exercise jurisprudence. *Smith* did not overturn a single case. Indeed, *Smith* actually reaffirmed earlier precedent applying strict scrutiny to laws that were not targeted against religion. To be sure, this Court said in *Smith* that laws that target religion would "doubtless be unconstitutional," *id.* at 877, but that is a far cry from saying *only* such laws are unconstitutional.

For example, *Smith* reinforced *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981), cases where the Court had struck down an unemployment compensation statute that burdened employees who refused work that conflicted with their religious beliefs, even though the Court recognized that the law did not "single[] out for disqualification only those persons who are unavailable for work on religious grounds." *Sherbert*, 374 U.S. at 416. *Smith* explained that despite the lack of religious targeting, the laws at issue in *Sherbert* and *Thomas* were not neutral and generally applicable because "[t]he statutory conditions * * * provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work" and the "'good cause' standard created a mechanism for individualized exemptions." *Smith*, 494 U.S. at 884 (quoting *Bowen* v. *Roy*, 476 U.S. 693, 708 (1986) (plurality opinion)). The Court reasoned that its "decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.* [5]

Then, in ***Lukumi***, the Court expounded upon the "neutral" and "generally applicable" standard. The Court unanimously struck down four city ordinances that restricted the killing of animals only when the killing took place as a part of a ritual or ceremony, and was not for the primary purpose of consumption. See 508 U.S. at 536-37. The Court explained that the design of the laws was "an impermissible attempt to target [the Santeria] and their religious practices" because they burdened "Santeria adherents but almost no others." *Id.* at 536. Importantly, the Court identified *Lukumi* as an extreme case, emphasizing that since these ordinances fell "*well below* the minimum standard necessary to protect First Amendment rights," it "***need not define with precision the standard used to evaluate whether a prohibition is of general application***." *Id.* at 543 (emphasis added). Thus, the Court indicated that there was room between *Smith* and *Lukumi* for a law to be considered not neutral and not generally applicable, even where it did not specifically target religion.

Properly read, *Smith* and *Lukumi* set out a rubric for deciding Free Exercise claims that is somewhat obscured by their "easy" facts. We next explore the space between *Smith* and *Lukumi* in greater detail and set forth that Free Exercise rubric, which courts can use to evaluate cases that, like this one, fall somewhere in between.[6]

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[5] The *Smith* opinion, and the *Sherbert* holding as reinterpreted in *Smith*, are both inconsistent with reading *Lukumi* as merely a unique exception to the general rule. *Smith* characterized the South Carolina law at issue in *Sherbert* as having "at least some" exceptions. *Smith*, 494 U.S. at 884.

B. Seven principles define the *Smith-Lukumi* standard.

Smith, *Lukumi*, pre-*Smith* precedent, and lower court decisions identify seven independent ways that the government may depart from the "[g]enerally applicable, religion-neutral" standard. We propose that a regulation violates this standard and will trigger strict scrutiny if the regulation:

(1) provides categorical exemptions for secular conduct but not analogous religious conduct;

(2) gives the government discretion to make individualized exemptions based on the reasons for the underlying conduct;

(3) is selectively enforced against religious conduct;

(4) is enacted "because of" hostility toward religion;

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[6] Indeed, since *Smith* and *Lukumi* lower courts have applied strict scrutiny to laws that they concluded were either not neutral or not generally applicable, even though the facts were "a very far cry from *Lukumi*." Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 35 (2000) (analyzing cases).

(5) is gerrymandered to apply almost exclusively to religious conduct;
(6) imposes gratuitous restrictions on religious conduct; *or*
(7) applies differently to different types of religious conduct.

As noted, this rubric encompasses *Smith*'s and *Lukumi's* two broad themes: the first three categories go to general applicability, which focuses on "unequal treatment"; the second four go to neutrality, which focuses on the "object or purpose of [the] law." *Lukumi*, 508 U.S. at 533, 542.

As then-Judge Alito articulated,

> A law [fails the *neutrality* requirement] if it * * * target[s] religiously motivated conduct either on its face or as applied in practice. A law fails the *general applicability* requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.

Blackhawk v. *Pennsylvania*, 381 F.3d 202, 209 (3rd Cir. 2004) (emphasis added) (citations omitted).

Importantly, each of these categories is independently sufficient to trigger strict scrutiny on its own.[7] Although many of the categories were arguably present in *Lukumi*, as noted earlier, the Court made clear that the regulations there fell "*well below* the minimum standard necessary to protect First Amendment rights." *Lukumi*, 508 U.S. at 533. The Court also acknowledged that a government regulation can fail to be generally applicable or neutral in "many ways." *Id.* at 543.

We discuss each category in turn and then apply the rubric to the present cases to show that heightened scrutiny applies to the HHS Mandate. Ultimately, however, our purpose is larger than just getting the right decision in the present cases. We urge the Court to confirm this framework so that lower courts will understand that *Smith* meant what it said—a law must be truly neutral and generally applicable to escape strict scrutiny—and that *Lukumi* did not set a baseline but was, rather, an extreme example of a law that fell "well below" *Smith*'s requirements.

C. Under *Smith* and *Lukumi*, a religion-burdening law is not generally applicable if it (1) categorically exempts analogous secular conduct, (2) provides for individualized

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[7] These categories do, however, contain some overlapping concepts. As *Lukumi* recognized: "Neutrality and general applicability are interrelated, and * * * failure to satisfy one requirement is a likely indication that the other has not been satisfied." 508 U.S. at 531.

assessments, or (3) is selectively enforced.

1. First, a regulation is not generally applicable when it "creates a categorical exemption" for secular conduct that undermines the government's interest in enacting the regulation but does not exempt analogous religious conduct. "Categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Lukumi*, 508 U.S. at 542. At a minimum, religious conduct must be treated as favorably as similar secular conduct. *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1234 (11th Cir. 2004); see also *Lukumi*, 508 U.S. at 542 ("The Free Exercise Clause protect[s] religious observers against unequal treatment." (internal quotation marks omitted)); *Smith*, 494 U.S. at 884 (a law is not generally applicable if "the reasons for the relevant conduct" determine whether the law has been violated).

For example, the ordinances in *Lukumi* prohibiting animal slaughter were ostensibly enacted to protect public health and prevent animal cruelty, but "fail[ed] to prohibit nonreligious conduct that endanger[ed] these interests in a similar or greater degree than Santeria sacrifice d[id]." 508 U.S. at 543. Because they expressly exempted many types of animal killing—hunting, fishing, euthanasia of excess animals, and the eradication of pests[8]—the ordinances were not generally applicable. *Id.* at 543-44. They represented "a prohibition that society [wa]s prepared to impose upon [the religious] but not upon itself," which is the "precise evil [that] the requirement of general applicability is designed to prevent." *Lukumi*, 508 U.S. at 545-46 (quoting *Fla. Star* v. *B.J.F.*, 491 U.S. 524, 542 (1989) (Scalia, J., concurring)).

Even a single secular exemption triggers heightened scrutiny when it undermines the State's alleged interest in enacting the regulation. Indeed, numerous lower courts have held that categorical exemptions rendered a law not generally applicable when the exemptions were far less sweeping than *Lukumi*'s.[9]

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[8] The city argued that "it is 'self-evident' that killing animals for food is 'important'; the eradication of insects and pests is 'obviously justified'; and the euthanasia of excess animals 'makes sense.'" *Lukumi*, 508 U.S. at 544. The secular exemptions may be important to the statutory scheme, but the financial hardship they shield is not constitutionally protected. The free exercise of religion is.

[9] *Canyon Ferry Rd. Baptist Church of E. Helena, Inc.* v. *Unsworth*, 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (campaign finance requirements exempted media organizations but not churches); *Blackhawk*, 381 F.3d at 211 (wildlife-permitting fee exempted zoos, circuses, and hardship but applied to Native American owning bear for religious purposes); *Midrash*, 366 F.3d at 1233 (retail-friendly zoning ordinance exempted lodges and private clubs, but not churches and synagogues); *Mitchell County* v. *Zimmerman*, 810 N.W.2d 1 (Iowa 2012) (prohibition on steel protuberances on wheels exempted school buses but applied to Mennonite tractors).

As just one example, in *Fraternal Order of Police* v. *City of Newark,*170 F.3d 359 (3d Cir. 1999), a Third Circuit decision written by then-Judge Alito, a police department adopted a policy prohibiting officers from growing beards in the interest of promoting "uniform appearance." 170 F.3d at 366. That policy had two exceptions: one for undercover officers and another for beards grown for medical reasons. *Id.* The Third Circuit held that the undercover officer exemption did not trigger strict scrutiny because it "d[id] not undermine the Department's interest in uniformity [of appearance]," but also held that the exemption for medical reasons did trigger strict scrutiny because it undermined the interest in uniformity just as much as a religious exemption would. *Id.* Thus, even though the law still applied to a wide array of secular motivations for a wearing a beard—fashion, personal preference, or convenience—the court concluded that the law was not generally applicable because of a single, categorical exemption that treated religious conduct unfavorably when compared to analogous secular conduct. *Id.*

These cases illustrate that the categorical exemptions doctrine is rooted in two concerns. First, selectively granting a secular but not a religious exemption represents a "value judgment" against religious conduct, even if that value judgment isn't explicit or rooted in discriminatory animus.[10] *Newark*, 170 F.3d at 366; see also *Lukumi*, 508 U.S. at 537 (indicating that the numerous exemptions "devalue[] religious reasons for killing by judging them to be of lesser import than nonreligious reasons"). Second, *Smith* presumes that religious individuals can be protected through "the political process." *Smith*, 494 U.S. at 890. Although a small religious minority will be unable to defeat a regulation on its own, when that regulation is generally applicable more powerful interests that are burdened by it may oppose it, providing vicarious protection for the religious minority. If, however, the government can make selective exemptions for powerful political groups, the "vicarious political protection [for religious minorities] breaks down * * * leaving a law applicable only to small religions with unusual practices." Douglas Laycock, *The Supreme*

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[10] It does not matter why some secular conduct has been favored; absent compelling reasons, religiously motivated conduct must be treated as favorably as the favored secular conduct. *Shrum* v. *City of Coweta*, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (McConnell, J.) ("[T]he Free Exercise Clause has been applied numerous times when government officials interfered with religious exercise not out of hostility or prejudice, but for secular reasons, such as saving money * * *."). Even good faith exemptions trigger strict scrutiny; exemptions that result in unequal treatment of religious and secular conduct make the law not generally applicable, no matter whether the inequality was "because of" religion, or targeted "against" religion. See Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 204 (2005).

Court and Religious Liberty, 40 CATH. LAW 25, 36 (2001).

2. A second way that a regulation can fail general applicability is if it gives the government discretion to make "individualized," case-by-case exemptions based on "the reasons for the [underlying] conduct." *Smith*, 494 U.S. at 884; see *Blackhawk*, 381 F.3d at 211.

This is largely what *Sherbert* stands for after *Smith*. *Sherbert* struck down a state law that denied unemployment benefits to any person who refused a job "without good cause." 374 U.S. at 401. As the Court explained in *Smith*, this triggered strict scrutiny because "good cause" created a mechanism for "individualized exemptions" based on an "individualized governmental assessment of the reasons for the relevant conduct" and "consideration of the particular circumstances" of personal hardship. 494 U.S. at 884.

The Court applied the same principle in *Lukumi* where the city ordinances prohibiting "unnecessary" killing of animals, which created considerable discretion. 508 U.S. at 537. The Court held that "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

Lower courts have also applied the doctrine of individualized exemptions. For example, *Blackhawk* v. *Pennsylvania*, 381 F.3d 202 (Alito, J.), confronted an animal-keeping law with an exemption that permitted fee waivers for "hardship or extraordinary circumstance" so long as the conduct was "consistent with sound game or wildlife management," *id.* at 211. The Court held that the law was not generally applicable because such "open-ended" exemption language gave government officials considerable discretion in granting the exemption, to the possible detriment of Native Americans owning bears for religious purposes. *Id.* at 205, 209-10.

The rationale behind the individualized exemptions doctrine is simple. When the government applies an "across-the-board" prohibition, as in *Smith*, there is little risk that it is discriminating against religious conduct. 494 U.S. at 884. But when an open-ended law grants government officials discretion to exempt conduct on an individualized, case-by-case basis, this "provides an opportunity for the decision maker to decide that secular motivations are more important than religious motivations and thus to give disparate treatment to cases that are otherwise comparable." *Blackhawk*, 381 F.3d at 209 (citing *Smith*); see also *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply the legislation and thus to escape the political retribution that might be visited upon them if large numbers were affected."). The risk that such discriminatory treatment might occur warrants application of heightened scrutiny. *Id.*

3. A third, independent way to show that a law is not generally applicable is to demonstrate that it has "been enforced in a discriminatory manner," such that religious and secular conduct are unequally treated in a way not reflected in the text of the regulation. *Blackhawk*, 381 F.3d at 209 (Alito, J.); see *Lukumi*, 508 U.S. at 534 (rejecting the contention that judicial "inquiry must end with the text of the law at issue").[11]

A leading example of selective enforcement is the Third Circuit's decision in *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002). In *Tenafly*, an ordinance banned signs or advertisements from public utility poles, without any exemption in the text. *Id.* at 151. In practice, however, there was an unwritten policy of non-enforcement against house numbers, lost animal signs, directional signs, and even Christmas displays. *Id.* But the town did enforce the ordinance against Orthodox Jewish *lechis*, which are thin black strips of plastic marking the area within which Orthodox Jews can carry objects on the Sabbath. *Id.* at 151-53. The Third Circuit held that "selective, discriminatory application" of the ordinance "'devalue[d]' Orthodox Jewish reasons for posting items on utility poles by 'judging them to be of lesser import than nonreligious reasons.'" *Id.* at 168 (quoting *Lukumi*, 508 U.S. at 537-38).

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[11] "Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373–74 (1886); see also *Wayte* v. *United States*, 470 U.S. 598, 608 (1985) (stating that a decision to prosecute a law may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification").

In some cases of selective enforcement the statute may already have explicit exemptions, and then also not be enforced in additional scenarios. For example, in *Rader* v. *Johnston*, 924 F.Supp. 1540, 1546 (D. Neb. 1996), a school had a formal policy with specific categorical exemptions but then also "grant[ed] exceptions to the policy, at their discretion, in a broad range of circumstances not enumerated in the rule and not well defined or limited." *Id.*. at 1552. Such selective enforcement independently warrants strict scrutiny. See *id.* at 1552-53; *Alpha Delta Chi-Delta* v. *Reed*, 648 F.3d 790, 804-05 (9th Cir. 2011) (holding that strict scrutiny would apply if a policy was applied selectively against religious groups in practice).

The rationale for the doctrine of selective enforcement is also obvious: The government cannot be permitted to write incomplete rules that leave accepted understandings unstated.[12] Otherwise it could easily treat religious and secular practices unequally without being subject to heightened scrutiny. See *Lukumi*, 508 U.S. at 534 ("The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause forbids * * * covert suppression of particular religious beliefs." (internal quotation marks and citations omitted)).

D. Under *Smith* and *Lukumi*, a religion-burdening law is not neutral if it (1) was adopted "because of" religious conduct, (2) accomplishes a "religious gerrymander," (3) imposes gratuitous restrictions on religious conduct; or (4) treats different religious groups differently.

In addition to general applicability, a regulation may also be subject to strict scrutiny if it is not neutral. A law fails neutrality if it "target[s] religiously motivated conduct either on its face or as applied in practice." *Blackhawk*, 381 F.3d at 209.

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[12] In a sense, the doctrine of selective enforcement is an extension of the individualized exemption doctrine. As the Tenth Circuit has indicated, a "'system of individualized exemptions' need not be [contained in] a written policy, but rather the plaintiff may show a pattern of ad hoc discretionary decisions amounting to a 'system.'" *Axson-Flynn* v. *Johnson*, 356 F.3d 1277, 1298-99 (10th Cir. 2004). In that case, the plaintiff had argued that the government's willingness to grant an ad hoc exemption from a school policy to one student but not the other meant the rule was not generally applicable. *Id.*

1. One way to show that a regulation is not neutral is to demonstrate that it was "enacted 'because of', not merely 'in spite of,' [its] suppression of [religious conduct]." *Lukumi*, 506 U.S. at 540 (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 265, 279 (1979)). A regulation enacted with an anti-religious motive is the epitome of a law that is not neutral.[13] *Id.* at 532 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.").

When determining motive, "[n]o inquiry into legislative purpose is necessary when [religious targeting] appears on the face of the statute." *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993). But if the face of the statute is neutral then the purpose of the regulation may be determined "from both direct and circumstantial evidence." *Lukumi*, 508 U.S. at 540.[14]

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[13] We reiterate that improper motive is only one way to show that a law is not neutral; it is *sufficient* to show lack of neutrality, but not necessary. See *Tenafly*, 309 F.3d at 168 n. 30 (noting that it is not "necessary to consider the subjective motivations" of those who enacted the regulation because discriminatory purpose can be "inferred * * * from the objective effects of the selective exemptions at issue without examining the responsible officials' motives"); *Shrum*, 449 F.3d at 1145 (McConnell, J.) ("Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus."). Indeed, although nine justices held the *Lukumi* ordinances unconstitutional, only two justices found or considered bad motive. 508 U.S. at 540-42 (Kennedy, J.).

2. A second way to show that a law is not neutral is to demonstrate that it is crafted or "gerrymander[ed]" to apply to religious conduct. *Lukumi*, 508 U.S. at 532-40, 543. Rather than focusing on the legislative purpose of the regulation—*i.e.*, whether there is evidence of *discriminatory intent*—the focus of a religious gerrymander inquiry is the *discriminatory effect* of the regulation. See *Lukumi*, 508 U.S. at 535 (noting "the effect of a law in its real operation is strong evidence of its object").[15]

Borrowing from equal protection analysis, which is where the principle of "religious gerrymander" derived, see *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 696 (1970), the question becomes whether the facially neutral regulation is "unexplainable on grounds other than [targeting religion]" because the effect is so "extremely irregular" or "bizarre." *Shaw*, 509 U.S. at 642-44 (internal quotation marks omitted).[16] In undertaking this inquiry, the effect of the regulation should be assessed to determine whether it is over or underinclusive relative to its stated purpose.

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[14] This portion of Kennedy's opinion in *Lukumi* did not receive majority support. Only two of the justices relied on the historical background to determine the purpose for the regulations. *Id.* at 540-42. However, every circuit to address the issue has found it permissible to consider the historical background of a law in a Free Exercise challenge. See, e.g., *St. John's United Church of Christ* v. *City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007); *Wirzburger* v. *Galvin*, 412 F.3d 271, 281-82 (1st Cir. 2005).

[15] See also *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 307 n.21 (2000) ("Even if the plain language of the [regulation is] facially neutral * * * a State [cannot] hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." (internal quotation marks omitted)). This Court's Voting Rights Acts cases, which discuss gerrymanders within the context of equal protection analysis, indicate that discriminatory effects can be evidence of discriminatory intent. See, e.g., *Shaw*, 509 U.S. at 642-44; *Davis* v. *Bandemer*, 478 U.S. 109, 127 (1986).

For example, in *Lukumi* the Court found that the effect of the ordinances was underinclusive: while generally prohibiting "unnecessarily * * * kill[ing] any animal," in practice, "the interpretation given to the [regulation] by [the government]" deemed killings for non-religious reasons to be necessary, such that they "f[e]ll outside the prohibition." 508 U.S. at 537. Moreover, they generally "fail[ed] to prohibit nonreligious conduct that endanger[ed] the[purposes of the ordinances] in a similar or greater degree than Santeria sacrifice d[id]." *Id.* at 544. In addition, the ordinances were overinclusive in that they "prohibit[ed] Santeria sacrifice even when it d[id] not threaten the city's interest in the public health," thus "proscrib[ing] more religious conduct than [wa]s necessary to achieve their stated ends." *Id.* at 538-39. The sum effect was that "the burden of the ordinance[s], in practical terms, f[ell] on Santeria adherents but *almost* no others," a clear discriminatory effect. 508 U.S. at 536 (emphasis added).

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[16] See *Hunt* v. *Cromartie*, 526 U.S. 541, 555 (1999) (Stevens, J., concurring in the judgment) ("[B]izarre configuration is the traditional hallmark of a * * * gerrymander."); see also *Am. Family Ass'n, Inc.* v. *F.C.C.*, 365 F.3d 1156, 1170 (D.C. Cir. 2004) ("The unconstitutional [religious] gerrymander occurs when the bounds of legislation, like those of a gerrymandered political district, are artfully drawn to exclude the disfavored category–in this case, religious institutions.").

Other courts have similarly found religious gerrymandering or targeting when the effect of the regulation was such that it was unexplainable on grounds other than a motive to target religion, because it was overinclusive and underinclusive.[17]

3. A third related way to show that a regulation is not neutral is if it imposes "gratuitous restrictions" on religious conduct. *McGowan* v. *Maryland*, 366 U.S. 420, 520 (1961). Although an extension of the concept of overinclusiveness, this point warrants independent consideration.

In *Lukumi*, for example, the Court found "significant evidence of the ordinances' improper targeting of Santeria sacrifice in the fact that they proscribe more religious conduct than is necessary to achieve their stated ends." *Lukumi*, 508 U.S. at 538. The Court explained that the government's interests could have been addressed through narrower restrictions rather than a "flat prohibition" that unnecessarily criminalized religious sacrifice "even when it d[id] not threaten the city's interest in the public health." *Id.* at 538-39.

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[17] See, *e.g.*, *Midrash*, 366 F.3d at 1233-34 (holding that a regulation limiting a business district to venues providing for shopping and commercial services "improperly targeted religious assemblies" because it was "overinclusive" since "synagogues contribute to retail and commercial activity," and was also "underinclusive" since it exempted private clubs that were not "carried on as a business").

Failure to use narrower means fatally undermines the government's claims of neutrality. When such "gratuitous restrictions" are imposed on religious conduct it is "reasonable to infer . . . [that the law] seeks not to effectuate the stated governmental interests, but to suppress the conduct because of its religious motivation." *Id.* at 538; see also *Midrash*, 366 F.3d at 1233-34.

4. Finally, a law is not neutral if it applies differently to different types of religious conduct, such that it selectively benefits or burdens certain religions. "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 536.

Although exempting (and thereby benefitting) the religious conduct of some, but not others, hearkens to the principle of unequal treatment that is encompassed within the generally applicable requirement,[18] differential treatment of religious conduct is also relevant to neutrality.[19] That is because when exemptions are only granted to some religions, it is "evidence that the legitimate secular purposes underlying the [regulation] have been abandoned" since the regulation "favors [some] religions over [others]." *Booth* v. *Maryland*, 327 F.3d 377, 381 (4th Cir. 2003). Presaging *Smith*, in *Bowen* v. *Roy*, 476 U.S. 693, this Court indicated that while governmental action is entitled to "substantial deference" when the government chooses to "treat all * * * alike" because it cannot be accused of "favoring" certain conduct, if a law selectively exempts some religious conduct, "its refusal to extend an exemption to an[other] instance of religious hardship suggests a discriminatory intent." *Id.* at 708.

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[18] *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432-37 (2006) (requiring exemption under RFRA

For example, in *Lukumi*, the ordinances exempted kosher slaughter (thereby benefitting Jewish conduct), while almost exclusively burdening Santeria sacrifice. *Id.* Although the Court noted that this "differential treatment of two religions," could constitute "an independent constitutional violation," *id.*, the Court stated that it was declining to decide that issue because it "suffice[d] to recite [differential

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for one religion where exemption had already been granted for another and the Act contemplated exemptions).

[19] In any event, it is of no consequence whether this principle is classified under neutrality or general applicability because a failure to meet either requirement triggers strict scrutiny. And as *Lukumi* recognized: "Neutrality and general applicability are interrelated, and * * * failure to satisfy one requirement is a likely indication that the other has not been satisfied." 508 U.S. at 531.

treatment] as support for [its] conclusion" that the city was targeting the Santeria religion.

Similarly, in *Booth* v. *Maryland*, 327 F.3d 377, a State correctional officer challenged the State's dress code and grooming policy that prohibited him from wearing Rastafarian dreadlocks. He presented evidence that despite the policy the State allowed a Jewish employee to wear peyos (long sideburns) and a Sikh employee to wear a turban and long beard, and argued that the "failure to consistently enforce its policy demonstrates that the [State's] stated legitimate reasons are not their real reasons for the policy, but are only pretext for their discrimination against him." *Id.* at 380-81. The Fourth Circuit held that the officer had "presented at least some evidence" that "the legitimate secular purposes underlying the policy ha[d] been abandoned," such that it violated his right to Free Exercise. *Id.*

Other Supreme Court and circuit cases have similarly struck down laws that exempted certain religions, but not others, on the basis of neutrality principles.[20] Indeed, concerns about differential treatment of religion within a regulation are closely related to Establishment Clause claims, which focus on neutrality.[21]

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[20] See, *e.g.*, *Fowler* v. *Rhode Island*, 345 U.S. 67, 69 (1953) (holding that a city that enforced an ordinance banning meetings in park against Jehovah's Witnesses but permitted Catholics and Protestants to hold services violated Free Exercise because its conduct "amount[ed] to preferring some religious groups over [the Jehovah's Witnesses]"); see also *Tenafly*, 309 F.3d at 151-52, 167 (holding that the law was not neutral where the government "granted exemptions from the ordinance's unyielding language for various secular and

Whether related to an Establishment Clause or Free Exercise claim or both,[22] neutrality requires that "religious adherents and institutions [are]

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religious" purposes, including the use of poles for Christmas displays, but "never Orthodox Jewish[] purposes").

[21] As the Court stated in *McCreary Cnty., Ky.* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005), "the Framers intended the Establishment Clause to require governmental neutrality in matters of religion," including the well-known principle that "the government may not favor one religion over another," *id.* at 875, 878. For example, in *Larson* v. *Valente*, 456 U.S. 228 (1982), the Court struck down registration and reporting requirements that benefitted "well-established churches that ha[d] achieved strong but not total financial support from their members," but disadvantaged "churches which are new and lacking in a constituency," *id.* at 246 & n.23 (internal quotation marks omitted). The Court explained that these "explicit and deliberate distinctions between religious organizations" showed "favoritism," violated the principle of "denominational neutrality," and ran contrary to "[t]he clearest command of the Establishment Clause * * * that one religious denomination cannot be officially preferred over another." *Id.* at 244.

[22] Although not before the Court in this appeal, when differential treatment of religion is involved there may also be an Establishment Clause claim. Where there is both a Free Exercise Claim and an Establishment Clause Claim this falls under *Smith*'s hybrid rights exception, which holds that a generally applicable and neutral law is still subject to strict scrutiny when the claim involves "the Free Exercise Clause in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881; see *E.E.O.C.* v. *Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that the EEOC's violation of the Establishment Clause triggered the hybrid rights exception in *Smith*).

neither * * * denied nor granted government benefits on the basis of religion." *E. Bay Asian Local Dev. Corp.* v. *State of California*, 13 P.3d 1122, 1158 (Cal. 2000).

E. The presence of any factor showing lack of general application or neutrality subjects the regulation to strict scrutiny.

The presence of any of these seven factors for assessing general applicability and neutrality triggers strict scrutiny. Under strict scrutiny analysis, a law restrictive of religious practice must (1) "advance interests of the highest order" (*i.e.*, "compelling" governmental interests), and (2) "be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546.

This test "leaves few survivors," *City of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 455 (2002), because "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Lukumi*, 508 U.S. at 546. "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert*, 374 U.S. at 406. Moreover, the regulation must further that compelling interest through the "least restrictive means" possible. *Thomas*, 450 U.S. at 718.

This is the same analysis required by RFRA for a regulation that substantially burdens religious exercise, and is fully briefed by the parties.[23]

III. THE HHS MANDATE IS NOT GENERALLY APPLICABLE, IS NOT NEUTRAL, AND FAILS STRICT SCRUTINY.

The federal regulation at issue in this case, the HHS Mandate, violates the Free Exercise Clause because it is neither generally applicable nor neutral under *Smith* and *Lukumi*.

1. A law that burdens religious exercise is not generally applicable if it contains a secular exemption that undermines the government's alleged interest as much as a religious exemption would. *Newark*, 170 F.3d at 366. The Mandate is riddled with exemptions: it has two large secular exemptions that extend to tens of millions of Americans, as well as additional exemptions for certain types of religious conduct that do not apply to the Greens or the Hahns.

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[23] RFRA's central provision directs that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability * * * [unless] it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b) (punctuation modified).

Among the secular exemptions are the "grandfather" exemption and the "small business" exemption. "Grandfathered" plans are indefinitely excused from complying with the Mandate, so long as they do not make certain changes to their plans after the ACA's effective date. 42 U.S.C. § 18011; 45 C.F.R. § 147.140. In addition, small businesses with fewer than 50 employees are exempted from offering health insurance at all, also freeing them from the Mandate. 6 U.S.C. § 4980H(c)(2). These two exemptions alone apply to the plans of tens of millions of employees.[24]

Moreover, both the grandfather and small-business exemptions "endanger[the government's] interests in a similar or greater degree" as the Greens' and the Hahns' religiously motivated conduct. *Lukumi*, 508 U.S. at 543. The Mandate's alleged purpose is to provide equal access to preventative healthcare for women. 78 Fed. Reg. 39870-01, 39,872, 39,887 (July 2, 2013). Exempting any plan, no matter the reason, undermines this purpose because whenever a plan is exempted the recipient no longer receives preventative healthcare, thus inhibiting equal treatment. Yet, small employers are exempted, presumably because of the financial hardship the law would impose; but religious hardship is not accounted sufficient enough to warrant an exemption.

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[24] See *Hobby Lobby*, 723 F.3d at 1124; WhiteHouse.Gov, *The Affordable Care Act Increases Choice and Saving Money for Small Business* at 2, http://www.whitehouse.gov/files/documents/health_reform_for_small_businesses.pdf.

This is exactly the kind of "value judgment in favor of secular motivations, but not [certain] religious motivations" that fails general applicability. *Newark*, 170 F.3d at 366. When exemptions are granted, "the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884). Importantly, it does not matter why some secular exemption has been granted; absent compelling reasons, religiously-motivated conduct must be treated as favorably as the favored secular conduct. As in *Sherbert*, the government cannot decide that there is "good cause" to exempt secular conduct, but that a religious excuse is not good enough.[25]

2. In addition to these two secular categorical exemptions, the Mandate violates neutrality because it applies differently to different types of religious

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[25] While it is true—as *Smith* and *Lukumi* hold—that religiously neutral laws of general applicability are reviewed more deferentially, the reason for that deference is a political check that provides strong hedges against both invidious *and* gratuitous abridgments of religious freedom. But that check *only* works where a law is truly neutral and generally applicable. *Smith* and *Lukumi*—both on their own terms and in light of prior free exercise decisions that remain good law—demonstrate that true religious neutrality and general applicability are often difficult to achieve, especially where regulators flexibly accommodate diverse secular interests, such as the financial concerns of small businesses.

conduct—selectively exempting (and thereby benefitting) certain religious objectors, while burdening others. "Religious employers," for example, are wholly exempted from the mandate. See 45 C.F.R. § 147.131(a). On the other hand, objecting non-profits, which were temporarily granted a safe harbor, 78 Fed. Reg. at 39,889,[26] may only be eligible for an "accommodation" that routes objectionable coverage through their insurer or plan administrator so that the nonprofit is not required to directly contract, arrange, or pay for such coverage, 78 Fed. Reg. at 39,874-79. Finally, for-profit religious objectors, like Hobby Lobby and Conestoga receive no exemption or accommodation at all. This violates the "minimum requirement of neutrality," which is that a regulation must not "discriminate on its face." *Lukumi*, 508 U.S. at 533.

Moreover, exempting only "religious employers" that are non-profit churches or their integrated auxiliaries, see 45 C.F.R. § 147.131(a),[27] may favor well-established, hierarchical churches that have the structures, funding, and adherents necessary to set up this type of religious employment within the church organization. Such a definition of religious employment discriminates among religious organizations based on their structure and belief. Such matters are outside the authority of the government. See *Hosanna-Tabor*, 132 S.Ct. at 704 (the First Amendment gives churches "'power to decide for themselves, free from state interference matters of church government as well as those of faith and doctrine'" (quoting *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)). Favoritism defeats the requirement of general applicability *and* neutrality.

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[26] This safe harbor that the government extended to nonprofits, first until August 2013 and then into January 2014, see 78 Fed. Reg. at 39,889, represents a measure of selective enforcement by the government, however temporary. *Tenafly*, 309 F.3d at 168.

[27] HHS regulations currently define "religious employer" as an organization that is a nonprofit organization as described in the Internal Revenue Code provision that refers to churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order. See 45 C.F.R. § 147.131(a).

In sum, selectively exempting some religious conduct while "refus[ing] to extend an exemption to an[other] instance of religious hardship suggests a discriminatory intent." *Bowen*, 476 U.S. at 708.

3. Further, the Mandate is not neutral because it accomplishes a "religious gerrymander." As result of the extensive exemptions granted to small businesses, grandfathered plans, certain religious employers, and non-profits, up to 100 million people or more[28] have plans that are exempt from the Mandate in one fashion or another, making the mandate "substantial[ly]" underinclusive. *Lukumi*, 508 U.S. at 543. The Mandate is also overinclusive to

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[28] See *Hobby Lobby*, 723 F.3d at 1124.

the extent that it requires religious for-profit employers to pay for plans that include preventative coverage for women who have no intention of using it because this would be against *their* religion.[29] If the services go unused, requiring employers to pay for these plans does not further the purpose of improving women's health.

While Hobby Lobby, Conestoga, and other similarly situated employers with religious objections are far from being the only (or even the "almost" only) employers subject to the ban, it is still telling that such a high amount of secular and religious conduct is exempted from the Mandate. Since regulators obviously were not concerned that exempting thousands of other employers (*i.e.*, grandfathered employers, small businesses, and religious employers) would defeat the purpose of the Mandate, then it is not clear why for-profit religious objectors could not be similarly exempted. The government has offered no explanation for why this particular conduct is any more threatening to the purposes of the law. This smacks of a religious gerrymander targeted toward for-profit conscientious objectors.

Exempting for-profit religious employers would not undermine the purpose of the Mandate any more than the exemptions the government has already granted. Indeed, businesses with fewer than 50 employees do not have to provide insurance to their employees at all. Hobby Lobby does not object to providing birth control, but only to certain types of birth control.

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[29] Indeed, religious-conscious employers like Hobby Lobby and Conestoga seem particularly likely to have employees that share their values and would not use preventative services. 78 Fed. Reg. at 39,874.

4. Finally, relatedly, the Mandate imposes a gratuitous restriction on for-profit religious employers like Hobby Lobby and Conestoga by forcing them to pay for religiously-objectionable abortifacients. Thus, the mandate "proscribe[s] more religious conduct than it necessary to achieve [its] stated ends." *Lukumi*, 508 U.S. at 538.

5. If only one of these categories from *Smith* and *Lukumi* is present, a case warrants strict scrutiny.[30] Here, the Mandate falls into several categories that defeat any claim that it is neutral and generally applicable. Like *Lukumi*, it falls "well below" the "across-the-board" criminal prohibition at issue in *Smith*. Thus, it should be subject to strict scrutiny.

We refer to the parties' briefs for their further application of this Court's strict scrutiny test. As Conestoga has already said, "[t]he interests of 'equality' and 'health' [that the Mandate] ostensibly furthers are generic, inconsistently pursued, and unsupported by evidence showing the Mandate [promotes] them to a compelling degree. And the government could use[] less restrictive means to achieve those ends because it already pursues such means extensively." *Id.*

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[30] We acknowledge that some of the factors apply better in this case than others, but that is of no consequence because any one of the problems listed in the rubric triggers heightened scrutiny. Indeed, the massive categorical exemptions alone are sufficient to require strict scrutiny.

CONCLUSION

For the foregoing reasons, the Court should uphold the judgment in *Hobby Lobby* and reverse the judgment in *Conestoga.*

Respectfully submitted,

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January 28, 2014

APPENDIX

APPENDIX

DETAILED STATEMENTS OF INTEREST OF *AMICI CURIAE*

The **Church of the Lukumi Babalu Aye, Inc.**, is a religious organization that has been subjected to discrimination in the United States and has sought judicial relief based on the Free Exercise Clause. *Amicus* has successfully pressed before the Supreme Court its constitutional rights to engage in religious practice. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Because *Amicus* is a religious minority in the United States who often relies on courts to protect its rights, it submits this brief to emphasize and explain the importance of considering all available evidence when evaluating whether a facially neutral law is truly neutral and generally applicable.

The **International Society for Krishna Consciousness, Inc.** ("ISKCON") is a monotheistic, or Vaishnava, tradition within the broad umbrella of Hindu culture and faith. There are approximately 500 ISKCON temples worldwide, including 50 in the United States. As a religious organization, ISKCON has been subjected to discrimination in the United States and has sought judicial relief based on the Free Exercise Clause. *Amicus* has successfully pressed before the Supreme Court its constitutional rights to engage in religious practice. See *Lee* v. *Int'l*

Soc. for Krishna Consciousness, Inc., 505 U.S. 830 (1992) (per curiam). Because *Amicus* is a religious minority in the United States who often relies on courts to protect its rights, it submits this brief to emphasize and explain the importance of considering all available evidence when evaluating whether a facially neutral law is truly neutral and generally applicable.

Ave Maria University ("AMU") was founded in 2003 in fidelity to Christ and His Church in response to the call of Vatican II for greater lay witness in contemporary society, and exists to further teaching, research, and learning at the undergraduate and graduate levels in the abiding tradition of Catholic thought in both national and international settings. AMU is vitally interested in the protection of the principle and practice of religious liberty as manifest in the present action.

Colorado Christian University ("CCU") is an interdenominational evangelical university located in Lakewood, Colorado. The essence of CCU is its distinctive integration of academic achievement, character development, and spiritual formation which prepares CCU graduates to honor God and impact the world with their lives. CCU serves more than 5000 students on campus, online and at five regional centers in Colorado.

East Texas Baptist University (ETBU) is a Christian liberal arts university located in Marshall, Texas. Established in 1912, ETBU is committed to offering a complete education that develops students spiritually, intellectually, and professionally. The University has more than 1,290 graduate and undergraduate students. Faith is central to the educational mission of ETBU. ETBU describes itself as providing "academic excellence while integrating faith with learning," and commits, in its mission, to "Christian stewardship and to providing and maintaining and environment conducive to learning, leadership development, and academic excellence." Consistent with its mission, ETBU works to manifest its Christian faith in all aspects of its operations.

Crescent Foods is a Halal poultry manufacturer, which has supplied Halal chicken to the American market for almost 19 years. Its business model incorporates its religious beliefs and is exhibited throughout the company. A Halal product must be slaughtered by Muslims in order to be Halal, which means "permitted." The product must be handled in a facility where no pork or alcohol may ever be brought in and is monitored by the USDA. *Amicus* never funds the expansion of the business with interest bearing loans, as it is against Islamic and Halal beliefs. It provides jobs for over 80 families. *Amicus* is very keen on the protection of religious values through the practice of religious liberty, as manifest in the present action.

The **Institutional Religious Freedom Alliance** ("IRFA"), founded in 2008, works to protect the religious freedom of faith-based service organizations, acting through a multi-faith network of organizations to educate the public, train organizations and their lawyers, create policy alternatives that better protect religious freedom, and advocate to the federal administration and Congress on behalf of the rights of such faith-based services.

The **Queens Federation of Churches** (the "Federation") was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of an equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian denomination and many independent congregations participate in the Federation's ministry. The Federation and its member congregations are vitally concerned for the protection of the principle and practice of religious liberty as manifest in the present action.

AMICUS
CURIAE
BRIEF

RECORD
AND
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HUMAN SERVICES, ET AL.,
Petitioners ,
v.
HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL.,
Respondents.

On Writs of Certiorari to the U.S. Courts of Appeals for the Tenth and Third Circuits

Brief of Constitutional Accountability Center as *Amicus Curiae* in Support of the Government

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INTEREST OF AMICUS CURIAE[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees.

CAC has published scholarship and filed *amicus* briefs demonstrating the ways in which corporations and living, breathing persons have been treated differently throughout our nation's history when it comes to constitutional rights and liberties, including in *Citizens United v. FEC*, 558 U.S. 310 (2010) and in *FCC v. AT&T*, 131 S. Ct. 1177 (2011). The Center has an interest in ensuring that these rights are protected for "We the People," while preserving the government's legitimate interest in regulating corporations.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

INRODUCTION AND SUMMARY OF ARGUMENT

Regulations implementing the Patient Protection and Affordable Care Act ("ACA" or "the Act") provide, among other things, that in order to promote women's health, employers' health insurance plans must cover preventive care and screening for women, including all FDA-approved contraceptives. *See* U.S. Br., No. 13-354, at 3-8; *see also* Pet., No. 13-354, at 5-9. Federal law imposes this obligation directly on corporate employers and, in the event of non-compliance, imposes civil penalties only on those employers; it imposes no obligations on the individual owners of those corporations. It also exempts entirely from this requirement religious employers, such as churches and their affiliates. *See* U.S. Br., No. 13-354, at 3-8.

Respondent Hobby Lobby Stores, Inc. is a for-profit, secular corporation that operates more than 500 arts-and-crafts stores employing approximately 13,000 full-time employees nationwide, and respondent Mardel, Inc. is a secular, for-profit affiliated chain of bookstores that specializes in Christian products and has about 400 full-time employees (collectively, "Hobby Lobby"). Petitioner Conestoga Wood is a for-profit, secular corporation that manufactures wood products and employs more than 900 employees. The individual owners of these secular, for-profit businesses oppose certain forms of Food and Drug Administration-approved contraception that they believe prevent implantation of a fertilized egg, Hobby Lobby BIO 3-4; Conestoga Wood Br. 5, and they therefore seek to deny insurance coverage for such products to the employees who work in their for-profit businesses. Specifically, Hobby Lobby and Conestoga Wood (collectively, "the corporate plaintiffs") contend that even though they are secular, for-profit companies, they are nonetheless capable of the "free exercise of religion" and are therefore entitled to protection under the First Amendment's Free Exercise Clause and/or the Religious Freedom Restoration Act of 1993 (RFRA), which provides that the government "shall not substantially burden a person's exercise of religion," 42 U.S.C. § 2000bb-1(a), (b). The individual owners of the corporate plaintiffs also argue that the ACA's requirements violate their own free exercise rights, even though the Act imposes no obligations on them.

The corporate plaintiffs' argument that they enjoy free exercise rights under the First Amendment and RFRA is in conflict with the text, history, and purpose of the First Amendment's free exercise guarantee. *Amicus* submits this brief to demonstrate that throughout our nation's history, corporations have been treated differently than individuals when it comes to fundamental, personal rights of conscience and human dignity. The First Amendment's free exercise guarantee has always been viewed as a purely personal liberty, guaranteeing the right of individuals to worship and exercise religion consistent with the dictates of their conscience. It has never been considered a right possessed by secular, for-profit corporations. Indeed, in the more than 200 years since the First

Amendment's ratification, this Court has never held that secular, for-profit corporations may assert rights under the Free Exercise Clause. Because RFRA—as its very name confirms—sought to *restore* the Court's free-exercise jurisprudence as it stood before ***Employment Division, Department of Human Resources v. Smith***, 494 U.S. 872 (1990), this history is fatal to the corporate plaintiffs' claims under both the First Amendment and RFRA.

History shows that the First Amendment's explicit protection for "the free exercise" of religion, U.S. CONST. amend. I, was intended to protect a basic right of human dignity and conscience, one of the "characteristic rights of freemen," as George Washington put it. WASHINGTON: WRITINGS 733 (John Rhodehamel ed., 1997) (First Inaugural Address, April 30, 1789). From the Founding until today, the Constitution's protection of religious liberty has been seen as a personal right, inextricably linked to the human capacity to express devotion to a god and act on the basis of reason and conscience. Business corporations, quite properly, have never shared in this fundamental aspect of our constitutional tradition for the obvious reason that a business corporation lacks the basic human capacities—reason, dignity, and conscience—at the core of religious belief and thus the free exercise right.

To be sure, the owners of the corporate employers have their own personal free exercise rights, but those rights are not implicated by the contraception coverage requirement because federal law does not require the individuals who own a company to *personally* provide health care coverage or to satisfy any other legal obligation of the corporation. The law places requirements only on the corporate entities. As the Court has held in the Fifth Amendment context, when individuals act in their official capacity as corporate agents, they "cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges." *Braswell v. United States*, 487 U.S. 99, 110 (1988). Instead, "they assume the rights, duties, and privileges of the artificial entity." *Id.* Plaintiffs here should not be permitted to "move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 389 (3d Cir. 2013).

The fact that the Free Exercise Clause has been recognized to protect churches and other explicitly religious organizations does not help the corporate plaintiffs here. Since the Founding, churches and business corporations have been treated as fundamentally different. Churches, created for the purpose of ensuring the flourishing of religious exercise, have received protection under our constitutional tradition, in federal statutes, and Court precedent. These protections have never been extended to secular, for-profit corporations like Hobby Lobby and Conestoga Wood. To do so now would represent an unprecedented extension of what it means to engage in the free exercise of religion.

Far from vindicating the Constitution's promise of religious liberty, a ruling granting an exemption to secular, for-profit business corporations from the ACA's contraceptive coverage requirement would allow business owners to impose their personal religious beliefs on their employees, many of whom have different religious views and want and need access to the full range of FDA-approved contraceptives. Such a ruling would turn the First Amendment on its head, allowing secular, for-profit businesses to enforce a religious orthodoxy in the workplace. This Court should deny the plaintiffs' free exercise and RFRA claims and uphold the ACA's contraceptive coverage requirement as it applies to secular, for-profit corporations.

ARGUMENT

I. SECULAR, FOR-PROFIT CORPORATIONS DO NOT HAVE RELIGIOUS FREE EXERCISE RIGHTS UNDER EITHER THE FIRST AMENDMENT OR RFRA.

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I. Enacted to declare one of the "great rights of mankind," 1 ANNALS OF CONG. 449 (1789), the First Amendment's Free Exercise Clause protects a purely personal right to worship and exercise religion according to the dictates of one's conscience, a right that does not extend to business corporations, who cannot pray and do not have a religious conscience. In the more than 200 years since the First Amendment's ratification, this Court has never held that secular, for-profit business corporations may assert rights under the Free Exercise Clause. Whatever other rights such corporations may enjoy under the Constitution, it would be inconsistent with the text, history, and purpose of the Free Exercise Clause to accord them free exercise rights.

The Religious Freedom Restoration Act provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). Although use of the word "person" in federal law often "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," that is not true when "the context indicates otherwise." 1 U.S.C. § 1. RFRA was enacted in 1993 to restore and enforce the First Amendment's Free Exercise guarantee, and thus the history, nature, and purpose of the First Amendment's free exercise guarantee provide the appropriate "context" for determining whether secular, for-profit corporations can claim its protection.[2] As just noted, the history, nature, and purpose of the Free Exercise Clause, consistent with this Court's case law, all make clear that such corporations cannot claim a free exercise right under RFRA.

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[2] Conestoga Wood places great emphasis on the fact that RFRA "protects '*any*' exercise of religion," Conestoga Br. 18 (emphasis added), but of course, that language does nothing to address the critical question of whether secular, for-profit corporations can engage in the "exercise of religion" at all. As *amicus* demonstrates, they plainly cannot.

A. Throughout Our Nation's History, Corporations Have Been Treated Differently Than Individuals When It Comes To Fundamental, Personal Rights.

The Constitution does not give corporations the same protection of rights and liberties as it gives to individual persons.[3] As its opening words reflect, the Constitution was written for the benefit of "We the People of the United States," U.S. CONST. pmbl., and when the Framers added the Bill of Rights shortly after the Constitution's ratification, they did so to protect the fundamental rights of "We the People." These amendments reflected the promise of the Declaration of Independence that all Americans "are endowed by their Creator with certain unalienable rights, [and] that among these are life, liberty, and the pursuit of happiness." President George Washington described the amendments as exhibiting "a reverence for the characteristic rights of freemen." WASHINGTON: WRITINGS 733. At its core, the Bill of Rights "declare[d] the great rights of mankind." 1 ANNALS OF CONG. 449 (1789).

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[3] *See generally* David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. MARSHALL L. REV. 643 (2011).

At the Founding, corporations stood on an entirely different footing than living persons. Unlike people who inherently enjoyed "certain unalienable rights," a corporation, in the words of Chief Justice John Marshall, was "an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). As early as the First Congress, James Madison summed up the Founding-era vision of corporations: "[A] charter of incorporation . . . creates an artificial person not existing in law. It confers important civil rights and attributes, which could not otherwise be claimed." 2 ANNALS OF CONG. 1949 (1791). In short, corporations, unlike the individual citizens that made up the nation, did not have fundamental and inalienable rights by virtue of their inherent dignity.

To be sure, corporate entities can assert certain constitutional rights, chiefly related to their right to enter into contracts, own and possess property, and manage their affairs, but they have never been accorded all the rights that individuals possess. *Compare Dartmouth College*, 17 U.S. (4 Wheat.) at 518 (protection under Contracts Clause); *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497 (1844) (right to sue under Article III); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885) (protection under Dormant Commerce Clause); *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897) (protection under Equal Protection Clause); *Hale v. Henkel*, 201 U.S. 43 (1906) (protection under Fourth Amendment) *with Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839) (no protection under Article IV's Privileges and Immunities Clause); *Hale*, 201 U.S. 43 (no protection under Fifth Amendment's Self-Incrimination Clause); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359 (1907) (no protection under Fourteenth Amendment's Privileges or Immunities Clause); *United States v. Morton Salt*, 338 U.S. 632, 652 (1950) (observing that "corporations can claim no equality with individuals in the enjoyment of a right to privacy").

Many of the constitutional rights possessed by business corporations are grounded in matters of property and commerce, because, as this Court has explained, "[c]orporations are a necessary feature of modern business activity" and, "[i]n organizing itself as a collective body, [a corporation] waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the 14th Amendment, against unlawful discrimination." *Hale*, 201 U.S. at 76. Business corporations enjoy other constitutional rights, but these rights do not vindicate a corporation's own claim to what is essentially human autonomy or dignity. For example, corporations enjoy the right to speech not because they enjoy personal dignity or freedom of conscience like people do, but because of the fundamental role that free speech plays in our democracy. As this Court explained in *Citizens United v. FEC*, 558 U.S. 310 (2010), business corporations have a protected constitutional right to speak—whatever the purpose of that speech—because speech paid for by corporations helps to inform the general public and provide a robust debate for individual listeners. *See id.* at 349 (stating that "[p]olitical speech is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual'") (quoting *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978)).

Because corporations do not possess the same dignity and conscience as individuals, it is well settled that "[c]ertain 'purely personal' guarantees" are available only to natural persons, not to corporations. *Bellotti*, 435 U.S. at 778 n.14. For example, the Fifth Amendment, which provides that no person shall be "compelled in any criminal case to be a witness against himself," does not apply to corporations because it "is an explicit right of a *natural person*." *Braswell*, 487 U.S. at 119 (Kennedy, J., dissenting) (emphasis added); *see Bellotti*, 435 U.S. at 778 n.14 (right against self-incrimination is "unavailable to corporations . . . because the 'historic function' of the particular guarantee has been limited to the protection of individuals"). As this Court has affirmed for more than a century, the constitutional privilege against self-incrimination cannot be invoked by corporations because it is a personal one that "grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." *United States v. White*, 322 U.S. 694, 698 (1944). In other words, the right cannot be invoked by corporations because it was enacted to "protect[] the realm of human thought and expression." *Braswell*, 487 U.S. at 119 (Kennedy, J., dissenting). Accordingly, "there is a clear distinction . . . between an individual and a corporation . . . . While an individual may lawfully refuse to answer incriminating questions . . . , it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges." *Hale*, 201 U.S. at 74, 75.

The *Braswell* case illustrates the different way fundamental rights apply to corporations as opposed to the individual persons who may operate or own them. Randy Braswell, the president and sole shareholder of a corporation, argued that he was entitled to resist a subpoena for corporate records because the act of producing those records would tend to incriminate him. In rejecting his contention, the Court found dispositive the fact that the subpoena was directed to corporate records: "[P]etitioner has operated his business through the corporate form, and we have long recognized that, for purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals." *Braswell*, 487 U.S. at 104. Proceeding from this basic principle, the Court held that "the custodian of corporate records may not interpose a Fifth Amendment objection to the compelled production of corporate records, even though the act of production may prove personally incriminating." *Id.* at 111-12.

Thus, since the Founding, corporations have been treated differently than individuals when it comes to certain fundamental, personal rights, and the Constitution's guarantees cannot be applied wholesale to corporations. Rather, "[w]hether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." *Bellotti*, 435 U.S. at 778 n.14. As the next two sections demonstrate, the free exercise right is a "purely personal" one unavailable to secular, for-profit corporations.

B. The Free Exercise Of Religion Is A Fundamentally Personal Liberty That Does Not Apply To For-Profit, Secular Corporations.

The history of the free exercise guarantee demonstrates that this right is a "purely personal" one that may not be invoked by secular, for-profit corporations. Much like the Self-Incrimination Clause, which protects a purely personal "realm of human thought and expression," *Braswell*, 487 U.S. at 119 (Kennedy, J., dissenting), and guarantees "dignity, humanity and impartiality," *White*, 322 U.S. at 698, by preventing the government from compelling an individual's own testimony, the right to freely exercise religion simply cannot be exercised by a business corporation. A secular, for-profit business corporation may be able to pay to disseminate an advertisement, *see* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 632 (1990) (noting long history of businesses running advertisements), or a film in support of a political candidate, *see Citizens United*, 558 U.S. at 349, but it cannot, in any meaningful sense, pray, express pious devotion, or act on the basis of a religious conscience. The fundamental values behind the Free Exercise Clause, like those that underlie the Fifth Amendment's constitutional privilege against self-incrimination, simply make no sense as applied to a secular, for-profit business corporation. For good reason, this Court has never invested business corporations with the basic rights of human dignity and conscience.

The Founding generation well understood that the First Amendment's guarantee of free exercise was an inalienable individual right, inextricably linked to the human capacity to express devotion to a god and act on the basis of reason and conscience. Indeed, the proposed amendment that would eventually become our First Amendment started out in the Select Committee as a proposal to ensure that "the equal rights of conscience" shall not be infringed. 1 ANNALS OF CONG. 766 (1789). While debates in the First Congress over what ultimately became the Free Exercise Clause were sparse, the protections for religious liberty contained in Founding-era state constitutions provide powerful evidence that the free exercise guarantee was understood to be a purely personal right. "These state constitutions provide the most direct evidence of the original understanding, for it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1456 (1990); *see also City of Boerne v. Flores*, 521 U.S. 507, 553 (1997) (O'Connor, J., dissenting) ("These state provisions . . . are perhaps the best evidence of the original understanding of the Constitution's protection of religious liberty.").

New York's 1777 Constitution, for example, provided that "the free exercise of religion and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this State to all mankind." N.Y. CONST. of 1777, art. XXXVIII. Likewise, New Hampshire's Free Exercise Clause described religious liberty specifically as a right of individuals: "Every individual has a natural and inalienable right to worship GOD according to the dictates of his own conscience, and reason . . . ." N.H. CONST. of 1784, pt. I, art. V. The Virginia Declaration of Rights of 1776 provided that "religion . . . can be directed only by reason and conviction . . . ; therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . ." Va. Declaration of

Rights of 1776, § 16. Many other state constitutions used similar language, *see* McConnell, 103 HARV. L. REV. at 1456-58 & nn. 239-42, confirming that the right to the free exercise of religion was understood to be a purely personal, inalienable human right. These provisions "defined the scope of the free exercise right in terms of the conscience of the individual believer and the actions that flow from that conscience," an affirmative understanding of free exercise "based on the scope of duties to God perceived by the believer." *Id.* at 1458-59.

Likewise, the Memorial and Remonstrance Against Religious Assessments, authored by James Madison, "'the leading architect of the religion clauses of the First Amendment,'" *Arizona Christian School Tuition Org. v. Winn*, 131 S. Ct. 1436, 1446 (2011) (quoting *Flast v. Cohen*, 392 U.S. 83, 103 (1968)), viewed the guarantee of the free exercise of religion in similar, wholly personal terms. Invoking the "fundamental and undeniable truth" that "'Religion . . . can be directed only by reason and conviction,'" Madison explained that "[t]he Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 2 THE WRITINGS OF JAMES MADISON 183, 184 (G. Hunt ed., 1901) (quoting Va. Declaration of Rights of 1776, § 16). Noting that "equality . . . ought to be the basis of every law," Madison argued that "[w]hilst we assert for ourselves a freedom to embrace, to profess, or to observe the Religion which we believe to be divine in origin, we cannot deny an equal freedom to those whose minds have not yielded to the evidence which has convinced us." *Id.* at 186.

For Madison, the free exercise of religion was fundamentally a personal right, closely linked to the human capacity of reason, conviction, and conscience. As with the right against self-incrimination, a business corporation simply lacks these basic human capacities. Indeed, the Founding-era protection for religious conscience overlaps with the concern for compelled testimony. The most common "free exercise controversies in the preconstitutional period" related to oaths. Michael W. McConnell, "Free Exercise As The Framers Understood It," *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 59 (Eugene Hickok, Jr., ed., 1991). Article VI ensured that conscientious objectors could "Affirm[]," rather than swear their support for the Constitution, in addition to forbidding the use of religious tests for officeholders. U.S. CONST. art. VI. The origins of the right against compelled self-incrimination and the right to religious free exercise are closely linked. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 82-83 (1998); William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 363, 411-12 (1995) (explaining that "the privilege entered the law in response to practices that were troubling . . . because of the crimes being prosecuted" including "crimes of religious belief"); *id.* at 413 (noting that cases in which oaths were compelled "involved the punishment of religious expression—expression that the suspects saw as compelled by God".) Critics of compelled oaths viewed them as a violation of freedom of conscience: "put[ting] the conscience uppon [sic] the racke." *Id.* at 412. With this backdrop, the Founding generation would never have imagined that a business corporation could claim for itself such quintessentially personal rights.

This Court's case law is in line with the historical understanding of the free exercise guarantee. In the more than 225 years since the ratification of the First Amendment, this Court has never held that secular, for-profit business corporations are capable of exercising religion and has never held that the Free Exercise Clause applies to such corporations. As the Government's brief in *Hobby Lobby* explains, "no pre-*Smith* case held, or even suggested, that for-profit corporations have religious beliefs that could . . . be impermissibly burdened under the First Amendment by general corporate regulation." U.S. Br., No. 13-354, at 17; *see Conestoga Wood*, 724 F.3d at 384 ("we are not aware of any case preceding the commencement of litigation about the Mandate, in which a for-profit, secular corporation was itself found to have free exercise rights").

And no wonder. Such a ruling would turn the First Amendment on its head, allowing business owners to impose their personal beliefs on their employees and deny them important federal rights. Indeed, if business owners can deny their employees contraceptive coverage because contraceptive use violates the owners' religious beliefs, they might also be able to fire employees (or not hire them in the first place) for engaging in all manner of activities that do not conform to the religious code of the company's owners. Individuals who take a job do not surrender their right to exercise the religion of their choice at their bosses' door.

Conestoga Wood argues that "this Court has repeatedly recognized" that "people may exercise religion through their closely-held businesses," Conestoga Br. 18, but the cases on which it relies exclusively involve free exercise claims brought by individual business owners, not by business corporations. *See, e.g.*, *United States v. Lee*, 455 U.S. 252 (1982); *Braunfeld v. Brown*, 366 U.S. 599 (1961). Individuals who run a business are entitled to invoke the privilege of self-incrimination, but corporations are not. *See Braswell*, 487 U.S. at 104. The same holds true here with respect to religious free exercise.

Moreover, these cases make clear that "when followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others." *Lee*, 455 U.S. at 261. Accordingly, the free exercise right does not require a religious exemption that would "operate to impose the employer's faith on the employees." *Id.* Far from supporting the corporate plaintiffs' free exercise and RFRA claims, these fundamental precepts are fatal to them. *See* U.S.

Br., No. 13-354, at 39-42, 45-46.

Thus, in light of the text, history, and purpose of the Free Exercise Clause, secular, for-profit corporations are not "person[s] exercis[ing] religion" within the meaning of RFRA, 42 U.S.C. § 2000bb-1(a), and the First Amendment.

C. While Explicitly Religious Organizations, Such As Churches, Have Been Protected Under The First Amendment, They Have Historically Been Distinguished From Secular, For-Profit Corporations Like Hobby Lobby And Conestoga Wood.

As just discussed, the free exercise guarantee has never been understood to apply to secular, for-profit corporations. To the contrary, the only corporations that have been permitted to invoke the protections of the Free Exercise Clause are, as makes sense, those corporations, such as churches and other religious bodies, that were explicitly established to further the exercise of religion. Plaintiffs here argue that because churches and other religious organizations can claim a free exercise right, so, too, can for-profit, secular corporations. *See* Conestoga Wood Br. 25-26. This argument is inconsistent with the text and history of the First Amendment, as well as contrary to settled law.

The text and history of the First Amendment show a "special solicitude to the rights of religious organizations." *Hosanna-Tabor*

Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694, 706 (2012). This solicitude for churches, synagogues, and other religious entities reflects the basic fact that "[r]eligion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] Clause." Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981); *see also* McConnell, 103 HARV. L. REV. at 1490 ("'Religion' . . . connotes a community of believers."). Going back to the writings of John Locke, a church was considered "a voluntary society of men, joining together of their own accord, in order to the public worshipping of God, in such manner as they judge acceptable to him, and effectual to the salvation of their souls." JOHN LOCKE, A LETTER CONCERNING TOLERATION 28 (1689) (James H. Tully ed., 1983).

The legal traditions that the Founders brought from England included a sharp distinction between religious and other private corporations. Blackstone observed the "division of corporations . . . into ecclesiastical and lay. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons . . . These are erected for the furtherance of religion, and perpetuating the rights of the church." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *470 (1768). Founding-era treatises on corporate law, following Blackstone, explained that "[t]here is one *general* division of corporations into *ecclesiastical*, and *lay*. Ecclesiastical corporations are those of which not only the members are spiritual persons, but of which the object of the institution is also spiritual . . . ." STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 22 (1793).

Consistent with this history, the law has long protected the ability of individuals to band together to form churches and other religious institutions, to choose their leaders, define their doctrines, and run those institutions as they see fit. Early in our nation's history, this Court recognized the power of state legislatures to "enact laws more effectually to enable all sects to accomplish the great objects of religion by giving them corporate rights for the management of their property, and the regulation of their temporal as well as spiritual concerns." *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815). Given "the difficulties which surround all voluntary associations," Justice Story remarked that the free exercise of religion "could be better secured and cherished by corporate powers." *Id.* In other words, without the ability to incorporate, churches would have grave difficulty maintaining ownership of their own property.

Since the Founding, this Court has consistently accorded special constitutional protection for the free exercise of religion that applies to religious, but not other, corporations. For example, in *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952), the Court held that "[f]reedom to select the clergy" has "federal constitutional protection as a part of the free exercise of religion against state interference," observing that the First Amendment specifically ensures "freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 154-55; *see Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1872).

Recently, in *Hosanna-Tabor*, the Court reaffirmed these principles, holding that a religious employer could not be sued under Title VII of the Civil Rights Act of 1964 for firing a minister. "Requiring a church to accept or retain an unwanted minister . . . interferes with the internal governance of the church . . . . By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments." *Hosanna-Tabor*, 132 S. Ct. at 706; *see id.* at 712 (Alito, J., concurring) ("[T]he Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs."). Under *Hosanna-Tabor*, incorporated churches and other religious employers are free from the strictures of federal anti-discrimination law in choosing their ministers. No secular, for-profit business corporation can claim a similar right to make employment decisions free from Title VII's mandate of equality of opportunity. *See* U.S. Br., No. 13-354, at 19-20 (emphasizing that Title VII's religious-employer exemption has been applied only to the non-profit activities of religious employers).

Congress, too, has provided exemptions that apply to religious corporations, but not other kinds of corporations. For example, Title VII's prohibition of employment discrimination on the basis of religion does not apply to a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1. A Christian church, organized as a corporation, can insist that its employees be members of the church, but a business corporation, even one that claims to be run on the basis of religious values, cannot limit employment to members of a certain religion. This Court has upheld the constitutionality of this legislative accommodation of religion, finding that it serves the permissible purpose of "alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987). The Court rejected the argument that Congress lacked the authority to "single[] out religious entities for a benefit," concluding that Congress could make special legislative accommodations for religious, but not other, corporations. *Id.* As Justice Brennan explained in an important concurring opinion, special religious accommodations given to churches and other religious entities reflect the twin facts that "religious activity derives meaning in large measure from participation in a larger religious community," and that "furtherance of the autonomy of religious organizations often furthers individual religious freedom as well." *Id.* at 342 (Brennan, J., concurring). Under the view of the corporate plaintiffs, however, this distinction between religious and business corporations would be unconstitutional.

As the foregoing makes clear, far from treating business and religious corporations as one and the same, constitutional text and history, as well as settled law, give a special status to churches and other religious institutions in recognition of the fact that individuals often exercise religion as part of a community of believers. At the Founding, churches and business corporations were seen as fundamentally different, the former created for the purpose of ensuring the flourishing of communal religious exercise, the latter to make running a business more profitable. Consistent with this history, religious institutions receive many types of legal protections for religious exercise rightly considered inapplicable to secular, for-profit corporations like Hobby Lobby and Conestoga Wood. Thus, far from violating the free exercise right, the ACA is very much in accord with our constitutional traditions in making accommodations for religious entities, but not business corporations.

II. THE FREE EXERCISE RIGHTS OF THE INDIVIDUAL OWNERS OF SECULAR, FOR-PROFIT CORPORATIONS ARE NOT IMPLICATED BY OBLIGATIONS IMPOSED ON THE CORPORATIONS.

As just discussed, secular, for-profit corporations do not enjoy free exercise rights under either the First Amendment or RFRA, and thus the corporate plaintiffs' claims under the First Amendment and RFRA must be rejected. Because the ACA imposes obligations *only* on the corporate plaintiffs, that should be the end of this case. But the individual owners of the corporate plaintiffs argue that the ACA contraception coverage requirement violates their own free exercise rights, *see* Hobby Lobby BIO 27; Conestoga Wood Br. 16, even though ACA imposes *no* obligations on them. These arguments are wrong. The free exercise rights of the individual owners of secular, for-profit corporations are simply not implicated by laws that place burdens only on the corporate entities. *See Conestoga Wood*, 72 F.3d at 388 ("Since Conestoga is distinct from the Hahns, the Mandate does not actually require *the Hahns* to do anything.").

As this Court has long recognized, corporate owners do not act as individuals when acting on behalf of the businesses they own. Even in the case of a corporation owned by a single shareholder, "[i]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions,* *Ltd. v. King*, 533 U.S. 158, 163 (2001). Indeed, the "whole purpose" of corporate law is to ensure that "the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006).

This Court's Self-Incrimination Clause cases make clear that corporate owners cannot invoke their own individual rights when acting on behalf of the corporation. *Braswell* is illustrative. Obviously, the sole owner of the corporation in that case, Mr. Braswell, retained his personal right against compelled self-incrimination. However, because he was acting for the corporation, he could not "be said to be exercising [his] personal rights and duties nor to be entitled to [his] purely personal privileges." *Braswell*, 487 U.S. at 110. Instead, he "assume[d] the rights, duties and privileges of the artificial entity." *Id.* And in that official capacity, he had no "personal privilege against self-incrimination" to assert. *Id.*[4]

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[4] A similar logic underlies the Court's holding that business corporations cannot invoke the protections of citizens secured by the Privileges and Immunities Clause. "If . . . members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens . . . they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. . . . Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created by the charter; and not the contract of the individual members." *Bank of Augusta*, 38 U.S. at 586-87.

Importantly, in *Braswell* the Court did not, as the Tenth Circuit did below, conflate the rights of the individual owner of a corporation with the rights of the corporation itself.

In this case, the individual owners of the corporate plaintiffs made the choice to operate their respective businesses through the corporate form and to create a new and independent legal entity to obtain limited liability and other special privileges to which they would not be entitled had they decided to operate their businesses as individuals. Having done so, having chosen the benefits of operating through the corporate form, they cannot now turn around and invoke their own private religious beliefs to justify overriding the ACA's requirement that the corporations provide contraceptive health care coverage to the women they employ. As the Third Circuit properly held, corporate owners cannot "move freely between corporate and individual status to gain the advantages and avoid the disadvantages of the respective forms." *Conestoga*, 724 F.3d at 389; *see* Pet. 23-26.

* * *

Our constitutional tradition recognizes a basic, common-sense difference between living, breathing individuals—who think, possess a conscience, and hold a claim to human dignity—and artificial corporate entities, which are created by the law for a specific purpose, such as to make running a business more efficient and lucrative by limiting the liability of their individual owners.

This is especially true in contexts related to matters of conscience, individual autonomy, and basic human dignity. Corporations are accountable to their shareholders for their business operations; a spiritual individual, in Washington's words, is "accountable to God alone for his religious opinions." WASHINGTON 739 (Letter to the United Baptist Churches of Virginia, May 1789).

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to affirm the decision of the Third Circuit and reverse the decision of the Tenth Circuit.

Respectfully submitted,

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KATHLEEN SEBELIUS, *et al.*,
Petitioners,
v.
HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,
v.
KATHLEEN SEBELIUS, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND TENTH CIRCUITS

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, *ET AL.*

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INTERESTS OF *AMICI CURIAE*

Amici are Constitutional Law scholars who have an interest in the development of coherent constitutional doctrine.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief argues that the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.* (RFRA), properly applied, complies with the Establishment Clause. The brief responds to the recent proposal by several scholars that the Establishment Clause prohibits the government from accommodating "substantial burdens" on religious exercise, as RFRA does, when the accommodation imposes "significant burdens on third parties who do not believe or participate in the accommodated practice."[2] This brief does not address the issues directly before the Court, *i.e.*, whether RFRA protects for-profit corporations like Hobby Lobby and Conestoga Woods, and whether either of those parties has a valid RFRA claim.[3]

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[1] All parties except Hobby Lobby have filed blanket consents to the filing of amicus briefs. Hobby Lobby has consented to the filing of this brief, and such consent is being filed herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amici curiae* or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. (forthcoming Spring 2014) (manuscript at 9), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328516; *see also* Nelson Tebbe, Richard Schragger, & Micah Schwartzman,

The scholars' proposed doctrine is contradicted by precedent, would needlessly require courts to analyze three speculative Religion Clause questions in most religious accommodation cases, and would threaten thousands of statutes that protect religious minorities.

First, precedent strongly supports the constitutionality of statutory religious accommodations, like RFRA, that allow courts to weigh the government's "compelling" interests against claimant's interests in religious exercise. In *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (Ginsburg, J.), the Court unanimously upheld the Religious Land Use and Institutionalized Persons Act against a facial Establishment Clause challenge. Guaranteeing "room for play in the joints between the Free Exercise and Establishment Clauses," *Cutter*, 544 U.S. at 713 (internal quotations omitted), the Court held that a statutory religious accommodation, like RLUIPA or RFRA, that (1) prohibits "substantial burden[s]" on religious exercise, (2) is denominationally neutral, and (3) allows courts to take into account the government's "compelling interest[s]" is

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The Establishment Clause and the Contraception Mandate, Balkinization (Dec. 4, 2013, 6:04 PM), http://balkin.blogspot.com/2013/12/hobby-lobby-and-establishment-clause.html ("At root the constitutional conviction is that it is unfair and unconstitutional for the government to impose any substantial costs of a religious exemption on a focused and identifiable class of third parties.").

[3] *Amici* do not share a view on the answers to these legal questions.

constitutional. *See id.* at 720. An application of RFRA's balancing test that does not take sufficient account of the government's interests, including its interests in protecting third parties, would therefore fail under RFRA, not the Establishment Clause.

While the Court has *never* invalidated a statutory religious accommodation that, like RFRA, enlists courts to evaluate the government's interest in "substantial[ly] burden[ing]" religious liberty, *Cutter* nevertheless resolved a tension between prior cases about Congress's authority to promote Free Exercise principles without running afoul of the Establishment Clause. *See id.* at 713-714. The Court should decline the scholars' invitation to return to that doctrinal uncertainty.

Second, the scholars' proposed doctrine requires courts to decide three vague Establishment *and* Free Exercise Clause questions. Under the proposed doctrine, a court facing a statutory religious accommodation will often face a difficult baseline question: does the statute provide a right to a third party that would be burdened by a religious accommodation, or is the statute preempted by a religious exercise interest, rendering null the third party's purported statutory right? In cases like this one, the answer is clear. Under RFRA's "rule of construction," by remaining silent about RFRA's applicability, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (ACA),[4] effectively incorporates RFRA's balancing test into its own provisions. *See* 42 U.S.C. § 2000bb-3(b). If ACA, therefore, by incorporating RFRA, accommodates the plaintiffs' religious exercise, plaintiffs' employees simply have no right to plaintiff-provided coverage under the ACA regulations, and employees would not be burdened by plaintiffs' religious exercise. Not every case will be so clear.

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[4] Amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

Furthermore, in every statutory religious accommodation case, a court would have to determine whether the accommodation would create a "burden" on third parties that is "significant" enough to raise an Establishment Clause question. The court would have to engage in speculative fact-finding about the effect of laws on third parties who, like in this case, may not be before the court. The court would then have to engage in common law rule-making to decide whether the accommodation created a burden "significant" enough to violate the Establishment Clause.

Because the Free Exercise Clause *requires* some religious accommodations, the court would also have to determine whether the Free Exercise Clause requires the accommodation at issue before it could conclude that the Establishment Clause prohibits it. *See Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-145 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."). Under RFRA, this awkward Religion Clause three-step is unnecessary and entirely avoidable. RFRA already ensures that courts take account of the government's interest in protecting third parties.

Third, with over 2,000 statutory religious accommodations, the federal and state governments have a long and admirable tradition of protecting minority religious belief and practice, particularly on moral questions about the beginning and end of life. The scholars' proposed doctrine would cast doubt on a well-established legislative patchwork of religious liberty.

ARGUMENT

I. Precedent Strongly Supports RFRA's Constitutionality

A. Under Cutter v. Wilkinson, Religious Accommodations That Take Account of "Compelling" Governmental Interests Comply With the Establishment Clause

The Establishment and Free Exercise Clauses cooperate to promote religious liberty by keeping religion from interfering with government, and the government from interfering with religion. Moreover, there is "play in the joints" between the Clauses so that legislatures may further protect minority religious liberty without effectively creating an establishment of religion. *Cutter*, 544 U.S. at 713 (quotations omitted); *see also Hobbie*, 480 U.S. at 144-145 (1987) ("This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."). Americans have inherited a "'happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.'" *Gillette v. United States*, 401 U.S. 437, 453 (1971) (quoting *United States v. MacIntosh*, 283 U.S. 605, 634 (1931) (Hughes, C.J., dissenting)). Unsurprisingly, this Court has maintained that "it is hardly impermissible for Congress to attempt to accommodate free exercise values." *Gillette*, 401 U.S. at 453.

A nearly unanimous Congress passed RFRA to promote robust free exercise values without running afoul of the Establishment Clause. *See* 42 U.S.C. § 2000bb (purpose), 2000bb-4 ("Establishment clause unaffected"). The Act prohibits the federal government from substantially burdening religious exercise, unless the government has used the least restrictive means to accomplish a compelling governmental interest. 42 U.S.C. § 2000bb-1. RFRA is, by its own terms, effectively incorporated into every act of Congress that does not expressly reject it. 42 U.S.C. § 2000bb-3(b).

Several scholars have recently proposed an Establishment Clause limit to RFRA's application in this case: accommodating plaintiffs' religious exercise would violate the Establishment Clause because it would, they allege, significantly burden third parties—plaintiffs' employees—who do not share plaintiffs' religious commitment.[5] The scholars misread this Court's Establishment Clause decisions.

Less than a decade ago, the Court considered an Establishment Clause argument much like the scholars' in a challenge to the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (RLUIPA). RLUIPA prohibits qualifying state and local institutions from imposing a "substantial burden on the religious exercise" of inmates without "a compelling governmental interest" and without using "the least restrictive means." 42 U.S.C. § 2000cc-1(a)(1)-(2).

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[5] *See* Gedicks & Van Tassel, *RFRA Exemptions*, *supra* note 2 (manuscript at 9).

Ohio, however, asserted the scholars' rationale, arguing that RLUIPA violates the Establishment Clause because "providing benefits for some inmates necessarily imposes costs on others." *See* Resp. Br. 2.

The Court disagreed, *see Cutter*, 544 U.S. at 717, despite its ordinary deference to the institutional expertise of prison administrators regarding the government's interests in prison safety, *see Overton v. Bazetta*, 539 U.S. 126, 132 (2003).

The Court held, rather, that RLUIPA is a "permissible government accommodation of religious practices." *Id.* at 714. In doing so, the Court reaffirmed that there is constitutional "space for legislative action that is neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause." *Id.* at 719 (citing *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation ..."); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 329-330 (1987); *Sherbert v. Verner*, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting) ("The constitutional obligation of 'neutrality' is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation.")).

Without adopting a standard that all statutory religious accommodations must meet to be constitutional, the Court reasoned that RLUIPA has three attributes that ensured its constitutionality. *Cutter*, properly understood, applies to facial *and* as-applied challenges of statutes, like RFRA, that share those three attributes.

First, like RLUIPA, RFRA "alleviates exceptional government-created burdens on private religious exercise." *Cutter* at 720. Courts assess the "substantial[ity]" of those burdens and the sincerity of the religious exercise on a case-by-case basis. *See United States v. Ballard*, 322 U.S. 78, 86-88 (1944) (articulating the sincerity test). This potential constitutional concern, *see Texas Monthly v. Bullock*, 489 U.S. 1, 8 n.1, 15, (1989) (Brennan, J., writing for a plurality), is thus covered by the statutory test.

Second, RFRA is denominationally neutral. *See Cutter* at 720. RFRA applies to laws substantially burdening *any* religion. *Cf. Bd. of Ed. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994) (invalidating a New York school district created for a religious denomination); *Larson v. Valente*, 456 U.S. 228 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").[6]

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[6] Any suggestion that RFRA would be constitutional only if it applied equally to religious and non-religious objectors is a *non sequitur* in this case for two reasons. First, the Free Exercise Clause, which requires some religious accommodations, protects "the exercise" of "religion." U.S. Const. amend. I; *see Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) ("[Henry David] Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses."). Furthermore, the Court has consistently upheld statutes that accommodate religious but not analogous non-religious objections. *See Amos*, 482 U.S. at 338 ("We see no reason to require that the [religious organization] exemption [to Title VII] come packaged with benefits to secular entities."). Second, in this case there are no nonreligious objectors before the Court, but if there were, and if the Court were concerned about RFRA's protection of *religious* exercise, its best resort would be to extend RFRA's protection to nonreligious objectors whose conscientious objections are

Third, "properly applying RLUIPA [and RFRA], courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter* at 720. Unlike an "absolute and unqualified [statutory] right" to religious exercise, regardless of the cost to third parties, *see Cutter* at 722 (quoting and contrasting the statute in *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985)), RLUIPA and RFRA allow courts to decide religious accommodation claims on a case-by-case basis, with due consideration of the government's "compelling" interests in the factual and regulatory "context" of each case. *Cutter* at 722-23 ("We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns."). Put simply, when a court "properly" applies the statutory balancing test, that application does not violate the Establishment Clause. An application of the test that does not take sufficient account of the government's interests, including its interests in protecting third parties, would fail under the statute—in this case, RFRA—not the Establishment Clause.

Likewise, RFRA incorporates a balancing test that allows courts to evaluate and protect the federal government's "compelling" interests, including its interest in requiring for-profit corporations to provide their employees with certain health benefits. *See* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 Fordham L. Rev. 883, 886 (1994) ("The compelling interest test allows government to regulate

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like those of religious objectors, not to decline to apply RFRA to religious objectors. *See Welsh v. United States*, 398 U.S. 333, 351-61 (1970) (Harlan, J., concurring in result).

for sufficiently strong reasons, principally to prevent *tangible* harm to third persons . . ..") (emphasis added). Because RFRA effectively incorporates an Establishment Clause test, "properly applying [it]" would obviate any Establishment Clause concerns. *See Gonzales v. O Centro Espirito*, 546 U.S. 418 (2006) (noting, in the course of invalidating a federal drug law for its inconsistency with RFRA, that the Court "affirmed just last Term the feasibility of case-by-case consideration of religious exemptions to generally applicable rules"); Michael W. McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 Geo. Wash. L. Rev. 685, 698 (1992).

This argument answers the "constitutional conviction" of the scholars who believe it is "unfair" to accommodate religious exercise at the expense of third parties.[7] As the reasoning in *Cutter* makes clear, the balancing tests incorporated into statutes like RFRA already provide courts ample opportunity to ensure that any given religious accommodation will not overly burden a third party. *Id.* at 726.[8] Adding a constitutional analysis to every

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[7] Tebbe, *et al.*, *supra* note 2.

[8] The Court noted that RLUIPA's standard ensures that where "requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order." Id. at 726. The only plausible reading of the Court's reference to "adjudication in as-applied challenges," given the whole opinion and the logic of RLUIPA's balancing test, is to adjudications that "properly apply[]" RLUIPA, not some extraneous Establishment Clause doctrine.

RFRA case would be useless, and the Court should avoid it. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Cutter represents a clear consensus on how to resolve a doctrinal tension that bedeviled the Court for decades. *See id.* at 719 ("While the two Clauses express complementary values, they often exert conflicting pressures."). The Free Exercise Clause requires some religious accommodations.[9] Under the Establishment Clause doctrine articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), however, virtually any religious accommodation could be characterized as having a "religious" "purpose," thereby putting it in tension with the Establishment Clause. *See, e.g., Thomas v. Review Board*, 450 U.S. 707, 720-727 (1981) (Rehnquist, C.J., dissenting) (highlighting this tension and expressing his view that the Establishment Clause permits legislative religious exemptions); *Wallace v. Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring) ("[T]he Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause"); *see* Michael W. McConnell et al., *Religion and the Constitution* 257-313 (3d ed. 2010) (exploring the doctrinal tension).

Cutter resolved this tension. For purposes of evaluating legislative religious accommodations like RLUIPA and RFRA, *see Cutter* at 717 n.6, the Court replaced *Lemon* with a clear principle: statutory religious accommodations steer well clear of the Establishment

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[9] *See, e.g., Hosanna-Tabor v. E.E.O.C.*, 132 S.Ct. 694 (2012); *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Clause when they alleviate a substantial burden on religious exercise, are denominationally neutral, and protect the government's compelling interests. *Id.* at 720. The *Cutter* principle harmonized prior case law and reiterated the government's authority to promote religious liberty without endorsing religion, allowing for "play in the joints" between the Religion Clauses. *Walz v. Tax Comm'n*, 394 U.S. 664, 669 (1970); *see also id.*, at 673 ("The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself."); *Locke v. Davey*, 540 U.S. 712, 719 (2004) ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause."). The Court should not resurrect a needless tension between the Religion Clauses.

B. The Court With Few Exceptions Has Consistently Upheld Religious Accommodations, Even When They Burden Third Parties

"This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie*, 480 U.S. at 144-145; *see also Amos*, 483 U.S. at 334 ("There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'") (quoting *Walz*, 397 U.S. at 669). Indeed, the Court has never invalidated an application of a statute like RFRA that prohibits "substantial burden[s]" on religious exercise subject to the least restrictive means of advancing a compelling governmental interest.

In fact, the Court has already unanimously enforced RFRA, presuming its constitutionality. *O Centro Espirito*, 546 U.S. at 418 (invalidating a drug law that substantially burdened a group's religious exercise).

The Court has also upheld statutory religious accommodations for employers, even when the accommodation limits employees' statutory rights. In *Amos*, the Court rejected an as-applied Establishment Clause challenge to Section 702 of Title VII, 42 U.S.C. § 2000e-1(a) (2006), which exempts "the secular nonprofit activities of religious organizations" from Title VII's antidiscrimination rules. 483 U.S. at 329-30. Applying the *Lemon* test, which no longer controls in this context,[10] *Cutter*, 544 U.S. at 717 n.6, the Court held that the exemption's purpose and effect were not to advance religion. Instead, Section 702 merely "lift[ed] a regulation [Title VII] that burdens the exercise of religion." *Amos*, 483 U.S. at 338. Likewise, RFRA operates here to "lift" whatever burden the ACA may place on religious exercise.

In *Amos*, the Court carefully distinguished Section 702 from the Connecticut statute invalidated in *Calder*. *Amos*, 483 U.S. at 337 n.15. The Connecticut law forced employers, without exception, to allow their religious employees to observe their respective Sabbaths. *Id.* That law interfered with the status quo by lifting a burden imposed on religious exercise by private ordering—employment agreements—and placing it on employers, without a case-by-case evaluation of religious burdens and costs to employers.

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[10] Even under *Lemon*, promoting religious liberty, as RFRA does (and as the Religion Clauses do), is a secular purpose and effect. *See Wallace*, 472 U.S. at 83 (O'Connor, J., concurring) ("[T] he Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause").

By contrast, the statute in *Amos* interfered with the status quo by forcing religious employers to provide benefits to which they have a religious objection. Section 702 merely "lift[ed] a regulation [Title VII] that burdens the exercise of religion." *Amos*, 483 U.S. at 338. While a minority of the Justices questioned whether Section 702 may apply to for-profit corporations consistent with the Establishment Clause without a case-by-case analysis,[11] none of them questioned the Court's fundamental baseline distinction between the government creating a statutory burden on nonreligious employers on the basis of their employees' religious exercise (which the Establishment Clause might prohibit) and the government relieving a burden on employers' religious exercise created by a statute (which the Establishment Clause permits).

In this case, like in *Amos*, the regulation at issue interferes with the status quo by requiring employers to provide certain health benefits to employees. Like in *Amos*, the employers here argue that a religious accommodation under RFRA merely "lift[s] [the ACA] regulation that burdens the exercise of religion." *Amos*, 483 U.S. at 338. Thus, as in *Amos*, *Caldor* is inapposite here. RFRA changes the baseline of legal entitlements.

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[11] *See, e.g.*, *Amos*, 483 U.S. at 344-346 (Brennan, concurring) (suggesting that Section 702 may apply to for-profit corporations only on a case-by-case basis); *id.* at 348-349 (O'Connor, J., concurring) (noting that the Court was not addressing the application of Section 702 to for-profit corporations).

The Court has likewise upheld statutory religious accommodations that imposed significant burdens on third parties. During the Vietnam era, the Court repeatedly upheld the selective service exemption for conscientious objectors, even though the exemption was facially limited to those whose objections were based on a belief in a "Supreme Being," and when an exemption for one otherwise eligible draftee necessarily sent another one to war. *Gillette v. United States*, 401 U.S. 437 (1971) (upholding the Military Selective Service Act); *see also Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1969); *cf.* James W. Tollefson, *The Strength Not to Fight* 7 (1993) (noting that 170,000 Vietnam draftees received conscientious objector deferments).

Further, courts routinely exclude from evidence at trial the substance of communications between a member of the clergy and a parishioner, though the exclusion of that evidence burdens the opposing party's right to the admission of all potentially favorable evidence, and burdens the court's quest for truth. *See Mockaitis v. Harcleroad*, 104 F.3d 1522, 1532 (9th Cir. 1997) ("All fifty states have enacted statutes granting some form of testimonial privilege to clergy-communicant communications. Neither scholars nor courts question the legitimacy of the privilege, and attorneys rarely litigate the issue.") (quotation omitted); *see also Trammel v. United States*, 445 U.S. 40, 51 (1980) (noting that the priest-penitent privilege, like the privilege between attorney and client, is "rooted in the imperative need for confidence and trust"); *Totten v. United States*, 92 U.S. 105, 107 (1875) (stating that "[s]uits cannot be maintained which would require a disclosure of the confidences of the confessional"); *see generally People v. Philips*, (N.Y. Ct. Gen. Sess. June 14, 1813), *reprinted in* McConnell, et al., *Religion and the Constitution, supra*, at 139 (presenting the classic case); Walter J. Walsh, *The Priest-Penitent Privilege*, 80 Ind. L.J. 1037 (2005) (recounting doctrinal development).[12]

Additionally, in *Walz*, 397 U.S. at 664, the Court upheld a New York City real property tax exemption for religious houses of worship, notwithstanding the cost imposed to taxpayers. In sum, as the Court has noted in other contexts, protecting individual rights is often costly, but worth it to safeguard a free society. *See New York Times v. Sullivan*, 367 U.S. 258, 281 (1964) ("[O] ccasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.") (internal quotation omitted).

On the few occasions when the Court *has* invalidated statutes designed to alleviate burdens on religious exercise, it has done so because the statute (1) directly coerced nonreligious people (2) without regard to whether a contrary law would have been a "substantial burden" on the accommodated beliefs, and (3) without regard to the government's interest in individual cases.[13]

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[12] *See, e.g.*, Eugene Volokh, *Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?*, The Volokh Conspiracy (Dec. 4, 2013, 5:11 PM), http://www.volokh.com/2013/12/04/3b-granting-exemption-employer-mandate-violate-establishment-clause/.

[13] The Court has also held that a government violates the Establishment Clause when it effectively delegates civic authority to a religious institution. *See Grendel's Den, Inc.*, 459 U.S. at 116; *see also Kiryas Joel*, 512 U.S. at 698 (1994) (Souter, J., concurring).

As already explained, in *Caldor*, the Court invalidated a law that directly coerced employers on the basis of their employees' religious beliefs, without exception. 472 U.S. at 708-711; *see also Amos*, at 337 n.15. In *Texas Monthly*, the Court invalidated a state law that exempted religious literature from sales tax. 489 U.S. at 1. The majority divided on the proper constitutional analysis. One Justice based his decision on the Press Clause, *id.* at 26 (White, J.), and two others seemed especially concerned that the law lent the government's support to "the communication of religious messages," *id.* at 28 (Blackmun, J.). A plurality of justices objected principally to the law's failure to relieve a substantial burden on religious exercise, or to incorporate an exception for compelling governmental interests. *Id.* at 18 n.8 (Brennan, J.). RFRA has neither defect. Unlike the laws at issue in *Caldor* and *Texas Monthly*, RFRA applies only where the government substantially burdens religious exercise without using the least restrictive means to advance a compelling governmental interest.

Likewise, the Court's Free Exercise Clause analysis in *United States v. Lee* is inapposite.[14] 455 U.S. 252 (1982). In *Lee*, the Court held that the Free Exercise Clause does not require an accommodation for Amish employers who object to participating in the social security system. *Id.* at 260-61. The Court did not suggest that the Establishment Clause prohibits Congress from providing such a statutory religious accommodation, or prohibits courts from applying a statute like RFRA to plaintiffs like Lee. *See id.* at 260 n.11 ("[W]e [need not] decide whether, if Congress had ... intended ... to reach this case, conflicts with the Establishment Clause would arise"). The Court finally settled those questions in *Cutter*.

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[14] *See, e.g.*, Tebbe, *et al.*, *supra* note 2.

The Court's decisions strongly support the constitutionality of RFRA, both facially and as-applied.

II. An Establishment Clause Limit on RFRA Would Require Courts To Perform Three Separate and Needless Religion Clause Analyses

In many, if not all, religious accommodations cases, the scholars' proposed doctrine would require courts to needlessly analyze the entitlement baseline, the weight of hypothetical burdens imposed on third parties, and whether the Free Exercise Clause requires an accommodation.

First, the proposed doctrine begs an entitlement baseline question in many religious accommodation cases. Where a religious accommodation would allegedly burden third party rights *that were created by the statute that burdens religious exercise*, we might ask which came first – the burden on religion, or the rights that the accommodation allegedly burdens? Plaintiffs allege that the ACA regulations burden their religious exercise, and the scholars allege that an accommodation would significantly burden employees because they would not be entitled to have their employer pay for certain health care services. But the employees were not entitled to have their employer pay for that health care *before* the administration adopted the regulations that allegedly burden the plaintiffs' religious exercise.

In this case, the answer to the baseline question is fairly straightforward: under RFRA's "[r]ule of construction," by remaining silent about RFRA's applicability, the ACA effectively incorporates RFRA's balancing test into its own provisions. *See* 42 U.S.C. § 2000bb-3(b). The regulations implementing the ACA therefore may not create a third party entitlement contrary to RFRA. *See Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984).

But the baseline issue will not be so easy in every case. Suppose a statute provides a right to physician-assisted suicide, but also provides that health care providers with religious objections do not have to assist a suicide. *See, e.g.*, Or. Rev. Stat. § 127.885 (2012). What if a certain hospital or pharmacist's objection imposes a significant burden on patients who want to exercise their right to physician-assisted suicide? In that case, which came first, the right to physician-assisted suicide, or the right to conscientious objection?

This difficult analysis is entirely unnecessary, especially when the religious accommodation, like RFRA, already takes into account the government's interest in protecting third parties.

Second, the proposed doctrine would limit only statutory accommodations that put a "significant burden" on third parties. To determine whether an accommodation violates the Establishment Clause, therefore, a court would be obligated to speculate about all of the possible burdens the accommodation could put on parties who are not before the court, and then to determine whether they are "significant." The proposed doctrine would generate a cottage industry of speculative judicial line drawing about what constitutes a "significant burden" on third parties sufficient to trigger an Establishment Clause analysis, often in cases, like this one, where those parties are not before the court to develop a factual record.

This contention finds no support in this Court's decisions. In *Amos*, the Court upheld a religious accommodation that cost a third party his job. 483 U.S. at 330-331. In *Gillette*, the Court upheld a religious accommodation that sent others to war. 401 U.S. at 449-453. Courts routinely enforce the clergy-penitent privilege against a party's right to present evidence at trial. And in *Cutter*, the Court explained that, for statutes like RLUIPA and RFRA, the way to protect third parties that might be burdened by a religious accommodation is to *apply the statute*, precisely because the statute requires courts to consider the government's interest in protecting nonbeneficiaries. 544 U.S. at 720.

Third, courts applying the proposed doctrine would also have to determine whether the Free Exercise Clause *requires* the accommodation.

The Court has not only upheld statutory religious accommodations, it has held that the Free Exercise Clause itself sometimes *requires* religious accommodations, even when those accommodations may impose burdens on third parties. At a minimum, the Free Exercise Clause limits the applicability of a statute: where a law appears on its face to target religious exercise, *Church of the Lukumi Babalu Aye, Inc. v. Hialea*, 508 US. 520, 532 (1993); where a law would interfere with a religious institution's ministerial decisions, *Hosanna-Tabor v. EEOC*, 132 S.Ct. 664, 706 (2012); and where a law would require teenage children to go to school, even if the limited schooling would impose a burden on those children, *Wisconsin v. Yoder*, 406 U.S. 205, 230-231 (1972). The reach of these doctrines is unclear. It *is* clear, though, as a matter of constitutional logic, that the Free Exercise Clause's mandatory religious accommodations and the Establishment Clause are in sync. *See* McConnell, *Accommodation of Religion, supra*, at 691 (arguing that reading the Establishment Clause to forbid all solicitude for religious accommodation would "[p]aradoxically" forbid the Free Exercise Clause).

Consistent with the doctrine of constitutional avoidance, courts ordinarily resolve religious exercise issues on statutory rather than Free Exercise grounds. As a result, courts rarely opine on whether statutory religious accommodations overlap with the Constitution's mandatory accommodations.

Were the Court to adopt the scholars' proposed Establishment Clause doctrine, however, a court considering whether a given accommodation creates a "significant burden" on third parties would *also* have to decide whether the Free Exercise Clause *requires* the accommodation. Vague and contradictory Religion Clause analyses would proliferate across state and federal courts, in cases arising from myriad regulatory and factual settings.

This Religion Clause three-step is entirely avoidable. The Court has already decided that statutes like RFRA that protect "compelling governmental interest[s]," "[p]roperly applied," comply with the Establishment Clause. *Cutter*, 544 U.S. at 720. Furthermore, in this case, the "compelling governmental interest" test adequately protects any interest the Government may have in requiring employers to provide health benefits to their employees. The Court should decline the scholars' invitation to needlessly venture into uncharted Religion Clause waters. *Cf. Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring) (discussing the merits of constitutional avoidance); *Pearson v. Callahan*, 555 U.S. 223 (2009) (opting for a qualified immunity analysis that minimizes unnecessary constitutional adjudication).

III. An Establishment Clause Limit on RFRA Would Threaten Thousands of Legislative Religious Accommodations

From the earliest days of the Republic, American legislatures have responded to religious pluralism with accommodations from laws that would otherwise substantially burden the religious exercise of political minorities. While some of the framers debated whether and when the Free Exercise Clause *requires* religious accommodations, "there is virtually no evidence that anyone thought [regulatory exemptions] were constitutionally prohibited or that they were part of an establishment of religion." Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1796 (2006); *see also* McConnell, *Accommodation of Religion*, *supra*, at 693 ("At a minimum, the message of [the drafting and ratifying] history is that religious accommodations are permissible and desirable, even if not constitutionally compelled."); *see generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 104 Harv. L. Rev. 1409, 1466-73 (1990).

Indeed, the first two Congresses debated whether to exempt Quakers from militia service. The First Congress debated a constitutional accommodation, and settled on the Free Exercise Clause without clearly deciding whether it required an accommodation for conscientious objectors. The Second Congress debated a statutory accommodation for Quakers under the Uniform Militia Act. *See* 2 *Annals Cong.* 1858-59, 1868-75 (Dec.17 to Dec. 24, 1790). The members disputed *whether* the Free Exercise Clause required an accommodation, and *how* to accommodate objectors without exempting them from their share of service to the republic. James Madison supported a federal statutory accommodation. *Id.* at 1871 (Dec. 22, 1790). Only one member suggested that a federal accommodation would "establish the [Quaker] religion" by inducing "the whole community" to "turn Quakers," but he went on to suggest that requiring those exempted to "pay a full equivalent" of the cost would satisfy his concern. *Id.* at 1869-70 (Jackson). In the end, "[m]ost speakers treated the question as one of federalism or policy," not a matter for concern under the Religion Clauses, "and it was left to the states" to resolve for themselves. David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801*, at 159 (1997).

Since the earliest days, Congress and the states have regularly accommodated religious minorities. Douglas Laycock, in a paper tracing the history of American regulatory exemptions from colonial to modern days, notes that "regulatory exemptions emerged" in early American history "when the majority became willing to provide for the religious liberty of minority faiths;" indeed, "exemptions were never part of the establishment; they grew out of a *political commitment to free exercise*." Laycock, *Regulatory Exemptions*, 81 Notre Dame L. Rev. at 1803 (emphasis added). Some exemptions, such as legislative exemptions from Prohibition for sacramental wine, National Prohibition Act of 1919 (The Volstead Act), Pub. L. No. 66-66, 41 Stat. 305, and from the military draft, *Gillette*, 401 U.S. at 437, have a storied place in American political life.

Out of growing sensitivity to religious, cultural, and moral pluralism, in the last few decades the federal government and states have adopted thousands of religious accommodations. Some of them apply in specific regulatory circumstances, such as the provision of health care. Others, like RFRA, establish heightened scrutiny for any government action that "substantial[ly] burden[s]" the exercise of religion. Many states have adopted a statutory or constitutional analog to RFRA.[15] Indeed, these statutes are in keeping with the Court's intuition that "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation." *Smith*, 494 U.S. at 890.

Legislatures have been particularly sensitive to plural views on questions about the beginning and end of human life. Accordingly, federal and state legislatures have exempted religious objectors from laws that would otherwise require objectors to engage in what they believe to be a form of unjustified killing. Abortion,[16] capital punishment,[17] physician-assisted suicide[18]—these are all matters about which Americans maintain a plurality of moral views. Despite the burden that accommodating minority religious views might place on third parties, including patients, physicians, prison administrators, etc., Americans have concluded that the appropriate

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[15] *See* Appendix A: *State Religious Exercise Provisions That Would Be Limited By An Establishment Clause Doctrine That Limits RFRA*.

[16] Church Amendment, 42 U.S.C. § 300a-7(b) (enacted as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-45) (mandating that public officials may not require individuals or entities receiving certain public fund to perform abortion or sterilizations procedures if it "would be contrary to [the individual or entity's] religious beliefs or moral convictions"); Danforth Amendment of 1988, 20 U.S.C. § 1688 (part of the Civil Rights

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Restoration Act of 1988, Pub. L. No. 100-259) (clarifying that Title IX of the Education Amendments of 1972 may not be construed to prohibit or require any individual or entity to provide or pay for abortion-related services); Coats/Snowe Amendment of 1996, 42 U.S.C. § 238n(a)(1) (part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134) (specifying that federal, state, and local governments may not discriminate against health care entities that decline to participate in abortion training or abortions); Medicare and Medicaid Conscience Clause Provisions, 42 U.S.C. §§ 1395w-22(j)(3)(B), 1396u-2(b)(3)(B) (part of the Balanced Budget Act of 1997, Pub. L. No. 105-33) (exempting managed care providers from requirement to cover counseling or referral for procedures that violate their moral or religious views, the first to exempt for counseling or referrals); Weldon Amendment, Consolidated Appropriations Act, 2009, Pub. L. No. 111-117, 123 Stat. 3034; *see generally* Appendix B: *Health Care Conscience Rights That Would Be Limited By An Establishment Clause Doctrine That Limits RFRA.*

[17] 18 U.S.C. § 3597(b) (prohibiting state governments and federal agencies from requiring an employee "to be in attendance at or participate in any prosecution or execution under this section if such participation is contrary to the moral or religious convictions of the employee" including "personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities").

[18] Oregon Death with Dignity Act sec. 4.01, Or. Rev. Stat. sec. 127.885 (2012); Washington Death with Dignity Act sec. 19, Wash. Rev. Code sec. 70.245.190 (2008).

resolution of these dilemmas is to forgo forcing dissenters to violate their consciences on matters of life and death. The scholars' proposed Establishment Clause limit on RFRA would threaten a wide array of statutory religious accommodations that have become integral to a robust culture of religious liberty and mutual respect in an increasingly religiously diverse society.

CONCLUSION

When Congress provides religious accommodations consistent with the government's compelling interests, including its interests in protecting third parties, it supplements, rather than contradicts, the Religion Clauses' protection of religious liberty. The scholars' proposed Establishment Clause doctrine has scant support in this Court's decisions, and would work a massive revision to the American religious liberty regime, one based on a tradition of respecting and protecting religious minorities. Respectfully, the Court should stay the course.

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APPENDIX B — STATE RELIGIOUS EXERCISE PROVISIONS THAT WOULD BE LIMITED BY AN ESTABLISHMENT CLAUSE DOCTRINE THAT LIMITS RFRA

Alabama

Ala. Const. Amend. 622, § V(b) (1999)

Alaska

Larson v. Cooper, 90 P.3d 125 (Alaska 2004)

Swanner v. Anchorage Equal Rights Comm'n,
874 P.2d 274 (Alaska), *cert. denied*, 513 U.S. 979 (1994)

Arizona

Ariz. Rev. Stat. Ann. §§ 41-1493–41-1493.04 (2011)

Connecticut

Conn. Gen. Stat. Ann. § 52-571b(b) (West 1999)

Florida

Fla. Stat. Ann. § 761.03(1) (West 1997)

Idaho

Idaho Code Ann. §§ 73.401–73.404 (2013)

Illinois

775 Ill. Comp. Stat. 35/15 (West 1999)

Indiana

City Chapel Evangelical Free Inc. v. City of South Bend, 744 N.E.2d 443 (Ind. 2001)

Kansas

Kan. Stat. Ann. §§ 60-5301–60-5305 (Westlaw 2013)

State v. Evans,
796 P.2d 178 (Kan. Ct. App. 1990)

Lower v. Bd. of Dirs. of Haskell Cnty. Cemetery Dist.,
56 P.3d 235 (Kan. 2002)

Kentucky

Ky. Rev. Stat. § 446.350 (Westlaw 2013)

Louisiana

La. Rev. Stat. Ann. §§13:5231–13:5242 (2012)

Maine

Rupert v. City of Portland,
605 A.2d 63 (Me. 1992)

Massachusetts

Attorney General v. Desilets,
636 N.E.2d 233 (Mass. 1994)

Rasheed v. Comm'r of Corr.,
845 N.E.2d 296 (Mass. 2006)

Michigan

Porth v. Roman Catholic Diocese, 532 N.W.2d 195 (Mich. Ct. App. 1995)

McCready v. Hoffius,
586 N.W.2d 723 (Mich. 1998), *vacated on other grounds*, 593 N.W.2d 545 (Mich. 1999)

Minnesota

State v. Hershberger,
462 N.W.2d 393 (Minn. 1990)

Mississippi

In re Brown,
478 So.2d 1033 (Miss. 1985)

Missouri

Mo. Rev. Stat. §§ 1.302–1.307 (West 2013)

Montana

St. John's Lutheran Church v. State Comp. Ins. Fund,
830 P.2d 1271 (Mont. 1992)

New Mexico

N.M. Stat. Ann. §§ 28-22-1–28-22-5 (West 2013)

New York

Rourke v. New York State Dep't of Corr. Servs.,
603 N.Y.S.2d 647 (N.Y. Sup. Ct. 1993), *aff'd*, 615
N.Y.S.2d 470 (N.Y. App. Div. 1994)

Catholic Charities v. Serio,
859 N.E.2d 459 (N.Y. 2006)

North Carolina

In re Browning,
476 S.E.2d 465 (N.C. 1996)

Ohio

Humphrey v. Lane,
728 N.E.2d 1039 (Ohio), *cert. denied*, 531 U.S. 912 (2000)

Oklahoma

Okla. Stat. tit. 51, §§ 251–258 (2013)

Pennsylvania

71 Pa. Stat. Ann. §§ 2401–2407 (West 2013)

Rhode Island

R.I. Gen. Laws §§ 42-80.1-1–42.80.1-4 (2006)

South Carolina

S.C. Code Ann. §§ 1-32-10–1-32-60 (2013)

Tennessee

Tenn. Code Ann. §4-1-407 (West 2013) *cf.*

State ex rel. Swann v. Pack,
527 S.W.2d 99 (Tenn. 1975) *cert. denied*, 424 U.S. 954 (1976)

Texas

Tex. Civ. Prac. & Rem. Code Ann. §§ 110.001–110.012 (West 2013)

Vermont

Hunt v. Hunt,
648 A.2d 843 (Vt. 1994)

Virginia

Va. Code Ann. § 57-2.02 (West 2013)

Washington

First Covenant Church v. City of Seattle,
840 P.2d 174 (Wash. 1992)

City of Woodlinville v. Northshore United Church of Christ, 211 P.3d 406 (Wash. 2009)

Wisconsin

State v. Miller, 549 N.W.2d 235 (Wis. 1996)

Coulee Catholic Schs. v. Labor & Indus. Review Comm'n, 768 N.W.2d 868 (Wis. 2009)

APPENDIX C — HEALTH CARE CONSCIENCE RIGHTS THAT WOULD BE LIMITED BY AN ESTABLISHMENT CLAUSE DOCTRINE THAT LIMITS RFRA

Federal

Danforth Amendment of 1988, 20 U.S.C. § 1688 (part of the Civil Rights Restoration Act of 1988, Pub. L. No. 100-259)

Coats/Snowe Amendment of 1996, 42 U.S.C. § 238n(a)(1) (part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134)

Church Amendment, 42 U.S.C. § 300a-7(b) (2006) (enacted as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-45)

Medicare and Medicaid Conscience Clause Provisions, 42 U.S.C. §§ 1395w-22(j)(3)(B), 1396u-2(b)(3)(B) (part of the Balanced Budget Act of 1997, Pub. L. No. 105-33)

Weldon Amendment, Consolidated Appropriations Act, 2009, Pub. L. No. 111-117, 123 Stat. 3034

State

Ariz. Rev. Stat. Ann § 36-2154 (2009)

Ark. Code Ann. § 20-16-601(a) (2005)

Cal. Health & Safety Code § 123420(a), (c) (West 2006)

Conn. Agencies Regs. § 19-13-D54(f) (2005)

Del. Code Ann. tit. 24, § 1791 (2005)

Fla. Stat. Ann. § 390.0111(8) (West 2007)

Ga. Code Ann. § 16-12-142 (2006)

Haw. Rev. Stat. Ann. § 453-16(d) (LexisNexis 2005)

Idaho Code Ann. § 18-612 (2004)

720 Ill. Comp. Stat. Ann. 510/13 (West 2003)

745 Ill. Comp. Stat. Ann. 70/7 (West 2002)

Ind. Code Ann. § 16-34-1-4 (LexisNexis 1993)

Iowa Code Ann. §§ 146.1, 146.2 (West 2005)

Kan. Stat. Ann. § 65-443 (2002)

Ky. Rev. Stat. Ann. § 311.800, (LexisNexis 2007)

La. Rev. Stat. Ann. § 40:1299.33 (2001)

Me. Rev. Stat. Ann. tit. 22, §§ 1591, 1592 (2004)

Md. Code. Ann., Health-Gen. § 20-214 (LexisNexis 2005)

Mass. Gen. Laws Ann. ch. 112, § 12I (West 2003)

Mich. Comp. Laws Ann. § 333.20181 (West 2001)

Minn. Stat. Ann. § 145.414 (West 2005)

Mo. Ann. Stat. §§ 197.032, 376.1199(1) (West 2004)

Mont. Code. Ann. § 50-20-111 (2007)

Neb. Rev. Stat. § 28-337 (1995)

N.J. Stat. Ann. § 2A: 65A-2 (West 2000)

N.M. Stat. Ann. § 30-5-2 (LexisNexis 2003)

N.Y. Civ. Rights Law § 79-i (McKinney 1992)

Nev. Rev. Stat. Ann. § 449.191 (LexisNexis 2004)

N.C. Gen. Stat. § 14-45.1(e), (f) (LexisNexis 2007)

N.D. Cent. Code § 23-16-14 (2002)

Ohio Rev. Code Ann. § 4731.91 (LexisNexis 2004)

Or. Rev. Stat. §§ 435.475, 435.485 (2007)

43 Pa. Cons. Stat. Ann. § 955.2 (West 1991); 18 Pa. Cons. Stat. Ann. § 3213(d) (West 2000)

R.I. Gen Laws § 23-17-11 (2001)

S.C. Code Ann. § 44-41-40, 50 (2002)

S.D. Codified Laws §§ 34-23A-11, 34-23A-12 (2004)

Ten. Code Ann. § 39-15-204 (2006)

Tex. Occ. Code Ann. § 103.004 (Vernon 2004)

Utah Code Ann. § 76-7-306(2) (2003)

Va. Code. Ann. § 18.2-75 (2004)

Wash. Rev. Code Ann. § 9.02.150 (West 2003)

Wis. Stat. Ann. § 253.09(4) (West 2004)

Wyo. Stat. Ann. §§ 35-6-105, 106 (LexisNexis 2007)

AMICUS
CURIAE
BRIEF

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AND
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In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL., RESPONDENTS

CONESTOGA WOOD SPECIALTIES CORP., ET AL., PETITIONERS

v.

KATHLEEN SEBELIUS, ET AL., RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici are forty-four law professors whose research and teaching focus primarily on corporate and securities law and criminal law as applied to corporations.[1] See Appendix A (listing the individual law professors joining this brief). This brief addresses those issues that are specifically within *amici*'s particular areas of scholarly expertise.[2]

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[1] Conestoga Wood Specialties Corporation (Conestoga) and Petitioners Kathleen Sebelius, Secretary of Health and Human Services, et al. previously filed with the Court letters consenting to the filing of *amicus curiae* briefs. Hobby Lobby Stores, Inc. (Hobby Lobby) separately consented to the filing of this brief, such consent letter which is lodged herewith. Pursuant to Rule 37.6, *amici* also state that this brief was not authored in whole or in part by counsel for any party and that no one other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] Thus, this brief does not address (1) whether the Patient Protection and Affordable Care Act (PPACA) contraceptive mandate "substantially burdens" the "exercise of religion" within the meaning of the Religious Freedom and Restoration Act (RFRA); or (2) whether this Court's decision in *Citizens United* v. *FEC*, 558 U.S. 310 (2010), which concerned the First Amendment's Free Speech Clause, has any bearing on the outcome of Hobby Lobby's and Conestoga's RFRA claims. *Amici* understand that experts in religion and constitutional law will file *amicus* briefs addressing such issues. In addition, because Hobby Lobby and Conestoga are for-profit corporations, this brief does not specifically address non-profit corporations, limited liability companies, or partnerships.

SUMMARY OF ARGUMENT

Hobby Lobby and Conestoga each asserts that the religious values of its present controlling shareholders should pass through to the corporation itself. This Court should reject any such "values pass-through" concept. To do otherwise would run contrary to established principles of corporate law.

1. The essence of a corporation is its "separateness" from its shareholders. It is a distinct legal entity, with its own rights and obligations, different from the rights and obligations of its shareholders. This Court has repeatedly recognized this separateness.

2. Shareholders rely on the corporation's separate existence to shield them from personal liability. When they voluntarily choose to incorporate a business, shareholders cannot then decide to ignore, either directly or indirectly, the distinct legal existence of the corporation when it serves their personal interests.

3. The separateness between shareholders and the corporation that they own (or, in this case, own and control) is essential to promote investment, innovation, job generation, and the orderly conduct of business. This Court should not adopt a standard that chips away at, creates idiosyncratic exceptions to, or calls into question this legal separateness.

4. On the facts of these cases, there is no basis in law or in fact to disregard the separateness between shareholders and the corporations they control. Hobby Lobby's and Conestoga's attempt to "reverse veil pierce"—that is, to imbue the corporation, either by shareholder fiat or a board resolution, with the religious identity of certain of its shareholders—should

be rejected. The concept of "reverse veil piercing" is wholly inapplicable on these facts.

5. Adoption by this Court of a "values pass-through" theory here would be disruptive to business and generate costly litigation. It would encourage intrafamilial and intergenerational disputes. It would also encourage subterfuge by corporations seeking to obtain a competitive advantage.

6. Adoption by this Court of a "values pass-through" theory would also have potentially dramatic and unintended consequences with respect to laws other than PPACA, such as the Public Accommodations and Employment Discrimination provisions of the Civil Rights Act of 1964. Rather than open up such a Pandora's box, the Court should simply follow well-established principles of corporate law and hold that a corporation cannot, through the expedient of a shareholder vote or a board resolution, take on the religious identity of its shareholders.

ARGUMENT

I. ATTRIBUTING TO A CORPORATION THE RELIGIOUS IDENTITY OF ITS CONTROLLING SHAREHOLDERS IS CONTRARY TO CORPORATE LAW.

A. A CORPORATION IS A LEGAL ENTITY, SEPARATE AND DISTINCT FROM ITS SHAREHOLDERS.

The first principle of corporate law is that for-profit corporations are entities that possess legal interests and a legal identity of their own—one separate and distinct from their shareholders. This is true whether the for-profit corporation has one, one hundred, or one million shareholders. In each scenario, the corporate entity is distinct in its legal interests and existence from those who contribute capital to it.

This Court has repeatedly recognized this principle of strict separation. As this Court has recognized, a "corporation and its stockholders are generally to be treated as separate entities." *Burnet* v. *Clark*, 287 U.S. 410, 415 (1932); see also *New Colonial Ice Co.* v. *Helvering*, 292 U.S. 435, 442 (1934). This Court has gone so far as to call this "'a general principle of corporate law deeply ingrained in our economic and legal systems * * * .'" *United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998) (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193 (1929), and citing *Burnet*). "After all," the Court has emphasized, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001).

The centrality of corporate "separateness" is well-established in the United States. More than a century ago, Justice Holmes observed: "A leading purpose of [corporation] statutes and of those who act under them is to interpose a nonconductor, through which, in matters of contract, it is impossible to see the men behind them." *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 273 (1908); see also *Klein* v. *Bd. of Tax Supervisors of Jefferson Cnty., Ky.*, 282 U.S. 19, 24 (1930) (explaining that a corporate entity "is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members.").

Indeed, this legal separateness—sometimes called legal "personhood"—has been the very basis of corporate law at least since the 18th Century. See William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND 456-67 (U. Chicago Press 1979) ("[I]t has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality. These artificial persons are called bodies politic, bodies corporate, * * * or corporations."); see also *The Queen* v. *Arnaud*, (1846) 115 Eng. Rep. 1485 (Q.B.) (holding that a British corporation with non-British members was entitled to register a vessel under a law limiting vessel registration to British subjects).

Today, legal separateness is recognized in every state, including Oklahoma, the home of Hobby Lobby, and Pennsylvania, the home of Conestoga. See *Kurtz* v. *Clark*, 290 P.3d 779, 785 (Okla. Civ. App. 2012) (recognizing "'the legal concept of corporate entity under which stockholders as such lose their individualities in the individuality of the corporation as a separate and distinct person'" (quoting *Dobry* v. *Yukon Elec. Co.*, 290 P.2d 135, 137 (Okla. 1955))); *Barium Steel Corp.* v. *Wiley*, 108 A.2d 336, 341 (Pa. 1954) ("It is well established that a corporation is a distinct and separate entity, irrespective of the persons who own all its stock. The fact that one person owns all of the stock does not make him and the corporation one and the same person, nor does he thereby become the owner of all the property of the corporation. The shares of stock of a corporation are essentially distinct and different from the corporate property.").

B. THE CORPORATION'S SEPARATE EXISTENCE PROTECTS ITS SHAREHOLDERS FROM LIABILITY FOR CORPORATE DEBTS, THEREBY ENCOURAGING INVESTMENT, INNOVATION, AND JOB GENERATION.

Because the corporation is a separate entity, its shareholders are not responsible for its debts. This "privilege of limited liability," as protected by the corporate veil, is "the corporation's most precious characteristic." William W. Cook, THE PRINCIPLES OF CORPORATION LAW 19 (1925).

Although the term "corporation" sometimes calls to mind large, publicly-traded corporations, incorporation provides equally critical benefits to smaller, private businesses. One of the most compelling reasons for a small business to incorporate is so that its shareholders can acquire the protection of the corporate veil. By incorporating a business, the founders and investors do not put their personal assets at risk. Absent significant misconduct and fraud, a shareholder in a corporation cannot lose any more than her original investment. If the corporation cannot pay its bills, the creditors—not the shareholders—bear the loss, with only very narrow exceptions.[3]

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[3] The leading treatise on closely-held corporations notes that, in addition to limited liability,

> [t]here may [be other benefits] from the recognition of the separate entity[:] the participants in the enterprise may be entitled to claim benefits as an employee for purposes of workers' compensation, social security, unemployment compensation or other

Even where a single shareholder owns 100% of the corporation's shares, the corporate veil cannot be pierced absent significant misconduct or fraud on the part of the shareholder. This impermeability of the corporate veil has been confirmed by "thousands of instances where a sole shareholder was held not liable for either tort or contract obligation of his wholly-owned corporation." George D. Hornstein, CORPORATION LAW AND PRACTICE § 751 (1959).

The rationale behind the corporate veil is simple: by creating the corporate veil, legislators wanted to encourage entrepreneurial activity by founders, investment by passive investors, and risk-taking by corporate managers. The corporate veil is a simple device that helps to achieve all three of these goals.

Allowing a corporation, through either shareholder vote or board resolution, to take on and assert the religious beliefs of its shareholders in order to avoid having to comply with a generally-applicable law with a

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> entitlement statutes. A corporate officer or employee who is also the sole or controlling shareholder of the corporation has sometimes been able to assert successfully a claim as an employee for workers' compensation. Similarly, some courts respect the separate entity of a close corporation so that shareholder-employees qualify for social security benefits for which they would not be eligible if self-employed.

F. Hodge O'Neal & Robert B. Thompson, 1 O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLC'S: LAW AND PRACTICE § 1:10 (3d ed. 2004).

secular purpose is fundamentally at odds with the entire concept of incorporation. Creating such an unprecedented and idiosyncratic tear in the corporate veil would also carry with it unintended consequences, many of which are not easily foreseen. For example, adopting a "values pass-through" theory or "reverse veil piercing" in this case could make the raising of capital more challenging, recruitment of employees more difficult, and entrepreneurial energy less likely to flourish. As a matter of policy, as well as well-established principles of corporate law, this Court should reject Hobby Lobby's and Conestoga's claims.

C. THE CORPORATION'S SEPARATE EXISTENCE PERMITS A BUSINESS TO OPERATE NOTWITHSTANDING THE DEATH OR DISABILITY OF ITS FOUNDERS OR CHANGES IN SHARE OWNERSHIP, THEREBY PROMOTING STABILITY AND PREDICTABILITY IN BUSINESS OPERATIONS.

In addition to the corporate veil separating shareholders from the corporation, another key feature of corporations is what known as "capital lock-in." Once an investor makes a capital contribution to the corporation, the money stays with the corporation, subject only to the decision of the board of directors to deploy it, reinvest it, or distribute it to shareholders in the form of dividends. See Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. Rev. 387, 388-89 (2003). Thus, for example, if a shareholder dies, her money stays in the corporation. Similarly, if shareholders become unhappy with management, they cannot demand their money back. This piece of the corporate architecture—a departure from the traditional laws of partnership—is essential to the stability of incorporated businesses, the confidence of lenders, and the willingness of trading partners to do business with a corporation. See *id.* (arguing that capital "lock-in" is one feature that has "made the corporate form so useful in the development of modern industrial economies").

Capital lock-in also permits what has long been known as the "perpetual existence" of corporations. Perpetual existence simply means that, as shareholders die, distribute their shares to following generations, or sell their shares to newcomers, the corporation does not founder or dissolve. Instead, the corporation keeps operating—even if the new shareholders hold different religious, social, political, or business views from those who came before them. Such transitions in ownership are not limited to publicly-traded corporations. Such transitions happen to closely-held and family-owned corporations as well due to, *inter alia*, death, disability, divorce, or generational shifts.

If this Court were to accept the arguments being advanced by Hobby Lobby and Conestoga, it would encourage disruptive and inefficient disputes as share ownership is transferred down through the generations. It would invite contentious shareholder meetings, disruptive proxy contests, and expensive litigation regarding whether the corporation should adopt a religion and, if so, which one. Even where the controlling shareholders are not religious at all, directors installed by the prior controlling shareholders may be. In addition, non-religious shareholders or directors might decide that voting the corporation a religious identity will provide the corporation an advantage over its competitors (namely, by relieving the corporation of its obligation to comply with a generally-applicable law). Indeed, it is not difficult to foresee the possibility that a shareholder would bring a derivative suit if the board of directors *refuses* to imbue the corporation with a religious identity that might relieve the corporation of the obligation to comply with generally-applicable laws and regulations and thereby give it a competitive business advantage. None of this is good for the stability—or profitability—of the corporation. And it is avoidable, simply by rejecting the values pass-through theory.

D. THE SEPARATION BETWEEN A CORPORATION AND ITS SHAREHOLDERS IS A PRINCIPLE NOT ONLY OF CORPORATE LAW, BUT ALSO OF AGENCY LAW AND CRIMINAL LAW.

Many different areas of law build upon the fundamental principle that a corporation is an entity separate and distinct from its shareholders. In agency law, for example, shareholders have no authority to act on behalf of the corporation or to bind the corporation to any legal commitments. James D. Cox & Thomas Lee Hazen, BUSINESS ORGANIZATIONS LAW § 7.01 (3d ed. 2011).

Under both federal and state procedure, shareholders generally do not have standing to bring suit on their own behalf for injuries suffered by the corporation. See *Rawoof* v. *Texor Petroleum Co.*, 521 F.3d 750, 757 (7th Cir. 2008) ("[A] shareholder generally cannot sue for indirect harm he suffers as a result of an injury to the corporation."). Such suits may only be brought derivatively, in the name of the corporation and in the corporation's behalf, when the corporation has improperly failed to assert a corporate claim. See Fed. R. Civ. P. 23.1; see also, *e.g.*, Del. Ch. Ct. R. 23.1.[4]

By the same token, corporations should not be able to sue to assert the rights of their shareholders. For-profit corporations are not like membership organizations, which are deemed to share the values of their members and have standing to sue on their members' behalf. See *Hunt* v. *Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Corporations are legally distinct entities whose shareholders may have idiosyncratic investment objectives and distinctive—and changeable—economic needs.

That a corporation is distinct from its individual constituents is also firmly rooted in criminal law doctrine. See generally *Cedric Kushner*, 533 U.S. 158 (holding that sole shareholder and president was a "person" distinct from the corporate "enterprise" under RICO statute). Because of this, a corporation may be found guilty while the sole shareholder is acquitted. See *State* v. *Christy Pontiac-GMC, Inc.*, 354 N.W. 2d 17 (Minn. 1984). Similarly, a shareholder may be found guilty while the corporation is not charged with a crime. See Ellen S. Podgor et al., HORNBOOK ON WHITE COLLAR CRIME § 2.7 (2013) (detailing situations where high-level executives are charged and found guilty while the corporation enters into a non-prosecution or deferred prosecution agreement).

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[4] Although some states allow shareholders to bring a direct action in narrow circumstances—specifically, when the shareholder has suffered a "separate and distinct injury," *Crosby* v. *Beam*, 47 Ohio St. 3d 105, 107 (1989)—the Delaware Supreme Court has rejected this putative exception to the derivative rule. See *Tooley* v. *Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004).

The separateness of corporations and their individual shareholders is also exemplified by the rights afforded to individuals that do not pass to the corporate entity. The "entity exception" limits the rights of "persons" under the Fifth Amendment to "natural persons." See generally *Hale* v. *Henkel*, 201 U.S. 43 (1906), overruled on other grounds by *Murphy* v. *Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964). In *Hale*, this Court noted the policy reasons for distinguishing between individual rights and corporate rights under the Fifth Amendment:

> [T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. * * * While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

Id. at 74-75. This principle was reaffirmed in *United States* v. *White*, 322 U.S. 694, 700 (1944), where this Court stated: "The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations." Thus, while individuals can claim a Fifth Amendment privilege, entities are precluded from equivalent rights. The entity exception has been applied even when the entity embodied personal as well as group interests. See *Bellis* v. *United States*, 417 U.S. 85 (1974) (applying the entity exception to partnership records).

Importantly, moreover, this Court has recognized the distinction even between a *sole shareholder* and the corporation for purposes of the Fifth Amendment. In *Braswell* v. *United States*, 487 U.S. 99 (1988), this Court ruled that the sole shareholder of a corporation has no Fifth Amendment right to resist a subpoena to the corporation for corporate documents that personally incriminate him.

The principle of corporate separateness is both strong and enduring. Nothing in the cases now before this Court should cause this Court to disregard the principle or to call it into any question, or to allow a corporation through either direct shareholder action or a board resolution, to simply "take on" the religious identity of its shareholders.

E. THIS COURT SHOULD NOT ALLOW HOBBY LOBBY AND CONESTOGA TO SELECTIVELY DISREGARD THE CORPORATE VEIL THAT SEPARATES THEM FROM THEIR SHAREHOLDERS.

In the present cases, Hobby Lobby and Conestoga argue that they should be exempt from federal law because of the religious values of their controlling shareholders, while seeking to maintain the benefits of corporate separateness for all other purposes. These corporations have benefited from their separateness in countless ways, and their shareholders have been insulated from actual and potential corporate liabilities since inception. Yet now they ask this Court to disregard that separateness in connection with a government regulation applicable solely to the corporate entity.

Hobby Lobby and Conestoga want to argue, in effect, that the corporate veil is only a one-way street: its shareholders can get protection from tort or contract liability by standing behind the veil, but the corporation can ask a court to disregard the corporate veil on this occasion.

Hobby Lobby and Conestoga cannot have it both ways. This Court has repeatedly held that corporations and their controlling shareholders cannot invoke the corporate veil on the one hand and ask courts to disregard it on the other. See *Schenley Distillers Corp.* v. *United States*, 326 U.S. 432, 437 (1946) ("One who has created a corporate arrangement, chosen as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public."); *Moline Props., Inc.* v. *Comm'r*, 319 U.S. 436 (1943) (holding that even a sole shareholder cannot seek to sidestep a corporation's "separateness" to gain a personal tax advantage).

Hobby Lobby's and Conestoga's position—that the personal religious values of a corporation's controlling shareholders may be "passed through" to, or injected into, the corporation they own—is inconsistent with the protection that the corporation's separate existence provides to the shareholders, i.e., the corporate veil. Moreover, this Court's ruling in *Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470 (2006), flatly repudiates the major premise on which Hobby Lobby's and Conestoga's argument rests.

In *McDonald*, an African-American individual was the sole shareholder of a corporation that had entered into several contracts with Domino's. Alleging that Domino's breach of those contracts was racially motivated and violated his civil rights, he brought a claim under 42 U.S.C. § 1981. This Court rejected his claim, explaining that

> it is fundamental corporation and agency law—indeed, it can be said to be the whole purpose of corporation and agency law—that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts. * * * The corporate form and the rules of agency protected his personal assets, even though he negotiated, signed, performed, and sought to enforce contracts for [the corporation]. The corporate form and the rules of agency similarly deny him rights under those contracts.

Id. at 477 (internal quotation marks omitted). Under *McDonald*'s reasoning, the religious values of Hobby Lobby's and Conestoga's shareholders cannot be "passed through" to the corporate entity, and any "burden" that the contraceptive mandate imposes on the corporate entity does not constitute a cognizable "injury" to the individual shareholders.[5]

F. "REVERSE VEIL PIERCING" HAS NO APPLICATION TO THE FACTS IN THESE CASES.

One corporate law scholar has recently suggested that the practice of "reverse veil-piercing" might justify a "religious values pass-through" from controlling shareholders to the corporation. Stephen M. Bainbridge, *Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers*, 16 Green Bag 2d 235 (2013). This argument fundamentally misunderstands the reverse piercing remedy.

As a general rule, reverse piercing is an equitable remedy, employed to permit creditors of an individual shareholder to reach the assets of a corporation in which she holds stock. See, *e.g.*, *Dzikowski* v. *Friedlander*, 411 B.R. 434, 441 (Bankr. S.D. Fla. 2009). What Hobby Lobby and Conestoga seek in these cases is to engage in a discredited variation on reverse veil piercing, known as "insider reverse piercing." In a "typical" insider reverse piercing case, "a corporate insider, or someone claiming through such individual, attempt[s] to pierce the corporate veil from within so that the corporate entity and the individual will be considered one and the same." *Postal Instant Press, Inc.*, v. *Kaswa Corp.*, 77 Cal. Rptr. 3d 96, 101 (Cal. Ct. App. 2008).

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[5] This Court previously has recognized that "the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy." *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R.*, 417 U.S. 703, 713 (1974). But this does not advance Hobby Lobby's and Conestoga's arguments here. *Bangor Punta* was not a case where the corporation was asking that a court disregard the veil that served to protect it and its shareholders. Instead, invoking equitable principles, this Court held that a shareholder who had acquired a 99% controlling interest in a company at a fair price could not then succeed in a derivative action against the company's former owner for alleged corporate waste and mismanagement that had occurred long before the purchase. *Id.* at 705, 716 (holding that, were such a suit allowed to be maintained, the new owner would "reap[] a windfall").

The law strongly opposes insider reverse veil piercing. The reasoning behind this opposition is straightforward: veil piercing is a doctrine of equity, guided by equitable considerations, and reverse veil piercing at the request of an insider who has consciously chosen the corporate form by which to do business is hardly equitable. See, *e.g.*, *Uniboard Aktiebolag* v. *Acer Am. Corp.*, 118 F. Supp. 2d 19, 25 (D.D.C. 2000) ("[T]he law generally does not allow the option of 'reverse piercing' the corporate veil when it suits the corporation's owner.").

Moreover, Hobby Lobby's and Conestoga's position is not supported by cases that pierce the corporate veil in order to fulfill a federal or state directive. In such cases, federal and state courts may invoke veil piercing because a corporation was created for the transparent purpose of evading state or federal policy. See, *e.g.*, *Anderson* v. *Abbott*, 321 U.S. 349, 362-63 (1944); *Ill. Bell Tel. Co.* v. *Global NAPS Ill., Inc.*, 551 F.3d 587, 598 (7th Cir. 2008); *Bhd. of Locomotive Eng'rs* v. *Springfield Terminal Ry. Co.*, 210 F.3d 18, 26-27 (1st Cir. 2001). By contrast, there is no allegation that Hobby Lobby's or Conestoga's shareholders created their respective corporations as a contrivance in order to evade a federal or state directive. Thus, these facts are different from, for example, cases in which state usury laws limited to individuals are evaded by the borrower purposely incorporating so as to obtain a loan at rates usurious if applied to individuals.[6] See, *e.g.*, *Atlas Subsidiaries of Fla., Inc.* v. *O & O, Inc.*, 166 So. 2d 458 (Fla. Dist. Ct. App. 1964).

In short, well-established corporate law principles do not support the suggestion that the religious identity of the corporation's controlling shareholders should pass through to and exempt those corporations from compliance with generally applicable laws and regulations. Because Hobby Lobby and Conestoga have taken full advantage of the benefits of incorporation, they cannot now disregard the wall of separation that incorporation requires.

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[6] This is also not a case where the decision to incorporate a family farm has threatened a shareholder's homestead exemption. See, *e.g.*, *Cargill, Inc.* v. *Hedge*, 375 N.W.2d 477 (Minn. 1985) (ignoring the fact that a farm had been incorporated in order to permit the sole owner of the corporation to keep her homestead exemption); *State Bank in Eden Valley* v. *Euerle Farms, Inc.*, 441 N.W.2d 121 (Minn. Ct. App. 1989) (same).

II. RECOGNIZING "VALUES PASS-THROUGH" AND/OR "REVERSE VEIL PIERCING" WOULD BE DISRUPTIVE TO BUSINESS AND HAVE IMPLICATIONS FAR BEYOND THE CONTRACEPTIVE MANDATE.

A. Permitting Controlling Shareholders to Imbue the Corporation With Their Religious Identity Would Invite Intrafamilial and Intergenerational Disputes and Generate Costly Litigation.

Shareholders in closely-held and family-owned businesses often find themselves in disputes over values. Factions emerge; majority shareholders gang up on minority shareholders; dissenters lose their jobs and are excluded from decision-making; dividends previously paid and relied upon are discontinued; etc. In such circumstances, minority shareholders find themselves with no economic return on their share ownership. Corporate law casebooks are filled with these dramas.

This factionalizing and exclusion of minority shareholders is statutorily known as "oppression." See Model Bus. Corp. Act § 14.30. Sometimes oppression gives rise to injunctive relief, imposition of damages, forced buy-backs of shares, and even dissolution of the corporation. Cox & Hazen, *supra*, at § 14.12; F. Hodge O'Neal & Robert B. Thompson, 1 Oppression of Minority Shareholders and LLC Members §§ 7.3-9 (2010). Sometimes, it merely results in heartache and fractured families.

Running a family business is difficult enough, even without infusing disruptive and personal issues such as religion into the mix. Under a values pass-through theory, one can imagine majority shareholders "freezing out" family members who do not adhere to the majority's religious beliefs. Would failure to attend church, or to participate in the majority's favored religious practices, form a legitimate basis for exclusion in a values pass-through regime? See Faith Stevelman, *Going Private at the Intersection of the Market and the Law*, 62 Bus. Law. 775 (2007) (describing "freeze out" transactions in which majority shareholders can eliminate minority shareholders from the corporation without providing a business justification and at less than full value).

If this Court were to agree that, as a matter of federal law, shareholders holding a control bloc of shares in a corporation may essentially transfer their religious beliefs to the corporation, the results could be overwhelming. Federal courts faced with RFRA and Free Exercise Clause lawsuits would be forced to resolve questions about what degree of ownership constitutes "control."[7] They would also be forced to resolve difficult questions about the "legitimacy" of controlling shareholders' efforts to imbue the corporation with a religious identity.[8]

---

[7] Such determinations are usually a matter of state law. See *Zimmerman* v. *Crothall*, 62 A.3d 676, 699-700 (Del.Ch. 2013) (defining standards for when a shareholder is a controlling shareholder under Delaware law). The state law standards for who is a controlling shareholder often involve case by case determinations. Under Delaware law, a shareholder is "controlling" if the shareholder "either owns more than 50% of the voting power of the company, or exercises 'actual control' over the board of directors during the course of a particular transaction." *Id.* at 699-700. Both of these tests for whether a controlling shareholder exists can become the subject of extensive litigation. See, *e.g.*, *Kelly* v. *Blum*, No. 4516-VCP, 2010 WL 629850, at *12 (Del. Ch. Ct. 2010) (defining powers

State courts, too, could become clogged with business disputes between shareholders who disagree over what religious identity, if any, their corporation

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that shareholder must possess to be a controlling shareholder, and citing *Paramount Comm'n Inc.* v. *QVC Network Inc.*, 637 A.2d 34, 43 (Del. 1994)); see also *Gould* v. *Reufenacht*, 471 U.S. 701, 706 (1985) (recognizing the complexities of determining what constitutes corporate "control" in closely-held businesses).

[8] Furthermore, questions regarding the "legitimacy" of the corporation's religious identity might not necessarily reduce to an inquiry into the beliefs of the controlling shareholders. For example, suppose that the controlling shareholders are concededly non-religious and yet, for business reasons, installed a set of directors who happen to be extremely religious. If, after receiving permission from the controlling shareholders, the directors were to pass a corporate resolution providing that the corporation adopts the directors' religious identity, would that resolution be "legitimate"? Or, suppose that, out of respect for a minority shareholder's strong religious beliefs, the corporation's non-religious controlling shareholders agree to amend the corporate charter in order to make clear that the corporation adopts the religious identity of the minority shareholder. Would that transaction qualify as "legitimate"? Or, suppose that a corporation's founding shareholders placed into the corporate charter a provision under which the corporate entity adopts their religious identity. If the founding shareholders were subsequently to bequeath their shares to their concededly non-religious grandchildren, would it be "legitimate" for the corporation to rely on its charter in seeking a RFRA-based regulatory exemption?

should adopt. The dispute might be between shareholders who agree that the corporation should adopt a religious identity but disagree over which one. Or, the dispute might be between majority shareholders who, for purely non-economic reasons, are opposed to having the corporation adopt a religious identity that would exempt it from certain regulations and minority shareholders who are focused on reducing the corporation's regulatory-compliance costs. Conversely, over the objection of minority shareholders who are solely interested in maximizing profit, the majority shareholders might seek to have the corporation adopt a religious identity even they anticipate that doing so will cause the corporation to lose customers.[9]

This Court should not take even a small step down this path. Rather than embracing a rule that says that shareholders claiming control of a corporation can impose their personal religious beliefs on minority (or even majority) shareholders and employees, the Court should reject the values pass-through theory.

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[9] Many states hold that controlling shareholders owe an absolute duty of loyalty to minority shareholders. See, *e.g.*, *Cede & Co.* v. *Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993).

B. PERMITTING CONTROLLING SHAREHOLDERS TO IMPOSE THEIR RELIGIOUS BELIEFS ON CORPORATIONS WOULD OPEN THE COURTS TO MANY ISSUES NOT RELATED TO CONTRACEPTION.

These cases raise not only questions of contraceptive and related women's health care. Allowing, or even compelling, corporations to adopt the religious beliefs of their shareholders could result in challenges to scores of other medical products or procedures that shareholders might deem objectionable. See Thomas E. Rutledge, *A Corporation Has No Soul—the Business Entity Law Response to the PPACA Contraceptive Mandate*, 5 Wm. & Mary Bus. L. Rev., at n. 74 (forthcoming 2014) (enumerating plausible religious objections to corporate funding of psychiatric care, treatment of illnesses related to the use of alcohol or tobacco, blood transfusions, delivery of babies born out of wedlock, and vaccination against the HPV virus). "The scope of the [contraceptive] Mandate is only a small subset of the medical procedures to which a Free Exercise objection could be raised." *Id.*

This case, moreover, raises not only questions under PPACA but also under the Civil Rights Act of 1964. Corporations have not raised the religious objections of shareholders as a basis for non-compliance with the public accommodations provisions of the Civil Rights Act. But, under a values pass-through theory, an incorporated business that withholds service from a person on the basis of race, gender, or religion, might try to invoke the religious convictions of its shareholders as a defense.[10]

Similarly, there may be shareholders who have sincere religious convictions that women's place is in the home, or that men should not be engaged in work such as nursing or child care. Could the corporation, which the majority shareholders control, be allowed to invoke the religious beliefs of the majority shareholders as a defense to an employment discrimination claim brought under Title VII?[11]

Recognizing or allowing any kind of religious values pass-through from shareholders to corporations would create a slippery slope that is easily avoidable. Thus, this Court should hold that the religious identity of a for-profit corporation's controlling shareholders, whether expressed through direct shareholder action or a board resolution, cannot excuse the corporation from strict compliance with generally applicable laws and regulations.

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[10] In resisting enactment of the Civil Rights Act, clergymen and senators invoked the "will of God," the "Christian way," and "God's color line" based on biblical texts. See Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 Wake Forest L. Rev. 173, 174-77 (2012) (surveying the climate surrounding the enactment of the Civil Rights Act); see also, Fred R. Harris, *The American Negro Today*, 10 Wm. & Mary L. Rev. 550, 555-56 (1969) (recounting biblical justifications for slavery and Jim Crow laws).

[11] At least one Title VII case might come out differently were the plaintiffs' arguments in these cases to prevail. See *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988) (holding that, notwithstanding the deeply-held beliefs of the shareholders, a manufacturing company could not require a non-religious employee to attend a mandatory "devotional service" each week). One can imagine the range of Title VII claims that would erupt if for-profit businesses were permitted to impose religious job requirements based on the religious beliefs of the controlling shareholders.

C. PERMITTING CORPORATIONS TO USE PUTATIVE RELIGIOUS BELIEFS TO AVOID LEGAL OBLIGATIONS GIVES THOSE CORPORATIONS COMPETITIVE ADVANTAGES AND INCENTIVIZES SUBTERFUGE.

Corporations have a duty, enforceable within corporate law itself, to obey the law. See Model Bus. Corp. Act § 3.02(15) (authorizing a corporation to "do any other act, *not inconsistent with law*, that furthers the business and affairs of the corporation" (emphasis added)). Indeed, in every American jurisdiction, corporations are chartered only for lawful purposes and illegal acts have long been considered *ultra vires*. See generally Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 Va. L. Rev. 1279 (2001).

Oklahoma and Pennsylvania both acknowledge the obligation for corporations to act lawfully. See 18 Okla. Stat. § 1005 ("A corporation may be incorporated * * * to conduct or promote any lawful business or purposes."); 15 Pa. Cons. Stat., § 1301 ("Corporations may be incorporated under this subpart for any lawful purpose or purposes.").

A related principle of corporate law holds that a corporation may not knowingly violate the law, even if the board authorizes it. See *Miller* v. *Am. Tel. & Tel. Co.*, 507 F.2d 759 (3rd Cir. 1974) (holding that the board was not insulated by the business judgment rule when it authorized non-collection of unpaid telephone bills in violation of the Communications Act of 1934).

The reasons for this insistence on legal obedience, beyond the obvious importance of legality to society at large, include the urgency of maintaining a fair and level playing field for all businesses. A competitive marketplace depends on the principle that competition among firms should be on grounds of efficiency, and should not depend on which companies are better at skirting legal obligations.

As a general matter, a corporation will enjoy a competitive advantage in the marketplace if it is exempted from otherwise generally applicable laws and regulations (namely, because the exemption will reduce the corporation's costs of doing business). In this case, Hobby Lobby and Conestoga are asking to be relieved from providing a standard of health care coverage that their competitors are required to provide. Regardless of the companies' purpose, the effect of their legal arguments would be to skew the level playing field of the market, giving an advantage to companies claiming regulatory exemptions. Companies that do not assert religious beliefs will find themselves competing at a disadvantage, on grounds that have nothing to do with efficiency.

If this Court were to accept Hobby Lobby's and Conestoga's arguments, what would prevent a corporation from invoking religion essentially at will in order to obtain exemptions from generally applicable laws and regulations that the corporation finds too costly? Are federal courts prepared to adjudicate complex (and potentially intrusive) questions of whether a given corporation is invoking religion merely as a subterfuge to gain an economic advantage over competitors, rather than in "good faith" (however a court might define that term)?[12] And, if federal courts are not prepared to entangle themselves in such questions, will boards of directors be duty-bound to shareholders to adopt some form of religious identity, so as to exempt the corporation from the greatest number of generally applicable laws and regulations?

These questions do not represent a mere parade of horribles. Rather, it is very easy to imagine how companies would react if this Court were to rule in favor of Hobby Lobby and Conestoga. Companies suffering a competitive disadvantage will simply claim a "Road to Damascus" conversion. A company will adopt a board resolution asserting a religious belief inconsistent with whatever regulation they find obnoxious, whether it be a state's insistence that companies not discriminate on the basis of sexual orientation, Title VII's obligation that women be paid the same as men, or PPACA's requirement of providing health insurance that includes contraceptive coverage.

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[12] Even assuming that federal courts were permitted to engage in such an inquiry, they would be stepping outside of their traditional area of expertise. See *Thomas* v. *Review Bd.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").

Unless federal courts were authorized and prepared to make inquiries into the "legitimacy" or good faith nature of the corporation's putative religious beliefs, then the only checks on all of this would be labor unrest or consumer disgust. And, even if federal courts *were* authorized and prepared to enmesh themselves in the chore of determining whether a corporation's assertion of religious beliefs is in good faith or a mere subterfuge, this chore would not be easy. The evidence typically will be no more, and no less, than what is present in this case: the views of shareholders that the regulation burdens their personal beliefs and a board resolution adopting those beliefs as the corporation's own.

CONCLUSION

Hobby Lobby's and Conestoga's RFRA claims rest on arguments that are contrary to well-established principles of corporate separateness that are recognized by corporate law, criminal law, and agency law. The judgment of the Tenth Circuit should be reversed and the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
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Nos. 13-354 & 13-356

IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS
v.
HOBBY LOBBY STORES, INC., ET AL., RESPONDENTS

CONESTOGA WOOD SPECIALTIES CORP., ET AL., PETITIONERS
v.
KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., RESPONDENTS.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE TENTH AND THIRD CIRCUITS

BRIEF OF *AMICI CURIAE* THE COUNCIL FOR CHRISTIAN COLLEGES & UNIVERSITIES, KUYPER COLLEGE, AND ANDREW V. ABELA IN SUPPORT OF RESPONDENTS HOBBY LOBBY, MARDEL, AND PETITIONER CONESTOGA

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QUESTION PRESENTED

Federal regulations implementing the Patient Protection and Affordable Care Act of 2010 compel some employers, including Conestoga Wood Specialties Corp., Hobby Lobby Stores, Inc., and Mardel, Inc., to provide health insurance for FDA-approved contraceptives. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012). The list of FDA-approved contraceptives includes *ella*, Plan B, and intrauterine devices—all of which can act after conception to terminate a human pregnancy. Because of their religious beliefs, Conestoga, Hobby Lobby, and Mardel, like many other businesses, object to financing the purchase of abortifacients. Are these corporations' rights under the Free Exercise Clause and the Religious Freedom Restoration Act of 1993 violated by requiring them to provide insurance coverage for abortifacient products in contravention to their religious beliefs, or else pay crippling fines?

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BRIEF OF THE COUNCIL FOR CHRISTIAN COLLEGES AND UNIVERSITIES, KUYPER COLLEGE, ANDREW V. ABELA AS *AMICI CURIAE* OPPOSING THE GOVERNMENT

Amici curiae, The Council for Christian Colleges and Universities, Kuyper College, and Andrew V. Abela, respectfully submit that the judgment of the Tenth Circuit should be affirmed and the judgment of the Third Circuit should be reversed.[1]

INTEREST OF THE *AMICI CURIAE*

Amici are responsible for instructing generations of religious business students on how their faith and their vocation interact. *Amici* are committed to integrating faith and business practices, and particularly educating their students to exercise religious faith in all realms of society, including business. This instruction is more nuanced and comprehensive than exhorting students to personal piety and prayer. It draws upon rich traditions of working out how faith applies to business practices—how faith should guide labor-management relations, corporate responsibility for the effect of corporate activities on the environment, and how to conduct business without engaging in immoral activity.

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[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters of consent are on file with the Clerk's Office.

The Council for Christian Colleges and Universities (CCCU) is an international association of intentionally Christian colleges and universities. The CCCU exists "[t]o advance the cause of Christ-centered higher education and to help member institutions transform lives by faithfully relating all areas of scholarship and service to biblical truth." CCCU, *About CCCU*, http://www.cccu.org/about. Headquartered in Washington, D.C., the CCCU has 119 members in North America, all of which are fully accredited colleges and universities with curricula rooted in the arts and sciences. The CCCU's members have over 300,000 students enrolled and over 1.5 million alumni.

Kuyper College is a ministry-focused, Christian leadership college that educates Christians to become leaders in ministry, service, healthcare, and business. Located in Grand Rapids, Michigan, Kuyper provides students with the opportunity to see, understand, and live all of life through the lens of the Bible. Kuyper's curriculum is intended to awaken students to the need for possessing a comprehensive, biblical worldview to interact with all aspects of human existence, including business.

Dr. Andrew V. Abela is the founding dean of the School of Business & Economics at The Catholic University of America, which was established with the explicit purpose of providing an education in business and economics based on Catholic social doctrine, a body of religious teachings related to social life, including life in business. The school aims to teach students how to exercise their faith through a career in business. Students read, study, and discuss the core documents of Catholic social doctrine, and apply them to various business situations in the course of their classes.

STATEMENT

The Government's arguments suggest that when a corporation pursues a religious purpose—like glorifying God through fulfilling a societal need for a given service or engaging in proselytizing—and is also for-profit, the corporation is not exercising religion. But the underlying presupposition that seeking profit is secular and inconsistent with religious exercise is contrary to the teachings of many faiths.

1. Religion plays a central role in many Americans' lives. For these citizens, religion provides answers to questions such as what existence means, and for what purpose we exist:

> "[God] calls man to seek him, to know him, to love him with all his strength." [Catechism of the Catholic Church ¶ 1.]

> "And I have not created . . . mankind except to worship Me." [Qur'an 51:56 (Sahih Int'l).]

> "Man's chief end is to glorify God, and to enjoy him forever." [Westminster Shorter Catechism, Q&A 1.]

Adherents of various faiths believe that the failure to live *all* aspects of their lives to love, worship, and glorify their god is hypocritical and risks eternal punishment. *E.g.*, Matthew 25:41 (NASB) ("Then He will also say to those on His left, 'Depart from Me, accursed ones, into the eternal fire which has been prepared for the devil and his angels.'"). Accordingly, being legally required to act in a manner inconsistent with one's faith is no small matter.

2. Various world religions contain teachings that apply to business conduct:

In Judaism, the ethical principles from the Talmud and precepts from the Torah are understood to apply to the practice of business. *See e.g.*, Hershey H. Friedman, "The Impact of Jewish Values on Marketing and Business Practices," 21 J. of Macromarketing 74 (2001).

Islam has strict rules forbidding the charging of interest, and an entire global industry (Islamic Finance) has been created to comply with these rules. *See generally*, Muhammad Ayub, *Understanding Islamic Finance* (2007).

Likewise, Buddhism has implications for all economic activity. E.F. Schumacher, *Small is Beautiful: Economics as if People Mattered* 56-67 (1973).

3. Christianity (in various forms, the religion at issue in these cases) has a long tradition of addressing how service to God affects business. Various Christian traditions, and the Roman Catholic Church in particular, have well developed doctrine applying Christian teachings to business practices.

The starting point for much of these teachings is that Christians should "recognize their work as a true vocation and . . . respond to God's call in the spirit of true disciples." Pontifical Council of Peace & Justice, *Vocation of the Business Leader* ¶ 87; accord Francis, *Evangelii Gaudium*, #203 (2013) ("Business is a vocation, and a noble vocation, provided that those engaged in it see themselves challenged by a greater meaning in life."). Work is a calling "only if someone else calls you to do it and you do it for them rather than yourself." Timothy Keller & Katherine Leary Alsordf, *Every Good Endeavor: Connecting Your Work to God's Work*, 19 (2012). "Dividing the demands of one's faith from one's work in business is a fundamental error which contributes to much of the damage done by business in our world today . . . ." Pontifical Council of Peace & Justice, *Vocation of the Business Leader* ¶ 10. Thus, from its starting point, this view of a Christian's religious obligations includes the workplace.

Such beliefs were held at the time the Constitution was adopted. In the late 1700s, the famous Methodist pastor John Wesley preached a sermon inquiring "in what spirit do you go through your business? In the spirit of the world, or the Spirit of Christ?" John Wesley, *The More Excellent Way*, III.3, available at http://new.gbgm-umc.org/umhistory/wesley/sermons/89/ (last visited Jan. 23, 2014). Wesley then expounded, "I am afraid thousands of those who are called good Christians do not understand the question. If you act in the Spirit of Christ you carry the end you at first proposed through all your work from first to last. You do everything in the spirit of sacrifice, giving up your will to the will of God; and continually aiming, not at ease, pleasure, or riches; not at anything 'this short enduring world can give'; but merely at the glory of God." *Ibid.*

Given this history, it is not surprising that Christian leaders have often addressed workplace issues, speaking to numerous topics including the following:

Advertising: "Sometimes advertisers speak of it as part of their task to 'create' needs for products and service . . . . 'If . . . a direct appeal is made to [the customer's] instincts—while ignoring in various ways the reality of the person as intelligent and free—then consumer attitudes and lifestyles can be created which are objectively improper and often damaging to his physical and spiritual health.'" Pontifical Council for Social Communications, "Ethics in Advertising," 10 (quoting John Paul II, *Centesimus annus*, #36 (1991)).

Collective bargaining: "We support the right of employees and employers to organize for collective bargaining." United Methodist Church: Our Social Creed, available at http://www.umc.org/site/c.lwL4KnN1LtH/b.2294683/k.B1A4/Church_and_Society.htm (last visited Jan. 20, 2014).

Fair wages: "A workman's wages should be sufficient to enable him to support himself, his wife and his children." John Paul II, *Centesimus annus*, #8 (1991); accord Leo XIII, *Rerum novarum*, #45 (1891); Catechism of the Catholic Church, ¶ 2434.

"You shall not oppress a hired servant *who is* poor and needy . . . You shall give him his wages on his day before the sun sets, for he is poor and sets his heart on it; so that he will not cry against you to the LORD and it become sin in you." Deuteronomy 24:14-15 (NASB).

Employee ownership of the company: "It is especially desirable today that workers gradually come to share in the ownership of their company, by ways and in the manner that seem most suitable." John XXIII, *Mater et magistra*, #77 (1961).

Timely payment of creditors: "A Christian who continues to order materials and other supplies when there are already past-due bills is being deceitful." Larry Burkett, *Business by the Book*, Ch.2, § 4 (1998) (citing Proverbs 3:27-28).

Workplace hours: "It is neither just nor human so to grind men down with excessive labor as to stupefy their minds and wear out their bodies. . . . Daily labor, therefore, should be so regulated as not to be protracted over longer hours than strength admits." Leo XIII, *Rerum novarum*, #42 (1891).

There are also numerous books and resources available to assist businesses to conform to Christian belief. The following is a small sample, including many titles that predate the HHS Mandate:

- Robert J. Banks, *Faith in Leadership: How Leaders Live Out Their Faith in Their Work – and Why It Matters* (2000);
- John D. Beckett, *Loving Monday: Succeeding in Business Without Selling Your Soul* (1998);

- Michael L. Budde & Robert W. Brimlow, *Christianity Incorporated* (2007);
- Nicholas Capaldi, ed. *Business and Religion: A Clash of Civilizations?* (2005);
- Richard Chewning, John Eby & Shirley Roels, *Business Through the Eyes of Faith* (1990);
- Wayne Grudem, *Business for the Glory of God: The Bible's Teaching on the Moral Goodness of Business* (2003);
- Lee Hardy, *The Fabric of This World: Inquiries into Calling, Career Choice, and the Design of Human Work* (1990);
- Alexander Hill, *Just Business: Christian Ethics for the Marketplace* (1997);
- Timothy Keller & Katherine Leary Alsordf, *Every Good Endeavor: Connecting Your Work to God's Work* (2012);
- Michael J. Naughton & Helen J. Alford, *Managing as if Faith Mattered* (2001);
- Michael Novak, *Business as a Calling: Work and the Examined Life* (1996);
- Max Stackhouse, Dennis McCann, & Shirley Roels, *On Moral Business: Classical and Contemporary Resources for Ethics in Economic Life* (1995);

- John Visser, *The Crossroads of Poverty and Prosperity: The Impact of Religious Beliefs & Worldviews on Economic Outcomes* (2013);
- Kenman L. Wong, *Business for the Common Cood: A Christian Vision for the Marketplace* (2011); and
- David Wright, *How God Makes the World a Better Place: A Wesleyan Primer on Faith, Work & Economic Transformation* (2012).

4. Throughout the country, businesses engage in various religiously-motivated practices, including closing on Sunday (Chick-fil-a, Inc.), printing Bible references on products (In-N-Out Burger), publishing Bibles and other Christian media (Tyndale House Publishers, Inc.), providing financial advice based on the Bible (Lampo Group, Inc.), producing and selling kosher foods (Hebrew National, whose well-known advertising slogan is "We Answer to a Higher Authority"), offering financial products that are consistent with Islamic teachings about usury (LARIBA American Finance House), placing Bibles and the Book of Mormon in all its hotel rooms (Marriott, Inc.), employing chaplains to provide spiritual counsel to employees (Tyson Foods, Inc.), and taking out full-page newspaper ads to proselytize to non-Christians (Hobby Lobby, Inc.). Every one of these businesses is a profit corporation.

SUMMARY OF ARGUMENT

Pursuit of profit is not incompatible with religious exercise. To the contrary, this Court has explained that whether an activity is religious depends on the motivation of person engaged in the activity. The American experience demonstrates that for-profit corporations act based on a variety of motives, including the desire to maximize profits, to advance social issues, to exercise the creativity of the entrepreneur and employees, to promote political causes, and to follow religious conviction. The Court has never conditioned a corporation's constitutional rights on whether the entity seeks profits. It should not start now. The Government's position interferes with the free exercise of religion.

ARGUMENT

I. Corporations can pursue profit while simultaneously exercising religion.

This Court has explained that "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp't Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 877 (1990). The government may not compel any person to adopt a specific religious belief. *Ibid.* The exercise of religion is more than just belief. It also includes "the performance of (or abstention from) physical acts." *Ibid.* But, to be protected, beliefs and conduct "must be rooted in religious belief." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972).

A. Various Christian traditions speak to how corporations should conduct business, and suggest that profit be viewed as a means and result of doing business, not a goal.

To determine whether a corporation can "plausibly assert [it is] engaged in religious exercise, [it] must first show that [its] religious beliefs have something to say about the conduct of business . . . ." Mark Rienzi, "God and the Profits: Is There Religious Liberty for Moneymakers?" 21 Geo. Mason L. Rev. 59, 66 (2013). As discussed above, there can be no doubt that Christianity has much to say about how business is conducted.

Christianity also speaks directly to profitmaking. In the Gospel of Luke, Jesus warns to "be on your guard against every form of greed; for not even when one has an abundance does his life consist of his possessions." Luke 12:15 (NASB).

But not all profitmaking is motivated by greed. In Proverbs, the Bible explains that profit is the normal result of labor. Proverbs 14:23; *see* Deuteronomy 8:18 (attributing to God the human ability to create wealth). For example, in the parable of the talents, Jesus tells the story of a master who entrusted various sums of money to three servants. The two to whom larger sums were entrusted used the capital to make more money; the third servant hid the master's money in the ground. The first two servants are praised for their profitable stewardship of the master's money. The third servant is characterized as worthless. Matthew 25:14-30. The parable is an allegory expressing the responsibility of

Christians to engage in service to God in proportion to the blessings that they have received. But it also demonstrates that Jesus recognized profit to be the normal outcome of doing business. Thus, Christianity hardly treats obtaining profit as an anti-religious activity.

Various Christian traditions expressly address profit. The Roman Catholic Church teaches that "[t]he purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a community of persons who in various ways are endeavoring to satisfy their basic needs, and who form a particular group at the service of the whole of society." John Paul II, *Centesimus annus*, #35 (1991). The church teaches that "[a] theory that makes profit the exclusive norm and ultimate end of economic activity is morally unacceptable." Catechism of the Catholic Church ¶ 2424. Profit is necessary to sustain a business, but profitability is not "the most important [indicator] by which business should be judged." Pontifical Council of Peace & Justice, *Vocation of the Business Leader* ¶ 53. Instead, "[p]rofit is like food. An organism must eat, but that is not the overriding purpose of its existence. Profit is a good servant, but it makes a poor master." *Ibid.*

Similarly, the Protestant tradition concludes that viewing work as a calling requires that work be done for more than profit: "Our work is a calling from God. We work for more than wages and manage for more than profit so that mutual respect and the just use of goods and skills may shape the workplace. While we earn or profit, we love our neighbors by providing useful products and services." Christian Reformed Church in North America, *Our World Belongs to God*

¶ 48 (2008). "Corporate profits . . . stewarded wisely, are a healthy means to a good end: They are vital to creating new products to serve customers, giving an adequate return to investors for the use of their money, and paying employees well for their work." Keller, *Every Good Endeavor* at 165-166.

But even within Christianity, there are a diversity of perspectives about profit. For example, Larry Burkett, a Protestant author and financial counselor, wrote that "[e]very Christian in business . . . should work to maximize profits, but not to the exclusion of other key elements of a biblically based business." Burkett, *Business by the Book* at 52.

Thus, not only do various Christian traditions view profitmaking as a normative aspect of business, but their religious belief also makes definitive claims about the relative importance of profitmaking within a corporation.

B. The Government's belief that a corporation's principal purpose is to maximize profits is contrary to the American experience.

The Government contends that non-profit corporations can exercise religion, but profit corporations cannot. (See *Hobby Lobby* v. *Sebelius* Pet. Br. 13, 17-19.) The former is unassailable.[2]

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[2] Though one judge disagrees, and suggests that churches, synagogues, mosques, and other non-profit corporations merely enjoy associational standing to assert the free-exercise rights of their members. *Korte v. Sebelius,* 735 F.3d 654, 695 (2013)

[Footnote continued on next page]

Many churches and other religious bodies legally exist as non-profit corporations, and the Court has recognized their free-exercise rights. E.g., *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 525-26 (1993); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 330 (1987).

The Government's view that profit corporations are motivated solely by profit—and somehow so different from non-profit corporations that they cannot exercise religion—is contradicted by corporate activity throughout the country. It is also inconsistent with this Court's First Amendment jurisprudence and the tax code. And it is contrary to the teachings of various world religions.

1. The concept that a corporation can take action motivated primarily by a purpose other than maximizing profit is well entrenched in American business.

Business organizations ranging from Forbes to Deloitte have commented on the changing view that the purpose of business is more than maximizing profit. In 2012, the chief executive officer of Deloitte Touche Tohmatsu Ltd., Deloitte's affiliate in Japan, noted that 76% of global business leaders surveyed by Deloitte "believe the value of a company should be

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[Footnote continued from previous page]
(Rovner, J. dissenting). But even that judge is forced to concede that numerous courts have concluded that non-profit corporations can exercise religion, and can cite no cases adopting her view. *Ibid.*

measured by the positive contribution its core business makes to society, as well as by its profits." Barry Salzberg, "Deloitte Perspectives: Business leaders and 'Millenials' agree—the purpose of business is more than just profit," http://globalblogs.deloitte.com/deloitteperspectives/2012/01/business-leaders-and-millennials-agree-purpose-of-business-is-more-than-just-profit.html (last visited Jan. 21, 2014). Likewise, more than 90% of 1,000 Deloitte employees born after 1981 "believe the success of a business should be measured by more than just profit." *Ibid.*

A recent Forbes internet article noted that even in 2003, half of corporate executives "believed the purpose of business is to contribute to the well being of society." David K. Williams, "A New Capitalist Manifesto: Balancing Profits with Purpose," http://www.forbes.com/sites/davidkwilliams/2012/08/01/a-new-capitalist-manifesto-revisited-balancing-profits-with-purpose/ (last visited Jan. 21, 2014) (referencing J. Jeffrey Spahn, "A New Capitalist Manifesto? Imagining Business in the 21st Century," *Virtual Strategist* (Feb. 2003)).

Management theorist Peter Drucker also disagreed with the Government's view that making a profit is the purpose of a corporation. Drucker wrote "profitability is not the purpose of business enterprise and business activity, but a limiting factor on it. Profit is not the explanation, cause or rationale of business behavior and business decisions, but the test of their validity. If archangels . . . sat in directors' chairs, they would still have to be concerned with profitability despite their total lack of personal interest in making profits." Peter Drucker, *The Practice of Management: A Study of the Most Important Function in American Society* 35-36 (1954).

2. Day-to-day American experience shows that corporations frequently act based on a desire to contribute to societal well-being. TOMS Shoes is a California-based company that designs and sells shoes and eyewear. TOMS is known for donating a pair of shoes to someone in need for every pair of shoes it sells. TOMS states that its business is "guided by 1 simple mission. With every product you purchase, TOMS will help a person in need. One for One.®" TOMS Mission Statement, http://www.toms.-com/our-movement/l (last visited Jan. 21, 2014). TOMS claims to have donated shoes to those in need in more than 60 countries. *Ibid.*

Ben & Jerry's Homemade, Inc. is a Vermont-based ice cream manufacturer that is "dedicated to a sustainable corporate concept of linked prosperity." Ben & Jerry's Mission Statement, http://www.-benjerry.com/activism/mission-statement (last visited Jan. 21, 2014). Ben & Jerry's touts itself as leading with progressive values across its business, and promotes various social causes including marriage equality, campaign-finance reform, and mandatory labeling to identify genetically modified organisms. *See ibid.*

Olsenhaus Pure Vegan is a Florida-based limited liability company that sells "cruelty-free shoes" while providing "peace-of-mind concerning animal advocacy, sustainability, and human rights." Olsenhaus Pure Vegan Policies, http://www.olsenhaus.com/policies (last visited Jan. 21, 2014). The company was founded not to make profit, but to "merge passions for design, fashion, function and being a voice for animals, the environment, transparent business practices and unwavering values in ethical and social responsibility." About Olsenhaus Pure Vegan, http://www.olsenhaus.com/-about (last visited Jan. 21, 2014).

These examples demonstrate that corporations undertake actions based on a multitude of ethical, moral, and philosophical commitments in addition to, and in some cases instead of, maximizing profit. Not surprisingly, the causes each company advances are consistent with the beliefs of its owners.

3. The Government's view that corporate profit-making and religious exercise are inconsistent contradicts this Court's other First Amendment jurisprudence. For example, in *Citizens United* v. *Federal Election Commission*, 558 U.S. 310, 342-55 (2010), the Court held correctly that the First Amendment protects the free speech rights not only of individuals, but of corporations. This holding is consistent with the experience of Americans who are regularly confronted with corporations taking positions on political and social issues. Logically, if a corporation is capable of expressing political and ideological beliefs, it is also capable of religious expression. *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1134-35 (10th Cir. 2013).

4. The Government's view is also contrary to the tax code. The Internal Revenue Code recognizes that non-profit corporations may engage in profit-making activities. Non-profits are subject to tax on "unrelated business taxable income." 26 U.S.C. § 511(a).

Unrelated business taxable income is "the gross income from any unrelated trade or business . . . regularly carried on by" a non-profit organization "less the deductions allowed by this chapter which are directly connected with the carrying on of such trade or business . . . ." 26 U.S.C. § 512(a)(1). Thus, if a church rents out its facility for GED classes, the profit from the rent is taxable despite the church's non-profit status. But surely that profit does not make the church less religious.

5. The Government's view is also contrary to the teaching of various Christian traditions. As discussed in Part I.A., various traditions explain that corporate profitmaking and religious exercise are not mutually exclusive. The Government's assertion that profit and religious exercise are mutually exclusive is itself a religious determination. But the Government is not allowed to determine what constitutes true religious practice. *Smith*, 494 U.S. at 877 ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires"). As Justice Jackson memorably wrote for the Court, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion . . . . If there are any circumstances which permit an exception, they do not now occur to us." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943).

The activities of Hobby Lobby, Mardel, and Conestoga demonstrate that the corporations themselves engage in religious activities with a religious motivation. Indeed, it is hard to comprehend how purchasing advertisements encouraging people to come "to know Jesus as Lord and Savior," as Hobby Lobby does, can be viewed as anything other than religious exercise.

II. Requiring employers with religious objections to pay for abortifacients imposes a substantial burden on religious exercise.

The Government argues that it is not a substantial burden on an employer's exercise of religion to require that employer to pay for abortifacients the employer believes are immoral. (*Sebelius* v. *Hobby Lobby* Pet. Br. 14.) This is true, the Government says, because the employer's cooperation in paying for such products is too indirect. (*Ibid.*) That may be the Government's belief, but it is not a traditionally held religious belief.

1. Various religious traditions have considered when and to what extent a religious adherent can cooperate with activity that is considered evil. John Calvin, in his commentary on Paul's Epistle to the Ephesians, notes that the biblical injunction against having anything to do with evil requires not just "'that we do not, of our own accord, undertake anything wicked. We must beware of joining or assisting those who do wrong. In short, we must abstain from giving any consent, or advice, or approbation, or assistance . . . .'" Rienzi, "God and the Profits: " 21 Geo. Mason L. Rev. at 72 n.86 (quoting John Calvin, *Commentaries on the Epistle of Paul to the Galatians & Ephesians* 262 (William Pringle trans., 2009)).

The Roman Catholic Church distinguishes between formal cooperation with evil, when a person "cooperates with the immoral action of another person, sharing in the latter's evil intent"; and material cooperation, when a person cooperates with the immoral action of another person, without sharing his/her evil intention." Pontifical Academy for Life, "Moral Reflections on Vaccines Prepared from Cells Derived from Aborted Human Foetuses" (June 5, 2005). Formal cooperation is always morally illicit. *Ibid.* Material cooperation with another's immoral act may not be wrong in some circumstances, but material cooperation with the immoral taking of a human life "is *always* considered to be morally illicit." *Ibid* (emphasis added).

If a law requires material cooperation with the immoral taking of a human life, Christians are required to abstain despite "the sacrifice of prestigious professional positions or the relinquishing of reasonable hopes of career advancement." John Paul II, *Evangelium vitae* § 74 (1995).

2. The Government's "too indirect" argument also ignores the reality that similar participation is punishable under the criminal law. Consider the following hypothetical: An employer knows that a worker has threatened to kill an ex-spouse. The worker comes to the employer and asks to borrow the employer's gun. If the employer merely provides the employee a paycheck, and the employee uses the money to buy a guy and commit murder, the employer faces no liability. But if the employer provides the gun—or even walks to the gun store and purchases the gun for the employee—then the employer may be liable for aiding and abetting, and is certainly at risk of being prosecuted for reckless endangerment.

Likewise, for religious purposes, there is a momentous distinction between an employer providing wages that an employee may use to purchase drugs, alcohol, and prostitutes, on the one hand, and the government compelling the employer to buy drugs, alcohol, and prostitutes for all employees on the other. And the Government's unwillingness to appreciate the moral difference between the two situations demonstrates the wisdom of withdrawing religious exercise "from the vicissitudes of political controversy." See *Barnette*, 319 U.S. at 638.

From the perspective of an employer who believes as a religious matter that life starts at conception, paying for Plan B, *ella*, and certain intrauterine devices can raise the same specter of moral culpability—not before a civil court, but in a divine tribunal where eternity hangs in the balance. Requiring an employer to choose between going out of business or participating in an activity that, for religious reasons, the employer believes is the unlawful taking of a human life, is a substantial burden on the employer's religious exercise.

* * * * *

The very reason that many religious colleges and universities exist is to propagate their faith through instruction that demonstrates how religious faith is exercised in all subject matters. This instruction is frequently provided in far more nuanced and comprehensive fashion than just engaging in group prayer, exhorting students to personal piety, and singing spiritual songs. Instead, faculty are required to integrate faith into the subjects that they teach, including business classes. Based on their academic work and the experience of their alumni and students, *amici* know the ramifications of this case to the religious exercise of employers throughout the country is considerable. If the Court agrees that despite the requirements of the Religious Freedom Restoration Act and the Free Exercise clause, the Government is free to compel religious employers to do this, some will be required to choose between violating their religious convictions or forfeiting their property. In some cases, employers will be morally bound to sell or shut down businesses that they have been running for generations. Employers should not be required to choose between their religious beliefs and their livelihood.

CONCLUSION

The judgment of the Third Circuit should be reversed, and the judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., PETITIONERS,

v.

HOBBY LOBBY STORES, INC., ET AL., RESPONDENTS.

CONESTOGA WOOD SPECIALTIES CORP, ET AL., PETITIONERS,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., RESPONDENTS.

On Writs Of Certiorari To The United States Courts Of Appeals For The Tenth And Third Circuits

BRIEF OF U.S. SENATORS TED CRUZ, JOHN CORNYN, MIKE LEE, AND DAVID VITTER AS AMICI CURIAE SUPPORTING RESPONDENTS IN CASE NO. 13-354 AND PETITIONERS IN CASE NO. 13-356

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INTEREST OF AMICI CURIAE[1]

Senators Ted Cruz, John Cornyn, Mike Lee, and David Vitter are United States Senators representing, respectively, the States of Texas, Texas, Utah, and Louisiana.

As elected representatives, the Senators have a powerful interest in preserving and protecting the constitutional and statutory rights of their millions of constituents. In particular, the Senators take seriously their responsibility to defend the right to freely exercise one's religious beliefs, as guaranteed by the First Amendment to the United States Constitution, as well as the right to practice one's faith without being substantially burdened by the federal government, as protected by the Religious Freedom Restoration Act.

Additionally, the Senators have long had an interest in the enforcement and constitutionality of the Patient Protection and Affordable Care Act of 2010 ("ACA") and its implementing regulations.

For example, one *amicus*, the Ranking Member of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, recently released a report that outlines the current Presidential

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than amici curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the respondents in Case No. 13-356 and the petitioners in both cases has filed a letter pursuant to Supreme Court Rule 37.3(a) reflecting consent to the filing of amicus curiae briefs in support of either party. Counsel of record for the respondents in Case No. 13-354 has individually consented to the filing of this amicus brief.

Administration's repeated attempts to ignore the ACA's statutory text.[2]

Another amicus, the Ranking Member of the Senate Judiciary Subcommittee on Immigration, Refugees, and Border Security, is a long-standing and stalwart advocate for religious liberty and against the ACA. For instance, in 2012, he demanded that this Administration withdraw the interim final rule implementing the ACA's contraception mandate at issue in this case, stating "that the rights of all individuals and entities to freely exercise their religious and moral beliefs [must be] both respected and protected."[3]

And another *amicus*, the Ranking Member of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, has been an outspoken critic of the Administration's attempts to amend the ACA's statutory text without congressional approval; supported legislation to protect the conscience rights of faith-based organizations by repealing the ACA's contraceptive mandate; and supported legislation to reverse the Administration's attempt to illegally amend the ACA's provisions requiring all Members of Congress and their staff to purchase health insurance through the exchanges.

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[2] U.S. Senator Ted Cruz, *The Legal Limit – Report No. 2: The Administration's Lawless Acts on Obamacare and Continued Court Challenges to Obamacare*, Dec. 9, 2013, http://www.cruz.senate.gov/?p=press_release&id=702.

[3] U.S. Senator John Cornyn, *Letter*, Feb. 8, 2012, http://www.cornyn.senate.gov/public/?a=Files.Serve&File_id=c70201f3-36b5-4778-a40e-64a4be33fae1.

SUMMARY OF THE ARGUMENT

The Patient Protection and Affordable Care Act of 2010 ("ACA") was the signature policy achievement of the current Presidential Administration. Unfortunately, the actual implementation of the ACA has been beset by countless complications. Time and time again, this Administration has brazenly disregarded the very law that it championed. It has ignored the explicit language of the ACA to extend statutory deadlines, expand penalties, and grant additional subsidies to certain groups—all in order to further its own policy interests.

In stark contrast, the Administration is trying to vigorously enforce one particular aspect of the ACA's implementing regulations, the contraception mandate. This mandate, among other things, requires certain employers to provide contraceptive coverage to their employees, even when doing so would violate the employers' sincere religious beliefs.

This case does not implicate the individual right to access to contraceptives, which this Court's cases have long protected. Instead, it concerns whether the federal government can force employers to violate their good-faith religious belief and pay for the contraceptives of others.

Because the Administration has repeatedly ignored the explicit language of the ACA in other contexts, it cannot deny the same leniency to those acting on the basis of religious faith. The federal government cannot grant special favor to the secular over the religious. Accordingly, the contraception mandate cannot withstand scrutiny under either the First Amendment or the Religious Freedom Restoration Act ("RFRA").

By refusing to enforce several provisions of the ACA for its own secular policy reasons, the Administration has revealed that the contraception mandate is not a rule of general applicability, and is thus invalid under the First Amendment. And the Administration's repeated disregard of the express dictates of the ACA shows that the government lacks a compelling interest justifying the contraception mandate, under RFRA.

The law does not allow the Administration to suspend enforcement of various provisions of the ACA to serve its own political and policy interests, while trampling on the constitutional rights and religious freedoms of Americans by enforcing the ACA's contraception mandate.

ARGUMENT

I. The Administration Has Repeatedly Ignored The Explicit Statutory Mandates of the ACA.

The ACA has been billed as the "signature legislative achievement" of this Presidential Administration.[4] Yet, as shown by the five examples below, that same Administration has repeatedly disregarded and contravened the express text of the ACA.

A. Delaying the Health Insurance Requirements.

Without statutory authority, the Administration has unilaterally delayed the stringent requirements that the ACA establishes for the types of plans health insurance companies can offer consumers. *See, e.g.*, 42 U.S.C. § 18022(b) (specifying several requirements for health benefits, including, for example, maternity and newborn care, prescription drug services, and chronic disease management).

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[4] Jonathan Weisman & Sheryl Gay Stolberg, *G.O.P. Maps Out Waves of Attacks Over Health Law*, N.Y. Times, Nov. 20, 2013, http://www.nytimes.com/2013/11/21/us/politics/gop-maps-out-waves-of-attacks-over-health-law.html.

These strict requirements have already led, by design and inevitability, to the cancellation of millions of health plans, as health insurance providers began cancelling plans that did not comply with the ACA.[5] This occurred despite the President's repeated assurances, both before and after the passage of the ACA, that nobody's plans would be cancelled.[6]

Now, however, the Administration has unilaterally declared that individuals can continue to purchase health care plans in 2014 even if those plans violate the express requirements of the ACA and its regulations.[7]

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[5] *Policy notification and current status, by state*, Associated Press, Dec. 26, 2013, http://news.yahoo.com/policy-notifications-current-status-state-204701399.html (ACA standards have resulted in "at least 4.7 million" cancellations).

[6] The White House, Remarks by the President on Supreme Court Ruling on the Affordable Care Act, June 28, 2012, http://www.whitehouse.gov/the-press-office/2012/06/28/remarks-president-supreme-court-ruling-affordable-care-act ("if you're one of the more than 250 million Americans who already have health insurance, you will keep your health insurance"); The White House, Remarks by the President on Health Insurance Reform, University of Iowa Field House, Iowa City, Iowa, Mar. 25, 2010, http://www.whitehouse.gov/the-press-office/remarks-president-health-insurance-reform-university-iowa-field-house-iowa-city-iow ("You like your plan? You'll be keeping your plan."); The White House, Remarks by the President in Town Hall on Health Care, Aug. 15, 2009, http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-In-Town-Hall-On-Health-Care-Grand-Junction-Colorado/ ("if you like your your health care plan, you keep your health care plan").

To be sure, *amici* Senators emphatically believe that every American should continue to have access to these health insurance plans. But the text of the ACA does not permit the Administration to disregard the ACA's requirements unilaterally, and it has not sought to change the requirements legislatively. Indeed, in a nod to Lewis Carroll, the Administration has gone so far as to issue a veto threat for any legislation that codifies the exemption it has already unilaterally imposed.[8]

Rather than seek legislative action, the Executive Branch has done an end run around Congress by ignoring the ACA's statutory text, all to achieve its own political and policy interests.

B. Delaying the Cap on Out-of-Pocket Costs.

The Administration also decreed that the ACA's out-of-pocket caps would not apply in 2014. The

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[7] *See* Gary Cohen, *Letter to Insurance Commissioners*, Center for Consumer Information and Insurance Oversight, Nov. 14, 2013, http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.PDF; *In reversal, Obama to allow canceled health plans*, Associated Press, Nov. 14, 2013, http://www.pbs.org/newshour/rundown/2013/11/obama-to-announce-fix-for-canceled-health-plans.html.

[8] *See* Jeff Mason & Roberta Rampton, *White House: Obama would veto Republican healthcare bill*, Reuters, Nov. 15, 2013, http://www.reuters.com/article/2013/11/15/us-usa-healthcare-veto-idUSBRE9AE03X20131115 ("President Barack Obama would veto a bill sponsored by a Republican congressman that would allow insurers to offer healthcare plans slated to be canceled because they do not meet the new U.S. healthcare law's standards, the White House said on Thursday.").

ACA caps the amount of out-of-pocket costs that people have to spend on their own health insurance. 42 U.S.C. § 18022(c)(1). Thus, by law, starting in 2014, individuals and families would have to spend no more than $6,350 and $12,700, respectively.[9]

But the Administration has unilaterally chosen to delay enforcement of this provision of the ACA—burying the announcement of the delay in one of 137 ACA FAQs found on the website of the Department of Labor.[10] The Administration has no statutory basis for delaying the out-of-pocket caps.

C. Delaying the Employer Mandate.

The Administration ignored the ACA again when it delayed the statute's employer mandate. Under the ACA, employers who employ over 50 "full-time" employees[11] are penalized if they do not offer health care coverage that the government deems to be "affordable," and an employee consequently receives a federal subsidy to purchase an insurance plan in a state health insurance exchange. *See* 26 U.S.C. § 4980H. This mandate was scheduled to take effect on January 1, 2014, along with most of the ACA. *See* The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 1513(d), 124 Stat. 119,

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[9] *Revenue Procedure 2013-25*, Internal Revenue Service, http://www.irs.gov/pub/irs-drop/rp-13-25.pdf.

[10] *FAQs about Affordable Care Act Implementation Part XII*, United States Department of Labor, Feb. 20, 2013, http://www.dol.gov/ebsa/ faqs/faq-aca12.html.

[11] The ACA has redefined "full-time" employees to be those that work an average of 30 hours a week over the course of a month, as opposed to the traditional 40-hour work week. 26 U.S.C. § 4980H(c)(4)(A).

256 (2010) ("The amendments made by this section shall apply to months beginning after December 31, 2013.").

Yet the Administration announced—via blog postings—that it will not enforce the employer mandate at all in 2014.[12] As with the Administration's decision to delay the requirements on health care plans, the American people are better off without the employer mandate. But the text of the ACA does not allow the Administration to unilaterally delay its enforcement. Nevertheless, the Administration decided to disregard Congress and ignore the text of the ACA.

D. Expanding the Employer Mandate Penalty.

But the Administration did not stop at just delaying the enforcement of the employer mandate. It has also drastically expanded the employer mandate penalty beyond what the ACA allows.

Under the ACA, the employer mandate penalty is only supposed to be assessed if at least one full-time employee is enrolled in a health insurance exchange for which a federal tax credit subsidy is available. 26 U.S.C. § 4980H(a)-(b). Those federal subsidies are available *only* when an individual purchases a health plan "through an Exchange established *by the*

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[12] Valerie Jarrett, *We're Listening to Businesses about the Health Care Law*, The White House Blog, July 2, 2013, http://www.whitehouse.gov/blog/2013/07/02/we-re-listening-businesses-about-health-care-law; Mark J. Mazur, Continuing to Implement the ACA in a Careful, Thoughtful Manner, Treasury Notes, July 2, 2013, http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx.

State." 26 U.S.C. § 36B(c)(2)(a) (emphasis added). Thus, under the ACA's text, the subsidies are *not* available if the health plan is purchased through any other type of exchange, including federal exchanges.

At this time, 34 states have refused to create their own health insurance exchanges.[13] In those 34 states, no federal tax credit subsidies should be available, and employers in those states should accordingly not be subject to the employer mandate penalty.

Yet, they are. The Administration disregarded the plain language of the ACA and is now granting federal subsidies in all states, including those that have not created state health insurance exchanges.[14] The Administration has chosen to interpret "Exchange established by the State" to mean "a State exchange, regional exchange, subsidiary Exchange, and Federally-facilitated Exchange"[15]—that is to say, an actual state exchange plus three types of exchanges that are *not* "established by the State."[16]

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[13] *State Actions to Address Health Insurance Exchanges*, National Conference of State Legislatures, Jan. 13, 2014, http://www.ncsl.org/research/health/state-actions-to-implement-the-health-benefit.aspx; State Decisions For Creating Health Insurance Marketplaces, The Henry J. Kaiser Family Foundation, http://kff.org/health-reform/state-indicator/health-insurance-exchanges/.

[14] *See Health Insurance Premium Tax Credit*, 77 Fed. Reg. 30,377-78 (May 23, 2012) (to be codified at 26 C.F.R. pts. 1 & 602).

[15] *Id.* at 30,377-78, 30,387; 45 C.F.R. § 155.20 (cited in 26 C.F.R. § 1.36B-1(k)).

[16] One district court recently denied the government's motion to dismiss claims seeking to invalidate this interpretation. *Ok-*

[Footnote continues on next page...]

E. Granting Subsidies to Members of Congress and to Congressional Staff.

Ignoring the clear language of federal statutes, the Administration unilaterally granted Members of Congress and congressional staff subsidies for their health care after they were forced, by the ACA, to buy health insurance through exchanges.

The ACA and other federal statutes contain explicit language requiring Members and their staff to be on the exchanges without subsidies—just as are millions of Americans. But, because that requirement is onerous, the Administration granted the request from Senate Majority Leader Harry Reid to disregard the plain language of the statute.[17]

[Footnote continues from previous page…]
lahoma ex rel. Pruitt v. Sebelius, 2013 WL 4052610, No. CIV-11-30-RAW (E.D. Okla. Aug. 12, 2013).

Another district court upheld the government's statutory interpretution position as consistent with the overall context of the ACA. *Halbig v. Sebelius*, ___ F. Supp. 2d ___, 2014 WL 129023, No. 13-0623 (D.D.C. Jan 15., 2014). But even that court was forced to admit that its holding was contrary to the plain language of the law:

> On its face, the plain language of 26 U.S.C. § 36B(b)-(c), viewed in isolation, appears to support plaintiffs' interpretation. The federal government, after all, is not a "State," which is explicitly defined in the Act to mean "each of the 50 States and the District of Columbia." ACA § 1304(d), *codified at* 42 U.S.C. § 18024(d). The phrase "Exchange established by the State under [42 U.S.C. § 18031]" therefore, standing alone, could be read to refer only to state-run Exchanges.

Id. at *13.

[17] Neils Lesniewski, *Obama Solves Health Care Problem for Lawmakers, Staff*, Roll Call, Aug. 1, 2013,

[Footnote continues on next page…]

In the past, Members and congressional staffs have received a federal health care subsidy that covered almost 75% of their total premium costs.[18] These federal subsidies, however, were only available for health benefits plans that met a specific statutory definition: "a *group* insurance policy . . . for the purpose of providing, paying for, or reimbursing expenses for health services." 5 U.S.C. § 8901(6) (emphasis added).

As a result of the ACA, Members and most congressional staff are no longer allowed to purchase the group insurance policies that were originally available to them. Instead, they have to purchase *individual* health insurance plans from a health insurance exchange, just as millions of Americans are being forced to do now. 42 U.S.C. § 18032(d)(3)(D). Those plans are not group insurance plans; they are plans purchased by individuals for themselves or their families, rather than general plans negotiated for a block of employees. So starting in 2014, Members and congressional staff should not be receiving any federal subsidies for their health care plans, according to the U.S. Code.

But Members and staff are today receiving these subsidies, because the Administration decreed that these individual health insurance plans purchased

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[Footnote continues from previous page...] http://blogs.rollcall.com/wgdb/reid-says-issue-with-health-care-for-lawmakers-staff-is-resolved/.

[18] *Questions and Answers – Health Insurance Coverage: Members of Congress and Congressional Staff*, Office of Personnel Management, http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-204attachment2.pdf.

by Members and staff through health insurance exchanges qualify for subsidies under 5 U.S.C. § 8901.[19] It did so in response to entreaties by powerful Democratic Senators unhappy about the burdens the ACA was placing on them. But this special favor by the Administration directly violates the express requirement found in § 8901(6), which limits subsidies to "group" health insurance plans.

II. The Administration's Conduct Demonstrates that Its Enforcement of the Contraception Mandate is Not a Rule of General Applicability, Nor Can It Be Justified by a Compelling Interest.

All the unilateral delays and waivers that the Administration has granted from ACA, as outlined in Part I, have direct legal consequences in this case. This Administration's pattern of ignoring the statutory text of ACA shows that its enforcement of the contraception mandate is not a rule of general applicability under the First Amendment, and also that it lacks a compelling interest to infringe on religious freedom under RFRA.

The First Amendment and RFRA protect the right to freely exercise one's religious beliefs. Accordingly, under the First Amendment, "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny." *Church of the Lukumi Babalu Aye, Inc.*

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[19] John O'Brien, *Federal Employees Health Benefits Program: Members of Congress and Congressional Staff*, Office of Personnel Management, Aug. 7, 2013, http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-204.pdf.

v. City of Hialeah, 508 U.S. 520, 546 (1993). And under RFRA, the government cannot substantially burden a person's exercise of religion unless the government uses "the least restrictive means" of furthering "a compelling governmental interest." 42 U.S.C. § 2000bb-1.

The Administration's conduct in ignoring other provisions of the ACA, as explained in Part I, reveals that the contraception mandate is *not* a rule of general applicability under the First Amendment. The various delays and exceptions that the Administration has announced all have one effect: exempting even more health care plans from the requirements of the ACA. In each instance, the beneficiaries of these exemptions are the politically powerful and well-connected. The Administration, however, refuses to grant the same leniency to those for whom the contraception mandate violates their sincere religious beliefs.

On its face, this double standard violates the First Amendment's general applicability requirement. *See, e.g.*, ***Church of the Lukumi Babalu Aye***, 508 U.S. at 537 ("in circumstances in which individualized exemptions from a general requirement are available, the government may not refuse to extend that system to cases of religious hardship without compelling reason" (quotations and citation omitted)); ***Fraternal Order of Police Newark Lodge No. 12 v. City of Newark***, 170 F.3d 359, 365 (3d Cir. 1999) (providing secular exemptions "while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under ***Smith*** and ***Lukumi***") (Alito, J.).

Moreover, and for largely the same reasons, the Administration's delays and waivers for other provisions of the ACA confirms that the contraception mandate does not serve a compelling interest. The government has attempted to justify its enforcement of the contraception mandate primarily on the basis that it has a compelling interest in providing a "comprehensive insurance system with a variety of benefits available to all participants." Br. of Petitioners at 14, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S.). But the numerous and varied exceptions to the ACA that the government has already authorized contradict this stated interest. The government has repeatedly ignored the express text of the ACA, when doing so will serve its own political and policy goals, even when their actions result in a failure to ensure a "comprehensive insurance system."

In fact, it appears the contraception mandate itself has been delayed, in part, as a result of some of the Administration's actions. For example, delaying enforcement of the ACA's health insurance requirements, *see supra* Part I.A, could allow plans that do not provide contraception coverage to continue to be offered in 2014.

The constitutional and statutory rights of all Americans to exercise their religion cannot be trumped by this Administration's supposed interest in a "comprehensive insurance system," when the Administration has repeatedly and unilaterally granted waivers and delays to other beneficiaries under the ACA. This Administration has ignored the ACA when it serves its own political interests, but it continues to force countless individuals to abide by the contraception mandate and violate their sincere religious beliefs. That contravenes the First Amendment and RFRA.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Tenth Circuit should be affirmed, and the judgment of the U.S. Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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AMICUS
CURIAE
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KATHLEEN SEBELIUS ET AL., *Petitioners*
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP. ET AL.,
Petitioners
v.
KATHLEEN SEBELIUS ET AL., *Respondents*

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND TENTH CIRCUITS

BRIEF OF DEMOCRATS FOR LIFE OF AMERICA AND BART STUPAK AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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INTEREST OF *AMICI*[1]

Former Congressman **Bart Stupak** (D-Michigan) served as an active member of the Congressional Pro-Life Caucus throughout his 18 year career (1993-2011), including his last six years as Co-Chair. The Pro-Life Caucus is composed of both Republican and Democratic members of the U.S. House of Representatives. The principal tenet of Caucus members is their belief that the fertilized embryo is a human life and that any man-made disturbance of the embryo is a form of abortion.

Democrats for Life of America (DFLA) is the preeminent national organization for pro-life Democrats. We believe that the protection of human life is the foundation of human rights, authentic freedom, and good government. These beliefs animate our opposition to abortion, euthanasia, capital punishment, embryonic stem cell research, poverty, genocide, and all other injustices that directly and indirectly threaten human life. As pro-life Democrats, we share the party's historic commitments to supporting women and children, strengthening families and communities, and striving to ensure equality of opportunity, reduction in poverty, and an effective social safety net that guarantees that all people have sufficient access to food, shelter, healthcare, and life's other basic necessities.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Blanket letters of consent from the *Conestoga* petitioners and the United States to the filing of *amicus* briefs are on file with the Court. The *Hobby Lobby* respondents consented to the filing of this brief, and such consent has been submitted to the Court.

Both *amici* supported the Affordable Care Act (the ACA or the Act); Stupak was among the pro-life Democratic members of Congress who voted for it. Throughout the process leading to the ACA's passage, *amici* offered means by which it could ensure comprehensive health-care coverage while respecting unborn life and the conscience of individuals and organizations opposed to abortion. The House approved a version of the bill with the Stupak-Pitts Amendment, which prohibited the use of federal funds "to pay for any abortion or to cover any part of the costs of any health plan that includes coverage of abortion." Roll No. 884, 155 Cong. Rec. H12962 (Nov. 7, 2009).

As the ACA passed in final form, Rep. Stupak helped negotiate an Executive Order by President Obama reinforcing that under the Act the Hyde Amendment's restriction on federal funding for abortions applied, and that "longstanding Federal laws to protect conscience . . . remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions." Executive Order No. 13535, 75 Fed. Reg. 15599, Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act, 2010 WL 1169591 (Mar. 24, 2010). Likewise, Rep. Stupak's colloquy in the final House debate made clear that "current law [on abortion] should apply" under the ACA and that "the intent behind both the legislation and the Executive order is to maintain a ban on Federal funds being used for abortion services, as is provided in the Hyde amendment." 156 Cong. Rec. H1859, H1860 (Mar. 21, 2010) (statements of Reps. Stupak and Waxman). Thereafter, DFLA defended the Executive Order's validity and identified mechanisms for ensuring that the ACA and the Order would successfully restrict funding for abortion and impositions on conscience.

Amici therefore have a strong interest in ensuring that neither the ACA nor its implementation undermines longstanding conscience rights of individuals and organizations. *Amici* strongly support the ACA's mandate to cover preventive services and its emphasis on health care for women. DFLA's members take varying positions on the mandate's inclusion of contraception among required preventive services. But these *amici* are committed to protecting the conscience rights of individuals and organizations—including those engaged in commerce—with objections to facilitating abortion, including drugs and devices that may act as abortifacients.

SUMMARY OF ARGUMENT

The plaintiffs' motions for preliminary injunctions should be granted in both *Hobby Lobby* and *Conestoga*. The plaintiffs—family owned, closely held corporations and the individuals who own and operate them—object to providing insurance coverage to employees for drugs and devices that the plaintiffs reasonably fear may terminate a human embryo after fertilization.

Plaintiffs' objections fall within our nation's tradition of broadly protecting conscientious objections to facilitating abortions.

I. Multiple federal and state laws show that the nation's tradition of protecting conscience, including religious conscience, is at its strongest and broadest for individuals and organizations that object to facilitating abortions. These protections are relevant in several ways to plaintiffs' claims under the Religious Freedom Restoration Act ("RFRA").

First, and generally, conscientious objections to abortion carry especially strong weight in American law because they fall within our tradition of protecting objectors from participating in actions that the objectors believe unjustly take human life—actions that include assisted suicide, abortion, capital punishment, and war. For this reason, although health-care conscience laws cover religious and moral objections to several procedures, protections for conscientious objection to abortion are particularly strong.

More specifically, laws protecting conscience rights for those objecting to abortion are not limited to individuals or to non-profit or religious organizations. Instead, the right not to facilitate or support abortions typically protects a wide range of objectors, regularly extending to individuals engaged in for-profit commerce and to for-profit businesses.

Finally, our tradition protects objectors to abortion far beyond the case of direct involvement in the performance of the abortion. This reflects the recognition that is the conscience of the objector that must be protected and it is not for the government to decide what degree of involvement should trigger moral culpability in the objector's mind.

II. Although the government has made statements that terminating a fertilized embryo before it implants in the uterus is not an abortion, the relevant matter for the claim of conscience under RFRA and the First Amendment's Free Exercise Clause is *plaintiffs' belief* that a distinct human life begins at fertilization. It is no salve to plaintiffs' conscience to be told that the government defines abortion differently. Furthermore, plaintiffs have a colorable cause for concern that the drugs and devices to which they object may act to terminate embryos. And even applying the government's definition, there is evidence that the "emergency contraceptive" Ella may terminate embryos after implantation.

III. The longstanding tradition of broadly accommodating conscientious objections to facilitating abortions supports plaintiffs' claims under RFRA. The pattern of conscience protection for objectors to abortion demonstrates that the contraception mandate "substantially burdens" plaintiffs' religious exercise, triggering the government's duty under RFRA to demonstrate that this burden serves a "compelling governmental interest" and does so by the "least restrictive means." 42 U.S.C. § 2000bb-1(a), (b).

The mandate pressures plaintiffs, on pain of substantial liability, to provide insurance coverage for procedures they believe are grave moral evils. The government's attempts to deny this burden must be rejected. The government claims that for-profit corporations cannot engage in religious exercise. *Hobby Lobby* U.S. Br. 15-22. It also claims that an employer suffers only an insubstantial, "attenuated" burden from being forced to cover methods and procedures that employees choose for themselves. *Id.* at 32, 33-34.

Both of these assertions are irreconcilable with our tradition of protecting health-care-related conscience in the commercial sphere—in particular the strong tradition, under federal and state laws, of protecting objections to abortion. Protections for objections to facilitating abortion have extended to multiple categories of for-profit entities and individuals engaged in commerce, and to many kinds of indirect facilitation, including mandatory coverage of abortion in insurance plans. When impositions are repeatedly prohibited under various conscience provisions, they cannot be dismissed as "insubstantial" burdens under RFRA. Therefore, this Court should find that the mandate substantially burdens plaintiffs by requiring them to cover methods they fear may act to terminate an embryo after fertilization.

Finally, plaintiffs are likely to succeed on the merits of their RFRA claims, because the government has articulated no arguments that would demonstrate a compelling interest in requiring coverage of such methods. The strong tradition of exempting objections to abortion—among other factors—undercuts the government's claim that it has a compelling interest in requiring coverage of possible abortifacients.

ARGUMENT

I. THIS CASE IMPLICATES OUR NATION'S STRONG TRADITION OF BROADLY ACCOMMODATING OBJECTIONS TO FACILITATING ABORTION, INCLUDING OBJECTIONS BY ORGANIZATIONS AND INDIVIDUALS IN FOR-PROFIT SETTINGS.

A. Numerous Laws, Including the Affordable Care Act Itself, Reflect the Nation's Tradition of Accommodating Conscientious Objections to Facilitating Abortions.

Our nation's tradition of protecting conscience is strongest, and broadest, for those who object to supporting abortions. Many federal and state laws protect such objections, including several provisions that the plaintiffs have invoked in their complaints. See *Hobby Lobby* J.A. 163-65 (Compl. ¶¶209-13, 219-23); *Conestoga* Am. Compl. ¶¶144-46. The Hyde-Weldon Amendment, included each year since 2005 in continuing appropriations acts, prohibits federal funds for the HHS and Labor departments from being "made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, *provide coverage of*, or refer for abortions." Consolidated Appropriations Act, 2012, § 507(d)(1), Pub. L. No. 112-74, 125 Stat. 786 (112th Cong. 1st Sess. Dec. 23, 2011) (emphasis added). The protected entities include "health insurance plan[s]," as well as other commercial entities, including "a hospital, a provider-sponsored organization, [or] a health maintenance organization." *Id.* § 507(d)(2).

Second, the Affordable Care Act itself protects qualified health plans from being forced to cover abortion. The Act states that "nothing in this title [which includes the section concerning "preventive services"] shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year." 42 U.S.C. § 18023(b)(1)(A)(i). The Act has other abortion-conscience protections. It restates the Hyde-Weldon principle that "[n]o individual health care provider or health care facility," including commercial entities, may be discriminated against because of a religiously or morally based refusal "to provide, pay for, provide coverage of, or refer for abortions." 42 U.S.C. § 18023(b)(4). And it expressly states that "[n]othing in [t]he Act shall be construed to have any effect" on federal laws concerning "(i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion." 42 U.S.C. § 18023(c)(2)(A).

President Obama summarized these provisions in his March 2010 Executive Order, which *amicus* Stupak helped negotiate:

> Under the [ACA], longstanding Federal laws to protect conscience (such as the Church Amendment and

> the Weldon Amendment) remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.

Executive Order No. 13535, 75 Fed. Reg. 15599, 2010 WL 1169591 (Mar. 24, 2010) (citations omitted).

These provisions of the ACA and the Hyde-Weldon Amendment may prohibit the HHS mandate insofar as it requires plaintiffs to cover drugs and devices that may cause abortions. But these provisions are also highly relevant to the issues before this Court concerning RFRA. The ACA and Hyde-Weldon provisions offer just two examples of the nation's tradition of broad protection for objections to facilitating abortion. As we discuss *infra*, this Court should take that tradition into account in interpreting RFRA.

Protections for objectors to abortion pre-date *Roe v. Wade*, 410 U.S. 113 (1973): states that liberalized their abortion laws before *Roe* "included explicit conscience protections for individuals and institutions in the [liberalization] statutes" or in separate laws. Mark L. Rienzi, *The Constitutional Right Not to Participate in Abortions:* Roe, Casey, *and the Fourteenth Amendment Rights of Healthcare Providers*, 87 Notre Dame L. Rev. 1, 30-31 & n.142 (2011). Moreover, in announcing constitutional abortion rights in *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973), this Court simultaneously endorsed conscience protections.

Doe, for example, noted that the Georgia statute in question had provisions "to afford appropriate protection to the individual and to the denominational hospital": for example, "the hospital is free not to admit a patient for an abortion. It is even free not to have an abortion committee." 410 U.S. at 197-98.

Soon after *Roe*, Congress passed the Church Amendment of 1973, which protects federally funded entities and their personnel from having to perform or provide facilities for abortions or sterilization against their "religious beliefs or moral convictions." Health Programs Extension Act of 1973, § 401, Pub. L. No. 93-45, 87 Stat. 91, 95 (1973), codified at 42 U.S.C. § 300a-7. The Church Amendment also protects individual health-care personnel against discrimination by their employers for such refusals. *Id.* Similar conscience clauses have been enacted in other federal laws and, as of 2007, in 47 states. James T. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. Pa. J. Lab. & Emp. L. 235, 269-71 (2007). A number of those states have covered objections concerning other procedures besides abortion. See *id.* at 271 (14 states protect health-care provider conscience concerning contraception, 18 concerning sterilization, and 3 concerning all health procedures). But every one of the 47 states protects provider conscience concerning abortion, and the abortion provisions "are remarkable" in, among other things, "the range of persons covered." *Id.*

Federal law also protects, for example, federally funded entities from any sex-discrimination challenge for refusing "to provide or pay for any service, including the use of facilities, related to an abortion." 20 U.S.C. § 1688. It protects "any health care entity," including an individual, from discrimination by federal or state governments for refusing to provide training, to undergo training, or even to refer someone for training, in performing abortions. 42 U.S.C. § 238n(a), 238n(c)(2). It prohibits the use of legal aid funds to assist any proceeding or litigation that seeks "to compel any individual or institution" to perform, assist with, or provide facilities for an abortion in violation of religious or moral convictions. 42 U.S.C. § 2996f(b)(8). And it protects various health plans and providers from having to cover counseling or referral concerning a service if they object to the provision of such service on moral, ethical, or religious grounds. 42 U.S.C. § 1396u-2(b)(3)(B); 42 U.S.C. § 1395w-22(j)(3)(B); 48 C.F.R. § 1609.7001(c)(7).

B. Our Laws Give Especially Broad Protection for Conscientious Objections to Facilitating Abortions.

Several conclusions follow from this array of federal and state conscience protections. As a general matter, although protections for objections to a number of health-care procedures are well established in American law, conscientious objections to abortion carry especially strong weight. See Rienzi, 87 Notre Dame L. Rev. at 35 ("The unique history of abortion-related conscience protections shows a collective judgment, arguably over the entire history of the nation, that healthcare providers should not be forced by the government to participate in abortions against their will."). These provisions reflect a more general principle: the seriousness of the burden on conscience when the objector is forced to participate in taking a life. The "right to refuse to take a human life over a sincere religious or moral objection" has "been consistently protected for health care practitioners in the context of abortion, abortifacient drugs, assisted suicide, and capital punishment," as well as for "conscientious objectors to military service." *Stormans v. Selecky*, 844 F. Supp. 1172, 1183 (W.D. Wash. 2012); see Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 147-48 (2012) ("government efforts to ensure that unwilling individuals are not forced to engage in what they believe to be killings" have been "systematic and all encompassing"). The special breadth of abortion-conscience protection is relevant to this case in two specific ways.

1. Laws protecting conscience rights regarding abortion extend to for-profit businesses, not just individuals and non-profit organizations.

The right not to facilitate or support abortions regularly extends to individuals engaged in for-profit commerce, and to for-profit corporations. Both the Affordable Care Act and the Hyde-Weldon Amendment protect not only health insurance plans—directly covering this case—but other commercial entities such as hospitals, HMOs, and provider-sponsored organizations. See *supra* pp. 7-9. All of the relevant provisions, from the Church Amendment through state conscience clauses to Hyde-Weldon and the ACA, protect individuals engaged in commerce—health-care personnel of various kinds—from having to participate in abortions.

2. Laws protecting conscience rights regarding abortion extend far beyond direct involvement in performing abortions.

Our tradition protects objectors to abortion far beyond the case of direct involvement in the performance of the abortion. Health-insurance plans are exempt, under the Hyde-Weldon Amendment and the ACA, from having to facilitate abortions through the provision of coverage. Entities and individuals are protected not only from having to participate in the abortion, but from having to refer anyone for an abortion, or for abortion training, or from having to assist in other ways. See statutes cited *supra* pp. 7-9, 11; Rienzi, 87 Notre Dame L. Rev. at 34 ("[t]hese protections extended not only to direct personal performance of an abortion, but more broadly to providers who have an objection to being forced to 'participate,' 'refer,' 'assist,'" or facilitate in other ways concerning abortion).

As discussed more fully in part III, the broad range of objectors and actions that these protections cover indicate society's recognition of the seriousness of the burden on the objector who believes abortion takes a life. The protections indicate powerfully that for purposes of RFRA, mandating coverage of abortifacients imposes a "substantial burden," even on for-profit entities, and does not serve a "compelling governmental interest."

II. PLAINTIFFS FALL WITHIN THE TRADITION OF ESPECIALLY STRONG PROTECTION FOR ABORTION OBJECTORS BECAUSE PLAINTIFFS HAVE A COLORABLE BASIS FOR FEARING THAT THE DEVICES AND DRUGS AT ISSUE MAY CAUSE TERMINATION OF A NEWLY-FERTILIZED EMBRYO.

This case implicates the tradition of protecting conscientious objections to abortion, in that plaintiffs object to devices and drugs that may act to terminate a newly fertilized embryo.

As the *en banc* Court of Appeals for the Tenth Circuit explained, respondents Hobby Lobby Stores Inc., Mardel Inc., and their owners, David and Barbara Green and their children, Steve Green, Mart Green and Darsee Lett, believe that human life begins when a sperm fertilizes an egg. Pet. App. 7a-8a. As a result, they believe it is immoral to facilitate any act that causes the death of a human embryo. *Id.* Accordingly, they object to "providing coverage for any FDA-approved device that would prevent implantation of a fertilized egg," and they would be violating their beliefs if the health plans offered by Hobby Lobby and Mardel provided coverage or paid for the four FDA-approved contraceptive methods that may prevent uterine implantation: Ella, Plan B, and two intrauterine devices (IUDs). Pet. App. 14a; see also *Hobby Lobby* J.A. 139 (Compl. ¶53). The Greens have no religious objection to providing coverage for the other contraceptives covered by the HHS mandate, which do not cause abortions. *Hobby Lobby* J.A. 140 (Am. Compl. ¶57).

The Greens' adherence to their religious tenets in the provision of health insurance unquestionably coincides with their general commitment to allow their faith to guide their business decisions—summarized in the Hobby Lobby statement of purpose, "Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." Pet. App. 8a. For example, Hobby Lobby's and Mardel's stores are closed on Sundays; Mardel's stores sell Christian books and materials; and Hobby Lobby has buys hundreds of full-page newspaper ads inviting people to "know Jesus as Lord and Savior." *Id.*

As the court of appeals found, the mandate puts the Greens and their companies to a "Hobson's choice": they must either (1) violate their faith by providing and paying for potential abortifacients, (2) pay approximately $475 million in fines yearly if they omit the objectionable devices from their health plans, or (3) pay $26 million yearly and suffer a substantial competitive disadvantage in recruiting and caring for their employees if they drop health insurance altogether. Pet. App. 52a.

Similarly, petitioners Conestoga Wood Specialties Corporation and the Hahns, owners and operators of the business, "object to facilitating" the use of contraceptives and IUDs that may "prevent the uterine implantation of human embryos." *Conestoga* Pet'rs' Br. 4. "The Hahns' Mennonite Christian faith requires them to integrate the gifts of the spiritual life, including its moral and social principles, into their life and work; they cannot separate their religious beliefs from their business practices." *Id.* at 5. Because "[t]he Mennonite Church teaches that taking a life is an intrinsic evil and sin against God for which all are held accountable, . . . the Hahns believe that it would be immoral for them to facilitate, or otherwise support the taking of a human life through war, capital punishment, suicide, euthanasia, or abortion." *Id.* at 3-4. And because the Hahns believe that "'human life begins at conception'" (*id.* at 5 (quoting Hahn Family Statement on the Sanctity of Human Life)), they view the intentional termination of an embryo, at any time after fertilization, as an impermissible abortion, which destroys a sacred life and is tantamount to murder. See *id.*

As a result, the Hahns "believe that it would be immoral for them to" pay for, or contribute in any way to, the use of abortifacient contraception, which they define as any drug or device that "prevent[s] the implantation of a human embryo into its mother's uterus after its fertilization." *Id.* at 4. The mandate puts the Hahns and Conestoga to the choice of violating their religious tenets by paying for possible abortifacients; paying $35 million yearly in fines for excluding the abortifacients from their health plans; or dropping health insurance altogether, which would require them to pay $1.9 million yearly and also "would have violated Petitioners' religious principles, devastated their work force, and compromised Conestoga's competitive position in the marketplace." *Conestoga* Pet. Cert. 7-8.

Plaintiffs here can invoke the strong tradition of abortion-conscience protection notwithstanding statements by the government that the drugs and devices in question are not abortifacients because the latest point at which they operate is to prevent implantation of a newly fertilized embryo in the uterus. See, e.g., *Hobby Lobby* U.S. Br. 9-10 n.4; Kelly Wallace, *Health and Human Services Secretary Kathleen Sebelius Tells iVillage "Historic" New Guidelines Cover Contraception, Not Abortion* (Aug. 2, 2011), http://www.ivillage.com/kathleen-sebelius-guidelines-cover-contraception-not-abortion/4-a-369771. This assertion by the government is both irrelevant to a claim under RFRA and wrong on its merits.

A. Under RFRA, It Is the Plaintiffs' Definition of Abortion, Not the Government's, That Is Relevant to This Case.

The fundamental issue in a case involving RFRA is the *objector's belief.* As this Court has stated, "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith . . . thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). The rule applies *a fortiori* where, as here, the government imposes substantial monetary liability. The Greens and Hahns, like millions of other Americans, believe that the life of a distinct human person begins at fertilization and that the grave wrong of abortion includes intentionally preventing the embryo's implantation. The government, of course, cannot question the validity of that moral view. See *Thomas*, 450 U.S. at 714 (under Free Exercise Clause, whether a law conflicts with a claimant's religious belief "is not to turn upon a judicial perception of the particular belief or practice in question").

Since these objectors believe that a distinct life begins at conception, it is no salve to their conscience to be told that the government defines abortion differently. Whatever the definition in the government's statements, objectors like plaintiffs are suffering the particularly serious burden of being forced to facilitate acts that they believe take an innocent human life. This nation's tradition of broadly protecting abortion objections must extend to them and to their claims under RFRA.

Plaintiffs' beliefs also include a factual component: that the four drugs and devices pose a risk of terminating a new embryo, a risk in turn sufficiently great that it is immoral to facilitate their use. This judgment too must receive deference from a court. Objectors such as plaintiffs weigh the risk in the light of the seriousness with which they view the intentional termination of embryonic life. This element is common in religious and moral analyses of "cooperation with evil." For example, Catholic moral teaching emphasizes that "'it is important to recognize just how serious abortion is when considering whether there are proportionate (i.e., very serious) reasons'" that warrant calling an action "remote" (that is, permissible) cooperation with abortion rather than "proximate" (impermissible) cooperation. Paul Loverde and Francis DiLorenzo, *The Voter's Responsibility*, 35 Origins CNS Documentary Service 370, 371 (2005) (statement of Catholic bishops of Virginia) (quoted in Gregory A. Kalscheur, S.J., *Catholics in Public Life: Judges, Legislators, and Voters*, 46 J. Cath. Leg. Stud. 211, 237 (2007)). Likewise, a pacifist forced to serve in a military unit is substantially burdened even if the likelihood that he or she will kill someone is relatively low; and a person forced to fire a loaded gun at another individual is substantially burdened even if most of the chambers are blanks.

Deference to the religious objector's judgment about (among other things) the gravity of the wrong requires that the court give the objector great leeway in determining what risk of the harm's occurrence is morally unacceptable. When it is colorable to believe that a drug or device may operate after fertilization, the objector's claim should fall within our tradition of broad protection for objections to abortion.

B. Objectors Have a Colorable Basis for Fearing that the Drugs and Devices in Question May Cause Termination of Embryos.

A colorable basis for fearing embryo-terminating effects exists for both the emergency contraceptive drugs and the IUDs in question. With respect to the former, the labeling information on both Ella (ulipristal acetate) and Plan B (levonorgestrel) states that although the primary mechanism for preventing pregnancy is inhibition or delay of ovulation, "[a]lterations to the endometrium that may affect implantation may also contribute to efficacy." *Ella* Full Prescribing Information, 12.1 (Aug. 2010), available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf; see also Plan B One-Step Prescribing Information, 12.1 (rev. July 2009), available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf (stating that Plan B is believed to act principally by preventing ovulation or fertilization; "[i]n addition, it may inhibit implantation (by altering the endometrium)").[2] Making the endometrium, the uterine lining, unreceptive to implantation is one way to cause the abortion of a new embryo. Based on these statements, an organization or individual convinced that a distinct human life begins at fertilization has a reasonable basis for objecting that the medicines they are being forced to cover can act as abortifacients. On a matter as grave as the risk of terminating human life, the objector is entitled to take seriously the government's statements that the risk exists.

With respect to Ella (ulipristal) in particular, objectors clearly have ample reason to conclude that the medication may terminate an embryo. Ulipristal is a selective progesterone receptor modulator (SPRM); as such it is structurally similar and "has similar biological effects to mifepristone, the antiprogestin used in medical abortion."[3] Although Ella involves lower doses of mifepristone than does RU-486, the so-called abortion pill, the record of the FDA's approval for Ella contains multiple statements that when administered after ovulation, the drug affects the endometrium in a way that could prevent implantation of a fertilized embryo. For example, the background document for the FDA advisory committee on Ella states that "[a]dministration of ulipristal in the luteal phase [of the menstrual cycle] also alters the endometrium. Based on the findings of the pharmacodynamic studies, ulipristal appears to exert an anti-progesterone contraceptive effect on both the ovary and endometrium, depending on the dose and time of drug administration during the menstrual cycle."[4]

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[2] As already noted, Secretary Sebelius herself has admitted that FDA-approved emergency contraceptives are "a category [of drugs] that prevent fertilization and implantation." Kelly Wallace, *Health and Human Services Secretary Kathleen Sebelius Tells iVillage "Historic" New Guidelines Cover Contraception, Not Abortion* (Aug. 2, 2011), http://www.ivillage.com/kathleen-sebelius-guidelines-cover-contraception-not-abortion/4-a-369771.

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[3] Giuseppe Bernagiano & Helena von Hertzen, *Towards More Effective Emergency Contraception?*, 375 The Lancet 527, 527 (Feb. 13, 2010).

[4] See FDA, Background Document for Meeting of Advisory Committee for Reproductive Health Drugs, FDA Advisory Committee Materials, NDA 22-474 (Ella), at 11-12 (June 17, 2010), available at http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/ReproductiveHealthDrugsAdvisoryCommittee/UCM215425.pdf (hereinafter FDA Background Document). See also FDA, Transcript of Proceedings, Advisory Committee on Reproductive Health Drugs 121 (June 17, 2010) (Dr. Ronald Orleans, FDA Medical Officer) ("Another possible mode of action is delaying the normal endometrial maturation which occurs in the luteal phase of the cycle. This delay of maturation could possibly prevent implantation."), available at http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/ReproductiveHealth

As one member of the FDA's advisory committee stated: "I'll even concede that the primary mechanism of action might be delayed ovulation, but not in this group that's five days out from unprotected intercourse. . . . I can't imagine how we can put all of these numbers together to say that delayed ovulation explains this continued efficacy [at five days after intercourse]."[5]

There is also evidence that Ella may have effects post-implantation, a time period that satisfies even the government's asserted definition of abortion. The FDA's own materials cite studies in pregnant rats and rabbits in which ulipristal "at drug exposures comparable to human exposure based on surface area (mg/m2)" were lethal to embryos.[6] Similarly, the European Medicines Agency (EMEA), the EU equivalent of the FDA, found embryotoxic effects in rats, rabbits, guinea pigs, and macaques (similar to monkeys). See European Medicines Agency, "CHMP Assessment Report for EllaOne," (Doc.Ref.: EMEA/261787/2009), at 16, 10 (finding that *ella* "is embryotoxic at low doses, when given to rats and rabbits" and "[was] approximately equipotent at the dose levels of 10 and 30 mg/day in terminating pregnancies in guinea-pigs"), available at http://www.ema.europa.eu/docs/en_GB/document_library/EPAR_-_Public_assessment_report/human/001027/WC500023673.pdf. These studies may not have

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DrugsAdvisoryCommittee/UCM218560.pdf (hereinafter Advisory Committee Proceedings).

[5] Advisory Committee Proceedings, *supra* note 4, at 160, 164 (statement of Dr. Scott Emerson).

[6] FDA Background Document, *supra* note 4, at 10.

conclusively determined the drug's effect on fetal development after implantation,[7] but they unquestionably raise significant concerns for the objector who believes that the genetically distinct human life that begins at fertilization must be protected.

With respect to Plan B, although some scientific studies have concluded that it does no more than prevent conception,[8] other studies, as well as the government's own labeling and statements, indicate that it may act after fertilization. For example, a summary of various effectiveness studies for levonorgestrel concludes that there are significant discrepancies between the effectiveness reported and the effectiveness that can be attributed to the drug's disturbance of ovulation. The authors conclude that "[e]ither the actual clinical effectiveness is far lower than has been estimated in the literature to date" or "that mechanisms of action other than disturbance of ovulation contribute to the reduction of clinical pregnancy, including mechanisms acting after fertilization."[9] Given such uncertainties, together with the medication's labeling and the government's other statements, objectors have a colorable basis for believing that Plan B may affect implantation.

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[7] *Id.* at 10-11.

[8] See, e.g., Sandra E. Reznik, *'Plan B': How It Works*, Health Progress, Jan.-Feb. 2010, at 59, available at http://www.chausa.org/docs/default-source/health-progress/hp1001k-pdf.pdf?sfvrsn=0. These arguments concerning the mechanism of action of levonorgestrel do not apply to ulipristal, which "is a new chemical entity, has a different mechanism of action, and a more limited safety profile." Advisory Committee Proceedings, *supra* note 4, at 222-23 (statement of Dr. Carol Ben-Maimon).

[9] Rafael T. Mikolajczyk and Joseph B. Stanford, *Levonorgestrel: Emergency Contraception: a Joint*

With respect to the two IUDs in question, the FDA prescribing information likewise states that they have the potential to operate by altering the uterine lining and preventing implantation. See, e.g., *Proposed Prescribing Information, ParaGard T 380A Intrauterine Copper Contraceptive*, at 3, http://www.accessdata.fda.gov/drugsatfda_docs/label/2005/018680s060lbl.pdf (possible "prevention of implantation"); *Mirena (Levonorgestrel-Releasing Intrauterine System)*, at 3, http://www.accessdata.fda.gov/drugsatfda_docs/label/2008/021225s019lbl.pdf (possible "alteration of endometrium"); FDA, *Birth Control: Medicines To Help You*, available at http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm (last visited Jan. 22, 2014) (stating that certain IUDs may "prevent[]" "implant[ation]" of embryos). With respect to the copper IUD, a Princeton-based study concluded that "[i]ts very high effectiveness implies that emergency insertion of a copper IUD must be able to prevent pregnancy after fertilization."[10] And the Family Planning Council, in a fact sheet on IUDs, says, "An IUD also changes the lining of

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Analysis of Effectiveness and Mechanism of Action, 88 Fertility and Sterility 565, 569, 570 (Sept. 2007).

[10] James Trussell, Ph.D., Elizabeth G. Raymond, MD, MPH & Kelly Cleland, MPA, MPH, *Emergency Contraception: A Last Chance to Prevent Pregnancy*, Princeton U., at 7 (Dec. 2013, http://ec.princeton.edu/questions/ec-review.pdf.

the uterus so an egg does not implant in the lining if it has been fertilized. Therefore, the egg has no place to grow."[11] The non-copper IUD (brand name *Mirena*) releases varying amounts of levonorgestrel, which, according to the manufacturer's materials, may not only inhibit sperm from reaching and fertilizing the egg but may also thin the endometrial uterine lining (which, again, would inhibit implantation).[12]

In short, the colorable fears that plaintiffs have that Ella, Plan B, and the two IUDs may terminate a new embryo are sufficient to bring this case within the tradition of making especially broad accommodation for conscientious objections to facilitating abortions.

III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR RFRA CLAIM.

RFRA provides that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates that imposing that burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b).

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[11] Family Planning Council, *Facts About IUDs*, at 1, http://www.familyplanning.org/pdf/Facts_About_IUDs.pdf (last visited Jan. 22, 2014). See also Mikaela Conley, *IUDs Work Best for Emergency Contraceptive*, ABC News, May 9, 2012, http://abcnews.go.com/Health/iuds-work-best-emergency-contraceptive/story?id=16305031 ("'The one thing that is different from the morning-after [pill], is the way it works. . . . [T]he IUD prevents implantation. That means the egg is fertilized. That brings up issues.'") (quoting gynecologist Dr. Jacques Moritz).

[12] *How Does Mirena Work?*, available at http://www.mirena-us.com/about-mirena/how-mirena-works.php (last visited Jan. 22, 2014).

The federal contraception mandate is unquestionably subject to RFRA. By the statute's terms Congress provided that "[f]ederal statutory law adopted after November 16, 1993, is subject to this chapter [i.e. RFRA] unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(b). RFRA thus "bolsters the already robust presumption against implied repeal by stating that any repeal or override of its protections must be explicit." Edward Whelan, *The HHS Contraception Mandate vs. the Religious Freedom Restoration Act*, 87 Notre Dame L. Rev. 2179, 2181 (2012); see, e.g., *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (noting the "'well settled'" rule disfavoring repeals by implication) (quotations omitted). The Affordable Act includes no provision—let alone any explicit language—excluding RFRA's application to the ACA or to regulations (such as the contraceptive mandate) based on the ACA.

On the merits, plaintiffs' claims under RFRA find strong support in the widespread pattern we have detailed of federal and state-law protections for objections to facilitating abortions (see *supra* pp. 7-13). RFRA's key terms—"exercise of religion," "substantial burden," and "compelling governmental interest"—reflect Congress's general value judgment to accommodate, where possible, the constitutional interest in free exercise of religion. To fill in the meaning of such terms, as in other areas of interpretation, "the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)) (looking to such evidence in Eighth Amendment cases). The pattern of conscience protections provides strong objective evidence that mandating coverage of potential abortifacients imposes a "substantial burden" on an objector, including a for-profit closely held corporation and its individual owners. And the fact that the protections are so numerous indicates that there is not a compelling interest, generally, in forcing objectors to facilitate abortions.

A. The Mandate Imposes a Substantial Burden on Plaintiffs' Religious Exercise.

We agree with the plaintiffs that both the individual owners and their closely held corporations are engaged in "religious exercise" when the individuals seek to run the businesses according to the principles of their faith. *Conestoga* Pet'rs' Br. 17-32; *Hobby Lobby* Pet. App. 23a-32a (*Hobby Lobby* court of appeals opinion). We also agree with the plaintiffs that the government substantially burdens their religious exercise when it requires them to support potential abortifacients, which they regard as sinful, by including them in their insurance plan and paying premiums to cover them. *Conestoga* Pet'rs' Br. 38-43; *Hobby Lobby* Pet. App. 44a-56a. Accordingly, plaintiffs' claims trigger RFRA, and the government must show a compelling interest in imposing these burdens.

The government's arguments that compelling-interest test is not triggered here are erroneous for a number of reasons. We focus on the right of conscientious objection against abortion and the logical effect that the government's arguments would have on that right. The government's narrow conception of religious exercise and "substantial burden" is irreconcilable with the nation's particularly strong tradition of protecting objections to abortion by both organizations and individuals.

1. We turn first to the government's argument that a for-profit corporation cannot be a person "exercising religion" under RFRA. See *Hobby Lobby* U.S. Br. 15-22; *Conestoga Wood Specialties v. Sec'y of U.S. Dept. of Health & Human Services*, 724 F.3d 377, 382-89 (3d Cir. 2013) (accepting the argument). We agree with plaintiffs' response: RFRA's protections are not limited to "religious organizations" (e.g., *Conestoga* Pet'rs' Br. at 24-28), and the corporations that individuals form and operate can exercise religion in the for-profit corporate setting.

The restrictive understanding of religious exercise is wrong for another reason. It would mean that, so far as RFRA (and free-exercise principles in general) are concerned, an employer could be forced to cover the cost of abortion itself. This is irreconcilable with the strong pattern of accommodations in federal and state law for those objecting to participating in abortions—including the objections of commercial entities such as businesses and health insurers. See *supra* pp. 7-13. Over and over again, federal and state laws have recognized that entities as well as individuals engaging in commerce exercise their religious conscience in objecting to facilitating abortions and other procedures and should be protected. It makes no sense to say that an interest recognized so frequently does not constitute the "exercise of religion" under RFRA.

In fact, as one state court has recognized, what health-care conscience laws do, "by offering protections to those who seek not to act in the health-care setting due to religious convictions," is precisely to "bolste[r]" "'a person's exercise of religion.'" *Morr-Fitz, Inc. v. Quinn*, 976 N.E.2d 1160, 1171 (Ill. App. 4th Dist. 2012) (using state health-care conscience act to protect corporate owners of pharmacies, as well as individual pharmacists, from state rules requiring them to provide emergency contraception), appeal dismissed, 982 N.E.2d 770, 367 Ill. Dec. 620 (Ill. 2013) (Table, No. 115122). The court held that the purposes of Illinois's conscience act—which covers corporate owners—are harmonious with the state's own version of RFRA. This Court should hold the same for the federal RFRA: its purposes harmonize with the many federal and state conscience acts protecting objections to facilitating abortion.

2. Next we turn to the government's argument that the plaintiffs' religious exercise is not "substantially burdened" under RFRA because they are not being forced to do anything directly sinful themselves. The government claims that

> RFRA does not protect against the burden on religious exercise that "arises when one's money circuitously flows to support the conduct of other free exercise-wielding individuals who hold religious beliefs that differ from one's own."

Hobby Lobby U.S. Br. 34 (quoting *O'Brien v. United States Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012), appeal docketed, no. 12-3357 (8th Cir. argued Oct. 24, 2013)).

As plaintiffs point out, however, this ignores that they believe it is wrong for them to facilitate the wrongs of others. Pet'rs' Br. at 4, 34-37. Again, the government's argument conflicts with *Thomas v. Review Board*, 450 U.S. 707, where the claimant quit his job because, based on his religious beliefs, he was unwilling to work in a factory that produced tank turrets. The state denied him unemployment benefits and argued that his objection was unfounded because he had been willing to work in a different factory that produced materials that might be used for tanks. The Supreme Court held that in determining whether Thomas's religious beliefs were burdened, it could not second-guess his judgment about what connection to armament production was unacceptably close for him: "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Thomas*, 450 U.S. at 715.

Plaintiffs are entitled, just as much as Mr. Thomas was, to make judgments about when their connection comes too close to action they believe is immoral—in the case of abortion, the grave immoral action of taking an innocent human life.

Under the logic of the government's argument, there is no burden on *any* employer that is forced to provide insurance coverage for employees' abortions. There would be no burden even on a religious organization, even on a Catholic diocese. But HHS's own exemption and accommodation for religious organizations show that it recognizes that an organization is significantly burdened by having to provide its employees insurance coverage to fund procedures it regards as sinful. See *Conestoga* Pet'rs' Br. 33-34.

Once again, the government's position here is irreconcilable with the long tradition [illegible] protecting conscientious objectors to abortion, which extends well beyond cases of direct personal involvement in the abortion. In multiple ways and contexts, federal and state laws protect those who refuse to help others procure or perform abortions. Objectors are freed from having to refer someone to an abortion provider, from having to provide facilities, and from having to conduct training sessions or refer someone for training sessions—even though in all those cases it could be said that the objector was merely facilitating someone else's voluntary participation. See *supra* p. 13. And most relevantly, both the ACA and the Hyde-Weldon Amendment specifically protect health plans (and by extension, employers purchasing them) from having to cover abortions. Burdens that over and over again trigger protections in federal and state laws cannot be dismissed "insubstantial" under RFRA.

In short, to find no substantial burden here would mean that government could force a small or closely held business to fund any abortion whatsoever, with no barrier from RFRA or free-exercise principles. Again, that would be irreconcilable with the nation's tradition of broad conscience protection for objectors to abortion, including individuals and entities in the for-profit sphere.

B. The Government Has Not Shown That Requiring Employers to Cover the Drugs and Devices at Issue Serves a Compelling Interest, Or That It Does So by the Least Restrictive Means.

Once the plaintiff demonstrates a substantial burden, the government has the obligation to demonstrate that application of the burden to the plaintiff furthers a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b). "[D]emonstrates" means that the government must "mee[t] the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3).

The government has not met either of those obligations. The government's general claims—that requiring objecting employers to cover contraception is necessary to promoting women's health and equity—cannot suffice to overcome claims of conscience concerning abortifacients, for a combination of reasons, some relating particularly to abortifacients, others applying more broadly.

By the Secretary's own admission, contraception is widely available in "community health centers, public clinics, and hospitals with income-based support,"[13] and there is no demonstration that these drugs and devices are different. Like contraception in general, emergency contraceptives and IUDs are subject to the huge coverage gaps that the ACA leaves: the exemption of small businesses (under 50 full-time employees) from the underlying requirement to provide health insurance, and the grandfathering of thousands of plans covering tens of millions of employees. See, e.g., *Conestoga* Pet'rs' Br. 44.

In addition, there are particular reasons to doubt that the government's interest is compelling with respect to potential abortifacients. First, the nation's tradition of broadly accommodating conscientious objections to facilitating abortion makes it extremely unlikely that the government can show a compelling interest in overriding employers' conscience concerning embryo-terminating drugs. With respect to abortion, the government accommodates the conscientious scruples of for-profit employers, health-insurance plans, health-care facilities, and individual salaried providers. The government cannot overcome the strong claim of conscience here concerning potential abortifacients by the mere declaration that all FDA-approved contraceptives should be covered or that terminating an embryo before implantation is not an abortion.

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[13] News Release, Dep't of Health and Human Servs., A Statement by [HHS] Secretary Kathleen Sebelius (Jan. 20. 2012), available at http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

Second, the government has justified the mandate throughout based on arguments that the costs of contraceptive methods may deter a significant number of women from using them. See, e.g., Final Rules, Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012). But even if that argument were valid, there is no specific showing it should also apply to emergency contraceptives. While the proper use of routine contraception should be frequent and regular over months, medicines like Ella and Plan B are appropriate for only a limited range of situations—shortly "after unprotected intercourse or a known or suspected contraceptive failure"—and neither is "intended for routine use as a contraceptive."[14] The costs of regularly ingested contraceptives mount over months; according to one chart, they reach up to $960 a year for uninsured women taking certain pills.[15] Ella and Plan B cost roughly $35 to $55 per dose.[16] Thus, it would take multiple uses of Ella or Plan B in a year (up to 20) to equal the yearly cost of routine contraception—a pattern contradicting the direction that neither Ella nor Plan B is "intended for routine use as a contraceptive." In that light, the government cannot simply equate the expenses for emergency and regular contraception without demonstrating the compelling need to require objecting employers to cover the former. Since there is no such demonstration at this point, the preliminary injunction should be granted.

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[14] FDA, Ella Prescribing Information, ## 2, 1, available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf; FDA, Plan B One-Step Prescribing Information, ## 2, 1, available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf.

[15] Center for American Progress, *The High Costs of Birth Control: It's Not Affordable As You Think* (Feb. 15, 2012), available at http://www.americanprogress.org/issues/women/news/2012/02/15/11054/the-high-costs-of-birth-control/.

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[16] See, e.g., Andrea Kim and Mary Barna Bridgman, *Ulipristal Acetate (ella): A Selective Progesterone Receptor Modulator For Emergency Contraception*, 36 Pharmacy & Therapeutics 325 and Table 1 (June 2011), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3138379.

CONCLUSION

The judgment of the court of appeals in *Hobby Lobby* (No. 13-354) should be affirmed, and the judgment of the court of appeals in *Conestoga* (No. 13-356) reversed, and the preliminary injunction should be granted in each case.

Respectfully submitted.

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In The
Supreme Court of the United States

◆

KATHLEEN SEBELIUS, ET AL.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

◆

CONESTOGA WOOD SPECIALTIES CORPORATION, ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL.,
Respondents.

◆

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Tenth Circuits

◆

AMICUS CURIAE BRIEF OF DRURY DEVELOPMENT CORPORATION, DRURY SOUTHWEST, INC., AND DRURY HOTELS COMPANY, LLC, WITH THE AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, CHRISTIAN MEDICAL ASSOCIATION, PHYSICIANS FOR LIFE, NATIONAL ASSOCIATION OF PRO LIFE NURSES, THE NATIONAL CATHOLIC BIOETHICS CENTER, AND NATIONAL ASSOCIATION OF CATHOLIC NURSES IN SUPPORT OF HOBBY LOBBY, ET AL. AND CONESTOGA WOOD SPECIALTIES, ET AL.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

It is undisputed that a new, distinct human organism comes into existence during the process of fertilization. Many drugs and devices labeled by the U.S. Food and Drug Administration as "contraception," however, have post-fertilization mechanisms of action – which means that these drugs and devices work after a new human organism is created (at fertilization) but before implantation. While such contraceptive methods may prevent implantation and therefore "pregnancy," as defined by the Government[2] and its *amici*, these drugs and devices can also end the life of a new human organism.

Amici Curiae – which include for-profit companies as well as national healthcare non-profit organizations, described below – are sensitive to healthcare disparities and support a variety of public and private efforts that address health care affordability and accessibility. *Amici* oppose, however, the Government's mandate imposed on nearly all private insurance plans to cover drugs and devices with post-fertilization (*i.e.*, life-ending) mechanisms of action. This mandate violates the genuine and sincerely held religious beliefs and freedom of conscience of the plaintiff family businesses. Based on the destructive, post-fertilization effect of "emergency contraceptives" and the coercive, unconstitutional actions of the Government to compel the family businesses to pay for those drugs and devices with post-fertilization (*i.e.*, life-ending) mechanisms of action, *Amici* urge this Court to affirm the decision of the United States Court of Appeals for the Tenth Circuit and reverse the decision of the United States Court of Appeals for the Third Circuit Court.

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[1] Pursuant to this Court's Rule 37.3(a), *Amici* have consent to file this brief. Conestoga et al. and the Government Defendants have filed blanket consent with this court; Hobby Lobby et al. has granted consent by letter, filed with this brief. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief.

[2] For purposes of clarity in this brief, the private, non-governmental parties in these cases are referred to as "family businesses" and the governmental parties are referred to as "Government" or "Defendants."

Drury *Amici*

Drury Development Corporation, Drury Southwest, Inc., and Drury Hotels Company, LLC [collectively referred to herein as "Drury *Amici*"] are for-profit companies that collectively employ hundreds of individuals. Drury *Amici* and their affiliates own and operate, among other things, hotels, office buildings, strip shopping centers, billboard companies, and convenience gasoline stations. Eligible employees of Drury *Amici* participate in a self-funded health and welfare benefit plan administered by Drury Hotels Company, LLC. Currently, 3,710 employees are eligible to participate, and 2,302 have elected to participate.

Members of the Charles L. Drury, Sr., and the Robert A. Drury families [collectively referred to as "Drury Family"] who own/control Drury *Amici* are adherents of the Catholic faith and wish to conduct their business in a manner that does not violate the principles of their faith. Specifically, they believe that life is a sacred gift from God and that they are not permitted to cause or pay for the direct, intentional termination of human life. Drury *Amici* always have been operated in a manner consistent with this belief. Previous health plan policies provided by Drury *Amici* to their employees have excluded contraception, including "emergency contraception," from employee health plans.

Under the Affordable Care Act, Drury *Amici* must provide coverage for "preventive care" for women, which the Government has defined to include "emergency contraception." The employee health plans provided by Drury *Amici* are not grandfathered or otherwise exempt[3] from this mandate. Thus, with the plan renewal of January 1, 2013, Drury *Amici* were forced to choose between conducting business in a manner consistent with the religious principles of the members of the Drury Family or paying ruinous fines and penalties.[4] Coerced by the Government to make this unconstitutional decision, Drury *Amici* have been forced to violate the religious tenets of members of the Drury Family which Drury *Amici* have always followed and provide coverage of life-ending "emergency contraception" through their employee health plans.

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[3] Drury *Amici* do not qualify for the "religious employer" exemption and are not composed of non-profit entities (*i.e.*, Drury *Amici* cannot take advantage of the "temporary safe-harbor" set forth by the Government at 77 Fed. Reg. 8725 (Feb. 15, 2012)).

Medical Organization *Amici*

The remaining *Amici* are six national medical organizations whose members include physicians, bioethicists, and other healthcare professionals who have a profound interest in protecting human life in their roles as healthcare providers and medical experts [collectively referred to herein as "Medical Organization *Amici*"]. As experts in the medical field, Medical Organization *Amici* provide documentation that a new human organism undisputedly begins at fertilization, and that "emergency contraception" has post-fertilization mechanisms of action.

Medical Organization *Amici* include the following:

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[4] Such fines would indeed be ruinous. Non-exempt employers who fail to provide certain services are subject to an assessment of $100 a day per employee, as well as potential of private enforcement suits. Drury *Amici*, with 3,710 eligible employees, would therefore face a penalty of up to $371,000 per day if it did not provide coverage of "emergency contraception." Drury *Amici* would also be subject to an annual fine of approximately $2,000 per full-time employee (not counting the first 30 employees).

American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a non-profit professional medical organization consisting of 2,500 obstetrician-gynecologist members and associates. AAPLOG held the title of "special interest group" within the American College of Obstetricians & Gynecologists (ACOG) for 40 years, from 1973 until 2013, until ACOG discontinued the designation of "special interest group." AAPLOG is concerned about the potential long-term adverse consequences of abortion on a woman's future health and continues to explore data from around the world regarding abortion-associated complications in order to provide a realistic assessment and appreciation of abortion-related health risks for women.

Christian Medical Association, founded in 1931, is a non-profit national organization of Christian physicians and allied healthcare professionals with almost 16,000 members. It also has associate members from a number of allied health professions, including nurses and physician assistants. Christian Medical Association provides up-to-date information on the legislative, ethical, and medical aspects of abortion and its impact on maternal health.

Physicians for Life is a national non-profit medical organization that exists to draw attention to the issues of abortion and contraception. Physicians for Life encourages physicians to educate their patients not only regarding the innate value of human life at all stages of development, but also on the risks inherent in abortion.

National Association of Pro Life Nurses (NAPN) is a national non-profit nurses' organization with members in every state. NAPN unites nurses who seek excellence in nurturing for all, including mothers and the unborn. NAPN seeks to establish and protect ethical values of the nursing profession.

The National Catholic Bioethics Center, established in 1972, conducts research, consults, publishes, and educates to promote human dignity in health care and the life sciences, and derives its message directly from the teachings of the Catholic Church.

National Association of Catholic Nurses is a national non-profit organization that gives nurses of different backgrounds the opportunity to promote moral principles within the Catholic context in nursing and stimulate desire for professional development. The organization focuses on educational programs, spiritual nourishment, patient advocacy, and integration of faith and health.

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SUMMARY OF ARGUMENT

The Affordable Care Act (ACA) requires that all private insurance plans "provide coverage for and shall not impose any cost sharing requirements for . . . preventive care and screenings [for women]."[5] The

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[5] 42 U.S.C. § 300gg-13.

Government's[6] regulatory mandate implementing this provision (the "Mandate") requires that nearly all private health insurance plans fully cover, without co-pay, all drugs and devices labeled by the Food and Drug Administration (FDA) as "contraception."[7]

It is scientifically undisputed that a new human organism begins at fertilization. *See* Part I, *infra*. However, the FDA's definition of "contraception" is broad and includes drugs and devices with known post-fertilization (*i.e.*, life-ending) mechanisms of action.[8] *See* Part II, *infra*. As such, forcing employers to provide coverage of such life-ending drugs violates the conscientious beliefs of the family businesses and Americans across the nation.

The Government and its *amici* ignore the family businesses' documented objections to the post-fertilization effect (*i.e.*, life-ending effect) of such drugs, instead inserting disingenuous semantic arguments about when "pregnancy" begins. "Pregnancy" is not the scientific benchmark; fertilization, which is the beginning of a new human organism, is the true scientific benchmark at issue here. When the post-fertilization mechanisms of action of "emergency contraceptives" are understood as ending the life of a developing human organism, it is clear that forcing the family businesses to pay for such drugs violates their rights and contradicts this nation's long-standing commitment to the freedom of conscience. *See* Part III, *infra*.

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[6] For purposes of clarity in this brief, the private, non-governmental parties in these cases are referred to as "family businesses" and the governmental parties are referred to as "Government" or "Defendants."

[7] *See* Health Resources and Services Administration, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011), http://www.hrsa.gov/womensguidelines/. All internet sites last visited January 3, 2014.

[8] *See* Food and Drug Administration, *Birth Control Guide* (Aug. 2012), http://www.co.burke.nc.us/vertical/sites/%7BDF44FA7A-21E3-466A-A30D-00122906F160%7D/uploads/FDA_Birth_Control_Guide-_Updated_August_2012.pdf.

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ARGUMENT

I. It is Undisputed that a New Human Organism is Created at Fertilization.

It is undisputed that a new, distinct human organism comes into existence during the process of fertilization.[9] Scientific literature states the following:

- "The fusion of sperm and egg membranes ***initiates the life*** of a sexually reproducing organism."[10]

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[9] *See, e.g.*, Condic, *When Does Human Life Begin? A Scientific Perspective* (The Westchester Institute for Ethics & the Human Person Oct. 2008), http://bdfund.org/wordpress/wp-content/uploads/2012/06/wi_whitepaper_life_print.pdf; George & Tollefsen, EMBRYO 39 (2008).

[10] Marsden et al., *Model systems for membrane fusion*, CHEM. SOC. REV. 40(3):1572 (Mar. 2011) (emphasis added).

- "The ***life cycle of mammals begins*** when a sperm enters an egg."[11]
- "Fertilization is the process by which male and female haploid gametes (sperm and egg) unite to produce ***a genetically distinct individual***."[12]
- "The oviduct or Fallopian tube is the anatomical region where ***every new life begins*** in mammalian species. After a long journey, the spermatozoa meet the oocyte in the specific site of the oviduct named ampulla, and fertilization takes place."[13]
- "Fertilization – ***the fusion of gametes to produce a new organism*** – is the culmination of a multitude of intricately regulated cellular processes."[14]

The Government's own definition attests to the fact that life begins at fertilization. According to the National Institutes of Health, "fertilization" is the "process of union" of two gametes (*i.e.*, ovum and sperm) "whereby the somatic chromosome number is restored *and the development of a* ***new individual*** *is initiated.*"[15] Thus, in the context of human life, a new individual human organism is initiated at the union of ovum and sperm.

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[11] Okada et al., *A role for the elongator complex in zygotic paternal genome demethylation*, NATURE 463:554 (Jan. 28, 2010) (emphasis added).

[12] Signorelli et al., *Kinases, phosphatases and proteases during sperm capacitation*, CELL TISSUE RES. 349(3):765 (Mar. 20, 2012) (emphasis added).

[13] Coy et al., *Roles of the oviduct in mammalian fertilization*, REPRODUCTION 144(6):649 (Oct. 1, 2012) (emphasis added).

[14] Marcello et al., *Fertilization*, ADV. EXP. BIOL. 757:321 (2013) (emphasis added).

One textbook similarly explains the following:

> Human development begins at fertilization when a male gamete or sperm (spermatozoon) unites with a female gamete or oocyte (ovum) to produce a single cell – a zygote. This highly specialized, totipotent cell marked ***the beginning of each of us as a unique individual***.[16]

Thus, a new human organism is created *before* the developing embryo implants in the uterus – *i.e.*, before that time at which some people consider a woman "pregnant."

The Government and its *amici* have at times tried to blur this distinct line with semantics about when "pregnancy" begins. Relying on a definition of pregnancy that begins at "implantation," the Government and its *amici* argue that "emergency contraceptives" are not "abortifacients." However, this is a nonresponse to the concern that a drug or device can work after fertilization by blocking the implantation of a developing human embryo. Such drugs might not end a "pregnancy" under the Government's definition, but it does end the life of a unique human being. What the family businesses – and *Amici* – conscientiously oppose is not simply the ending of a "pregnancy," but the ending of human life itself.

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[15] National Institutes of Health, *Medline Plus Merriam-Webster Medical Dictionary* (2013), http://www.merriam-webster.com/medlineplus/fertilization (emphasis added).

[16] Moore & Persaud, THE DEVELOPING HUMAN 16 (7th ed. 2003) (emphasis added).

II. Drugs and Devices Defined by the FDA as "Emergency Contraception" Have Post-Fertilization Mechanisms of Action.

Drugs and devices with post-fertilization (*i.e.*, life-ending) mechanisms of action are included in the FDA definition of "contraception." Even though these drugs and devices may end a developing, distinct human being's life by preventing implantation, they are labeled by the FDA as "contraception." However, referring to such drugs as "contraception" is deceiving in that the term implies to the public only the *prevention of fertilization*. Yet the scientific endpoint which defines a drug as a "contraceptive" is the ability to prevent a "pregnancy" – which in operational terms means preventing detection of a positive pregnancy test at the end of a woman's cycle, nearly ten days to two weeks after embryo formation.

Thus, because the FDA's criterion in categorizing a drug as "contraception" is whether a drug can work by preventing "*pregnancy*" – which the FDA defines as beginning at "implantation," not fertilization – drugs that interfere with *implantation*, which occurs days *after* fertilization and the creation of a new human organism, are categorized as "contraception."[17]

There is no dispute among the parties that at least some of these drugs have post-fertilization (*i.e.*, life-ending) mechanisms of action and can prevent implantation of an already-developing human embryo. The Government has conceded before this Court that various "emergency contraceptives" can work after fertilization but before implantation. For example, the Government concedes that copper IUDs work "possibly by preventing implantation (of a fertilized egg in the uterus)"; likewise, the Government concedes that an IUD with progestin can work by "altering the endometrium." Brief of Government Respondents in *Sebelius v. Hobby Lobby Stores, Inc.*, at 9 n.4. Further, the Government concedes that Plan B "may inhibit implantation (of a fertilized egg in the uterus) by altering the endometrium," and that *ella* "may also work by altering the endometrium in a way that may affect implantation (of the fertilized egg in the uterus)." *Id.*

In *Hobby Lobby Stores, Inc. v. Sebelius*, the United States Court of Appeals for the Tenth Circuit noted the following:

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[17] For an overview of how the definition of "pregnancy" has changed, *see* Gacek, *Conceiving Pregnancy: U.S. Medical Dictionaries and Their Definitions of Conception and Pregnancy*, 9 NAT'L CATHOLIC BIOETHICS QUARTERLY 542 (2009).

> Both the government and the medical amici supporting the government concede that at least some of the contraceptive methods to which the plaintiffs object have the potential to prevent uterine implantation. . . . [W]e need not wade into scientific waters here, given the above-noted agreement that some of the challenged devices function in a manner that Hobby Lobby and Mardel find morally problematic.

723 F.3d 1114, 1123 n.3 (10th Cir. 2013). Unless the parties have requested that this Court review this conclusion of the Tenth Circuit – and they have not – the Tenth Circuit's conclusion stands. The Government and its *amici* are barred from arguing that the family businesses are mistaken in their belief that "emergency contraception" can work to end life after fertilization and before implantation.[18]

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[18] One *amicus* brief cited by the Tenth Circuit was filed by Physicians for Reproductive Health, American College of Obstetricians & Gynecologists, Dr. James Trussell, and other medical organizations or individuals, and a version of that brief is likely to be filed in this Court [collectively referred to herein as "Government's medical *amici*"]. The previous versions of that brief are filled with semantic arguments, such as when "pregnancy" begins and whether a drug can be considered an "abortifacient;" however, such semantic arguments miss the mark. When "pregnancy" begins is not the scientific benchmark at issue here. The relevant scientific benchmark is when the life of a human organism begins – and that is undisputedly at fertilization.

Previous versions of the brief filed by the Government's medical *amici* also argue that certain forms of "emergency

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Additional statements by the Government defendants and their *amici* further demonstrate that there is no dispute as to the post-fertilization mechanism of action of some "contraceptives." For example, when promoting the Mandate, Defendant Kathleen Sebelius, Secretary of Health and Human Services (HHS), admitted that the FDA's definition of "contraception" extends to *blocking the implantation* of an already developing human embryo: "The Food and Drug Administration has a category [of drugs] that prevent fertilization *and implantation*. That's really the scientific definition."[19] Defendant Sebelius stated that under the new Mandate, "[t]hese covered prescription drugs are specifically those that are

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contraception" do not prevent implantation – but these claims are purely speculative. The sources cited by the Government's medical *amici* never present conclusive scientific evidence that "emergency contraceptives" do not interfere with implantation. The Government's medical *amici* try to make up for this lack of evidence by claiming that the "emergency contraceptives" Plan B and *ella* work ***"primarily***, ***if*** not exclusively, by inhibiting ovulation" or that "the ***primary***, and ***perhaps*** only, method of action" is pre-fertilization. But such statements are by no means scientifically conclusive. Just because Plan B and *ella* work "primarily" before fertilization does not mean that they do not also work after fertilization. Simply put, the Government's medical *amici* solely rely on semantics and speculation and skirt the scientific fact that a new life begins at fertilization.

[19] Wallace, *Health and Human Services Secretary Kathleen Sebelius Tells iVillage "Historic" New Guidelines Cover Contraception, Not Abortion* (Aug. 2, 2011), http://www.ivillage.com/kathleen-sebelius-guidelines-cover-contraception-not-abortion/4-a-369771 (emphasis added).

designed to *prevent implantation*."[20] The Government defendants know and admit that these drugs work after fertilization.

In his most recent study on "emergency contraception," Dr. James Trussell, who appeared as an *amicus* supporting the Government in both cases below, states: "To make an informed choice, women must know that [emergency contraception pills] . . . may at times inhibit implantation. . . ."[21] Although an advocate of "emergency contraception," Dr. Trussell believes that the scientific difference between a drug that prevents fertilization of an egg and one that may also prevent implantation of a unique human organism is significant enough that it must be disclosed to a potential user. He has also stated that these post-fertilization effects "should certainly be [acknowledged and] celebrated, because without them the [contraceptive] method would not provide as much benefit as they do."[22] In other words, if fertilization has occurred, the method provides "benefit" by preventing implantation.

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[20] *Id.* (emphasis added).

[21] Trussell et al., *Emergency Contraception: A Last Chance to Prevent Unintended Pregnancy* (Office of Population Research at Princeton University June 2010).

[22] Raymond et al., *Embracing post-fertilisation methods of family planning: a call to action*, J. FAM. PLAN. REPROD. HEALTH CARE (2013), http://press.psprings.co.uk/jfprhc/september/jfprhc100702.pdf.

Moreover, a new drug classified by the FDA as "emergency contraception" – Ulipristal Acetate (*ella*) – is actually an abortion-inducing drug, because it can kill a human embryo *after* implantation.

An understanding of these post-fertilization mechanisms of action, discussed below, further demonstrates that "emergency contraception" can end the life of an already developing human organism.

A. Plan B can prevent implantation.

In 1999, the FDA approved the distribution of the drug known as Plan B. Although called "emergency contraception," the FDA-approved labeling acknowledges that Plan B can prevent implantation of an already-developing human embryo.[23] Further, the FDA states on its website, "[i]f fertilization does occur, Plan B may prevent a fertilized egg from attaching to the womb (implantation)."[24] The same explanation is provided by Duramed Pharmaceuticals, the manufacturer of Plan B One-Step.[25] The Government relies on the Plan B drug label when it similarly explains the mechanisms of action of Plan B in its *Hobby Lobby* brief. *See* Brief of Government Respondents in *Sebelius v. Hobby Lobby Stores, Inc.*, at 9 n.4.

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[23] Plan B Approved Labeling, http://www.accessdata.fda.gov/drugsatfda_docs/nda/2006/021045s011_Plan_B_PRNTLBL.pdf.

[24] Food and Drug Administration, *FDA's Decision Regarding Plan B: Questions and Answers* (updated Apr. 30, 2009), http://www.fda.gov/cder/drug/infopage/planB/planBQandA.htm.

[25] Duramed Pharmaceuticals, *How does Plan B One-Step work?* (2010), http://www.planbonestep.com/faqs.aspx (explaining that Plan B can work "by preventing attachment (implantation) to the uterus (womb)").

Under the Government's Mandate, the family businesses are forced to pay for Plan B, despite its life-ending effect on already formed unique human organisms, in violation of the family businesses' genuinely held religious beliefs.

B. Ulipristal Acetate (*ella*) can prevent implantation or kill an implanted embryo.

In 2010, the FDA approved the drug Ulipristal Acetate (*ella*) as another "emergency contraceptive." Importantly, *ella* is not an "improved" version of Plan B; instead, the chemical make-up of *ella* is similar to the abortion drug RU-486 (brand name Mifeprex). Like RU-486, *ella* is a selective progesterone receptor modulator (SPRM) – "[t]he mechanism of action of ulipristal (*ella*) in human ovarian and endometrial tissue is identical to that of its parent compound mifepristone."[26] This means that though *labeled* as "contraception," *ella* works the same way as RU-486. By blocking progesterone – a hormone necessary to build and maintain the uterine wall during pregnancy – an SPRM can either prevent a developing human embryo from implanting in the uterus, or it can kill an implanted embryo by essentially starving him or her to death. Put another way, *ella can abort a pregnancy*, whether you define "pregnancy" as beginning at fertilization or at implantation.[27]

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[26] Harrison & Mitroka, *Defining Reality: The Potential Role of Pharmacists in Assessing the Impact of Progesterone Receptor Modulators and Misoprostol in Reproductive Health*, 45 ANNALS PHARMACOTHERAPY 115 (Jan. 2011).

Studies confirm that *ella* is harmful to a human embryo.[28] The FDA-approved labeling – relied upon by the Government in its *Hobby Lobby* brief – notes that *ella* may "affect implantation"[29] and contraindicates use of *ella* in the case of known or suspected pregnancy. A study funded by *ella*'s manufacturer explains that SPRMs (drugs that block the hormone progesterone), "including ulipristal acetate," can "impair implantation."[30] While the study theorizes that the dosage used in its trial "might be too low to inhibit implantation,"[31] it states affirmatively that

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[27] *See* Gacek, *Conceiving Pregnancy*, *supra*.

[28] European Medicines Agency, *Evaluation of Medicines for Human Use: CHMP Assessment Report for Ellaone* 16 (2009), http://www.ema.europa.eu/docs/en_GB/document_library/EPAR_-_Public_assessment_report/human/001027/WC500023673.pdf.

[29] *ella* Labeling Information (Aug. 13, 2010), http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf.

[30] Glasier et al., *Ulipristal acetate versus levongestrel for emergency contraception: a randomized non-inferiority trial and meta-analysis*, 375 THE LANCET 555 (Jan. 2010).

[31] In the Glasier study, "follow-up was done 5-7 days after expected menses. If menses had occurred and a pregnancy test was negative, participation [in the study] ended. If menses had not occurred, participants returned a week later." Considering

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"an additional postovulatory mechanism of action," *e.g.*, impairing implantation, "cannot be excluded."

Thus, *ella* has the potential to destroy a human embryo. Notably, at the FDA advisory panel meeting for *ella*, Dr. Scott Emerson, a professor of Biostatistics at the University of Washington and a panelist, raised the point that the low pregnancy rate for women who take *ella* four or five days after intercourse suggests that the drug *must* have an "abortifacient" quality.[32]

In short, *ella* goes beyond any other "contraceptive" approved by the FDA at the time of the Affordable Care Act's enactment. By approving *ella* as "contraception," the FDA removed, not simply blurred, the line between "contraception" and "abortion" drugs because *ella* can work by ending an established "pregnancy."

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that implantation must occur *before* menses, the study could not, and did not attempt to, measure an impact on an embryo prior to implantation or even shortly after implantation. *ella* was not given to anyone who was known to already be pregnant (upon enrollment participants were given a pregnancy test and pregnant women were excluded from the study). The only criterion for *ella* "working" was that a woman was not pregnant in the end. Whether that was achieved through blocking implantation or killing the embryo after implantation was not determinable.

[32] *See* Transcript, Food and Drug Administration Center for Drug Evaluation and Research (CDER), Advisory Committee for Reproductive Health Drugs (June 17, 2010), http://www.fda.gov/downloads/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/ReproductiveHealthDrugsAdvisoryCommittee/UCM218560.pdf.

Further, though "indicated" for contraceptive use, mandated coverage for *ella* opens the door to the funding (through health insurance) of purposeful, off-label abortion usage of the drug. Already, *ella* is available for sale online, where a purchaser need only fill out a questionnaire to obtain the drug, with no physician or pharmacist to examine the patient, explain the risks in person, or verify the identity and intentions of the purchaser.

Thus, contrary to their religious and conscientious beliefs, the family businesses are required to pay for *ella* – an abortion-inducing drug – under the Government's Mandate.

C. Intrauterine Devices (IUDs) can also prevent implantation.

Copper Intrauterine Devices (IUDs) are heavily promoted as another form of "emergency contraception." IUDs can block the implantation of a human embryo after fertilization.[33] In his study on "emergency contraceptives," Dr. Trussell concludes that "[i]ts very high effectiveness implies that emergency insertion of a copper IUD *must* be able to prevent pregnancy *after fertilization.*"[34] Put another way, IUDs are so effective *because* they do not just prevent conception – they can kill an already developing human embryo.

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[33] *See* Department of Health and Human Services, *Birth Control Methods* (Nov. 21, 2011), http://www.womenshealth.gov/publications/our-publications/fact-sheet/birth-control-methods.pdf ("If fertilization does occur, the IUD keeps the fertilized egg from implanting in the lining of the uterus.").

Clearly, under the Government's Mandate, the family businesses are required to pay for devices that can kill human embryos, contrary to their religious and conscientious beliefs.

III. The Mandate Violates Sincerely Held Religious Beliefs and Freedom of Conscience.

The plaintiff family businesses are required under the Mandate to provide insurance coverage for drugs and devices with life-ending mechanisms of action, including "emergency contraception." The family businesses have made clear their conscientious objection to paying for such life-ending drugs, and if the family businesses do not comply with the Government's Mandate, they will face potentially ruinous penalties.[35] Clearly, the family businesses are being forced to choose between either following their religious and conscientious beliefs or complying with the law. It is exactly this type of coercive dichotomy that violates the U.S. Constitution's guarantee of freedom of conscience.

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[34] *See* Trussell, *Emergency Contraception*, *supra* (emphasis added).

[35] *See* 26 U.S.C. § 4980H(a), (c)(1); 26 U.S.C. § 4980D(b); 29 U.S.C. § 1132(a)(1)(B); 42 U.S.C. § 300gg-22(b)(2)(C)(i). *See also* Cong. Research Serv., RL 7-5700 (Feb. 24, 2012).

Freedom of conscience is a fundamental right that has been respected and protected since the founding of our Nation. Since that time, the paramount importance of this historic right has been affirmed by our Founders, by the U.S. Supreme Court, and by Congress. In short, history, tradition, and jurisprudence affirm that a person cannot be forced to commit an act that is against his or her moral, religious, or conscientious beliefs – including payment for such an act – and this history, tradition, and jurisprudence unequivocally support the family businesses in these cases.

A. Freedom of Conscience is a fundamental right affirmed by our Founders.

The First Amendment guarantees that Congress shall make no law prohibiting the free exercise of religion. U.S. CONST. amend. I. At the very root of that promise is the guarantee that the government cannot force a person to commit an act in violation of his or her religion.[36]

The signers to the religion provisions of the First Amendment were united in a desire to protect the

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[36] *See generally* McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).

"liberty of conscience." Having recently shed blood to throw off a government which dictated and controlled their religion and practices, guaranteeing freedom of conscience was of utmost importance.[37]

Thomas Jefferson made it clear that freedom of conscience is not to be subordinate to the government:

> [O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.[38]

Jefferson also stated that no provision in the Constitution "ought to be dearer to man than that which protects the rights of conscience against the enterprises of civil authority."[39]

Jefferson also maintained that forcing a person to *contribute* to – much like forcing the family businesses to pay for – a cause to which he or she abhorred was "tyrannical."[40] This belief formed the basis of Jefferson's bill in Virginia, which prohibited the compelling of a man to furnish money for the propagation of opinions to which he was opposed.[41] Jefferson – who considered it "tyrannical" to force a person to contribute monetarily to a position he disagreed with – would likely be aghast at a law requiring payment for a drug that is conscientiously objectionable.

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[37] The Founders often used the terms "conscience" and "religion" synonymously. Berg, *Free Exercise of Religion*, in THE HERITAGE GUIDE TO THE CONSTITUTION 310 (2005). Thus, adoption of the "religion" clauses does not mean that the Founders were ignoring freedom of conscience. The two were inextricably intertwined.

[38] Jefferson, *Notes on Virginia* (1785).

[39] Jefferson, Letter to New London Methodists (1809).

[40] Boyd, THE PAPERS OF THOMAS JEFFERSON 545 (1950).

Likewise, James Madison, considered the Father of the Bill of Rights, was also deeply concerned that the freedom of conscience of Americans be protected. Madison stated:

> The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature *an unalienable right*.[42]

In fact, Madison described the conscience as "the most sacred of all property."[43] Madison also amended the Virginia Declaration of Rights to state that all men are entitled to full and free exercise of religion, "according to the dictates of conscience."

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[41] Thus, not only is Jefferson the author of the Declaration of Independence, but he is also the author of one of this Nation's first statutes granting the right to refuse to participate or to act because of conscientious convictions. Jefferson was so proud of this accomplishment that he had "Author of the . . . Statute of Virginia Religious Freedom. . . ." etched on his gravestone.

[42] Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 15 (1785) (emphasis added).

[43] Milton, THE QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS 36-37 (2005).

Madison understood that if man cannot be loyal to himself, to his conscience, then a government cannot expect him to be loyal to less compelling obligations, statutes, judicial orders, or professional duties. If the government demands that he betray his conscience, the government has eliminated the only moral basis for obeying any law. Madison considered it "the particular glory of this country, to have secured the rights of conscience which in other nations are least understood or most strangely violated."[44]

George Washington maintained that "the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle," and he advised Americans to "labor to keep alive in your breast that little spark of celestial fire called conscience."[45] Washington also maintained that the government should accommodate religious persons:

> The conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be extensively accommodated to them, as a due regard for

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[44] Madison, Speech Delivered in Congress (Dec. 22, 1790).

[45] Novak & Novak, WASHINGTON'S GOD 111 (2006); Milton, *supra*.

> the protection and essential interests of the nation may justify and permit.[46]

John Adams stated that "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner most agreeable to the dictates of his own conscience."[47] Patriot leader Samuel Adams wrote that the liberty of conscience is an original right.[48]

Forcing the family businesses to pay for drugs and devices which have the effect of ending human life and to which they are conscientiously opposed eviscerates the very purpose for which this Nation was founded and formed. As Thomas Jefferson charged us:

> [W]e are bound, you, I, every one, to make common cause, even with error itself, to maintain the common right of freedom of conscience. *We ought with one heart and one hand hew down the daring and dangerous efforts of those who would seduce the public*

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[46] Washington, Letter to the Religious Society Called Quakers (1789).

[47] Adams, *A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts*, in REPORT FROM COMMITTEE BEFORE THE CONVENTION OF DELEGATES (1779).

[48] Cushing, THE WRITINGS OF SAMUEL ADAMS 350-59 (vol. II, 1906).

> *opinion to substitute itself into . . . tyranny over religious faith. . . .*"[49]

B. Freedom of Conscience is a fundamental right affirmed by the U.S. Supreme Court.

This Court has consistently ruled in favor of protecting the freedom of conscience of every American. "Freedom of conscience" is referenced explicitly throughout Supreme Court jurisprudence. *See*, *e.g.*, *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) ("This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience."); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 n.2 (1969) (referencing "constitutionally protected freedom of conscience").

Further, this Court has held that laws cannot abridge expressions protected by the First Amendment simply because a corporation is the source of protected conduct. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

This Court has stated that "*[f]reedom of conscience . . . cannot be restricted by law.*" *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) (emphasis added). While the "freedom to believe" is absolute, the

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[49] Jefferson, Letter to Edward Dowse, Esq. (Apr. 19, 1803) (emphasis added).

"freedom to act" is not; however, "in every case," regulations on the freedom to act cannot "unduly infringe the protected freedom." *Id.* at 303-04.

In the 1940s, this Court considered regulations requiring public school students to recite the pledge to the American flag, ultimately vindicating the students' freedom of conscience. Initially, however, the Court ruled against a group of Jehovah's Witnesses who sought to have their children exempted from reciting the pledge. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).[50] However, in just three short years, the Court reversed this decision. In *West Virginia State Board of Education v. Barnette*, the Court stated:

> If there is any fixed star in our constitutional constellation, it is that no official, high or

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[50] Even though *Gobitis* was ultimately decided incorrectly, Justice Frankfurter, writing the majority opinion, did expound upon the balance between the interest of the schools and the interest of the students. He saw that the claims of the parties must be reconciled so as to "prevent either from destroying the other." *Gobitis*, 310 U.S. at 594. Because the liberty of conscience is so fundamental, "every possible leeway" must be given to the claims of religious faith. *Id.* On the other hand, Justice Frankfurter stated, similarly to what the Government has argued here, that "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Id.* at 594-95. However, such conclusions were ultimately overthrown in *Barnette*, and as such this Court should reject any similar arguments that "religious convictions which contradict the relevant concerns of a political society" must submit to an overreaching authority.

> petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . . [L]ocal authorities [may not] transcend[ ] constitutional limitations on their power and invade[ ] the sphere of intellect and spirit which it is the purpose of the *First Amendment to our Constitution* to reserve from all official control.

Barnette, 319 U.S. 624, 642 (1943) (emphasis in original). The Court also stated, "[F]reedom to differ is not limited to things that do not matter much. . . . The test of its substance is the right to differ as to things that touch the heart of the existing order." *Id.*[51] Based upon these principles, the Court ruled it unconstitutional to force public school children to perform an act that was against their religious beliefs.

Barnette has been affirmed on numerous occasions, including in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), where the Court stated:

> It is conventional constitutional doctrine that where reasonable people disagree the

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[51] "The very purpose of a *Bill of Rights* was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's . . . freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638 (emphasis in original).

> government can adopt one position or the other. *That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty*. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, *we have ruled that a State may not compel or enforce one view or the other*.

Id. at 851 (citing *Barnette*, 319 U.S. 624) (other citations omitted) (emphasis added).

In the context of an obligatory flag salute and pledge, the Court has established the principle that to force parents and children to choose between their religious beliefs and their public education is a clear violation of their First Amendment rights. Likewise, forcing the family businesses to choose between adhering to their religious, moral, or conscientious convictions and the potential of heavy fines – or going out of business altogether – and complying with the Mandate is an unconstitutional exercise of state power.

In the 1960s and 1970s, the Court continued to protect Americans' freedom of conscience. In a notable example, the Court protected men who were conscientiously opposed to war. Section 6(j) of the Universal Military Training and Service Act contained a conscience clause exempting men from the draft who were conscientiously opposed to military service because of "religious training and belief."[52] In *United States v. Seeger* and *Welsh v. United States*, the Court extended draft exemptions to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become part of an instrument of war." *Welsh*, 398 U.S. 333, 344 (1970) (affirming *Seeger*, 380 U.S. 163 (1965)).

Welsh acknowledged that § 6(j) protected persons with "intensely personal" convictions – even when other persons found those convictions "incomprehensible" or "incorrect." *Welsh*, 398 U.S. at 339. Seeger and Welsh "held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice." *Id.* at 337. Important here is Welsh's statement:

> I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. . . . I cannot, therefore, conscientiously comply with the Government's insistence that I assume

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[52] Section 6(j) did not embody a "new" idea. Early colonial charters and state constitutions spoke of freedom of conscience as a right, and during the Revolutionary War, many states granted exemptions from conscription to Quakers, Mennonites, and others with religious beliefs against war.

> duties which I feel are immoral and totally repugnant.

Id. at 343.

The holdings in these two cases demonstrate a strong commitment by this Court to protect freedom of conscience. Like Welsh, the family businesses believe that human life is valuable – at all stages and in all situations. As discussed *supra*, "emergency contraception" has the potential to kill developing human embryos. Being forced to pay for the termination of a human life is just as objectionable as being forced to participate in the termination of human life in war. Indeed, paying for the act *is* participating in the act.

C. Freedom of Conscience is a fundamental right affirmed by Congress.

Congress likewise has considered and passed numerous measures expressing the federal government's commitment to protecting the freedom of conscience.

Congress addressed the issue of conscience just weeks after the Supreme Court decided *Roe v. Wade*. In 1973, Congress passed the first of the Church Amendments.[53] The original and subsequent Church Amendments protect healthcare providers from discrimination by recipients of U.S. Department of

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[53] 42 U.S.C. § 300-7.

Health and Human Services (HHS) funds on the basis of their objection, because of religious belief or moral conviction, to performing or participating in *any* lawful health service or research activity.

In 1996, § 245 of the Public Health Service Act, known as the Coats Amendment, was enacted to prohibit the federal government and state or local governments that receive federal financial assistance from discriminating against individual and institutional healthcare providers, including participants in medical training programs, who refused to, among other things, receive training in abortions; require or provide such training; perform abortions; or provide referrals or make arrangements for such training or abortions.[54] The measure was prompted by a 1995 proposal from the Accreditation Council for Graduate Medical Education to mandate abortion training in all obstetrics and gynecology residency programs.

The most recent federal conscience protection, the Hyde-Weldon Amendment, was first enacted in 2005 and provides that no federal, state, or local government agency or program that receives funds under the Labor, Health and Human Services (LHHS) appropriations bill may discriminate against a healthcare provider because the provider refuses to provide, pay for, provide coverage of, or refer for abortion.[55] The Amendment is subject to annual renewal and has survived multiple legal challenges.[56]

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[54] 42 U.S.C. § 238n.

Congress has also acted to provide specific conscience protections in the provision of contraceptives. For example, in 2000, Congress passed a law requiring the District of Columbia to include a conscience clause protecting religious beliefs and moral convictions in any contraceptive mandate.[57] Similarly, in 1999, Congress prohibited health plans participating in the federal employees' benefits program from discriminating against individuals who refuse to prescribe contraceptives.[58]

These laws highlight the commitment of the American people to protect individuals and employers from mandates or other requirements forcing them to violate their consciences and/or religious and moral beliefs, and demonstrate that the Government's

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[55] Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (2007).

[56] Many similar conscience provisions related to federal funding have been passed over the last 45 years. *See*, *e.g.*, 42 U.S.C. § 1395w-22(j)(3)(B) (1997); 42 U.S.C. § 300a-7(e) (1979); 42 U.S.C. § 300a-7(c)(2), (d) (1974); 42 U.S.C. § 300a-7(b), (c)(1) (1973); 48 C.F.R. § 1609.7001(c)(7) (1998); Pub. L. No. 108-25, 117 Stat. 711, at 733 (2003).

[57] *See* Pub. L. No. 108-7, 117 Stat. 11, 126-27 (2000).

[58] *See* Pub. L. No. 108-7, 117 Stat. 11, 472 (1999).

Mandate ignores the longstanding national commitment to protect the freedom of conscience.[59]

◆

CONCLUSION

It is undisputed that a new human organism is created at fertilization. Being forced to pay for drugs that can end a human life after fertilization is forced participation in the act itself. Such a coercive policy runs contrary to the history, tradition, and jurisprudence of this Nation and violates the family businesses' freedom of conscience.

For the forgoing reasons, this Court should conclude that the Government's Mandate unconstitutionally denies the family businesses the religious freedom guaranteed under the Religious Freedom Restoration Act and the Free Exercise Clause of the First Amendment, and should affirm the decision of the United States Court of Appeals for the Tenth

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[59] The Government's actions also run contrary to the laws and clear intent of the vast majority of states that protect the freedom of conscience. At least 47 states provide some degree of statutory protection to healthcare providers who conscientiously object to certain procedures. Some states – including Louisiana and Mississippi – extend this protection to public and/or private payers (*i.e.*, health insurers). ***See Rights of Conscience Overview***, in DEFENDING LIFE 2013: DECONSTRUCTING ROE: ABORTION'S NEGATIVE IMPACT ON WOMEN (2013), http://www.aul.org/wp-content/uploads/2013/04/06-Freedom-of-Conscience.pdf.

Circuit and reverse the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED
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Nos. 13-354 & 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS *ET AL.*,
Petitioners,
v.
HOBBY LOBBY STORES, INC., *ET AL.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *ET AL.*,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL.
Respondents.

On Writs of Certiorari to the U.S. Court of Appeals for the Third and Tenth Circuits

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF THE CONESTOGA WOOD SPECIALTIES *ET AL.* PETITIONERS AND THE HOBBY LOBBY *ET AL.* RESPONDENTS

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QUESTIONS PRESENTED

Federal regulations implementing the Patient Protection and Affordable Care Act of 2010 (ACA) compel certain employers, including Petitioners, to provide health-insurance coverage for FDA-approved contraceptives. See 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) ("the Mandate").

Petitioners, a family of five Mennonites and their closely-held, family-run woodworking corporation, object as a matter of conscience to facilitating contraception that may prevent the implantation of a human embryo in the womb, and therefore brought this case seeking review of the Mandate under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993.

The decision below rejected these claims, carving out an exception to the scope of religious free exercise. The court denied that either "a for-profit, secular corporation" or its family owners could claim free exercise rights. Pet. App. at 10a. In so holding, the Third Circuit expressly rejected contrary decisions of the Ninth and Tenth Circuits, and ruled at odds with prior decisions of the Second Circuit and Minnesota Supreme Court, but accorded with a recent decision of the Sixth Circuit.

The question presented is: Whether the religious owners of a family business, or their closely-held, for-profit corporation, have free exercise rights that are violated by the application of the contraceptive-coverage Mandate of the ACA (No. 13-356). Alternatively, the federal petitioners in No. 13-354 framed the question presented as follows: "whether

RFRA allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners."

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Nos. 13-354 & 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS *ET AL.*,
Petitioners,
v.
HOBBY LOBBY STORES, INC., *ET AL.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *ET AL.*,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL.
Respondents.

On Writs of Certiorari to the U.S. Courts of Appeals for the Third and Tenth Circuits

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is an Illinois nonprofit corporation organized in 1981. For over thirty years, Eagle Forum has defended principles of limited government and individual liberty, including freedom of religion. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues presented before this Court.

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[1] *Amicus* Eagle Forum files this brief with the consent of all parties; the parties' written letters of consent or blanket consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel, contributed monetarily to preparing or submitting this brief.

STATEMENT OF THE CASE

This litigation pits the religious freedom of employers – both for-profit corporations and their officers and shareholders (collectively, "Plaintiffs") – to refrain from subsidizing actions that they view as sinful under deeply held religious beliefs versus the power of the Executive-Branch defendants (collectively, the "Administration") to require that Plaintiffs subsidize those actions through health insurance. Plaintiffs rely on the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb-2000bb-4 ("RFRA") and the First Amendment, while the Administration relies on authority purportedly conveyed by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Pub. L. No. 111-152, 124 Stat. 1029 (2010) ("PPACA"). The subsidy in question concerns drugs and devices that are abortifacients according to Plaintiffs, but contraceptives according to the Administration. Under the circumstances, *amicus* Eagle Forum respectfully submits that Plaintiffs' right of conscience would trump the Administration's attempt to compel them to violate their consciences, even if the Administration had the general authority to impose its mandates (which it does not).

Constitutional Background

Under U.S. CONST. art. I, §1, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." But even Congress has its limits: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I, cl. 1.

Under the Supremacy Clause, federal law preempts state law whenever they conflict. U.S. CONST. art. VI, cl. 2. Two general presumptions underlie preemption cases. First, courts presume that statutes' plain wording "necessarily contains the best evidence of Congress' pre-emptive intent," *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658, 664 (1993), where the ordinary meaning of statutory language presumptively expresses that intent. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 383 (1992). Second, courts apply a presumption against federal preemption of state authority. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Article III limits federal courts' jurisdiction to cases and controversies, U.S. CONST. art. III, §2, which presents "the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin,* 422 U.S. 490, 499 (1975). Standing consists of an "injury in fact" that is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision. *Ass'n of Data Processing Serv. Org., Inc. v. Camp,* 397 U.S. 150, 153 (1970). With injuries directly caused by the defendant, plaintiffs can show an injury in fact with "little question" of causation or redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

Statutory Background

RFRA prohibits a government's "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. §2000bb-1(a), unless both "in furtherance of a compelling governmental interest" and via "the least restrictive means." *Id.* §2000bb-1(b)(1)-(2). Congress enacted RFRA to restore strict-scrutiny requirements for Free-Exercise claims under *Sherbert v. Verner*, 374 U.S. 398 (1963), in response to *Employment Division v. Smith*, 494 U.S. 872, 890 (1990), which allowed as-applied infringement of religious freedom by facially neutral government actions. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006).

Under the McCarran-Ferguson Act, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." 15 U.S.C. §1012(b). Congress intended the Act to safeguard the states' predominant position in regulating insurance, in the wake of this Court's holding in *U.S. v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), that insurance can qualify as interstate commerce. *See U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 499-500 (1993) ("Congress moved quickly to restore the supremacy of the States in the realm of insurance regulation").

As enacted, both PPACA's "Individual Mandate" and its "Employer Mandate" required insurance that met PPACA's "minimum essential coverage" criteria. 26 U.S.C. §§5000A(a), 4980H(a)(1); *see also* 42 U.S.C. §300gg-13 (defining "minimum essential coverage" criteria with respect to "preventive health services"). Under this Court's decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S.Ct. 2566 (2012) ("*NFIB*"), however, the "Individual Mandate" did not survive as a mandate because Congress lacks the Commerce-Clause authority to mandate that individuals purchase insurance, much less insurance of any particular type. *NFIB,* 132 Ct. at 2600. As such, as applied to those on the individual market for health insurance, the minimum-essential-coverage criteria are merely a detailed tax exemption, not a requirement for a type of insurance. It remains unresolved whether the Employer Mandate operates similarly only under the Taxing Power or instead operates under the power to regulate interstate commerce.

Regulatory Background

Acting under PPACA, defendants Departments of Health & Human Services ("HHS"), Labor, and Treasury and their respective Secretaries have purported to require that health insurance cover without charge "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" (hereinafter, the "Mandate" or "Contraceptive Mandate"). The Administration adopted this controversial requirement as an implementation of PPACA's general directive that "health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for ... with respect to women, such additional preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph." 42 U.S.C. §300gg-13(a)(4). To implement this provision, the Administration promulgated two interim final rules, 75 Fed. Reg. 41,726 (2010); 76 Fed. Reg. 46,621 (2011), and a final rule, 77 Fed. Reg. 8725, 8725 (2012), which together adopt the Health Resources and Services Administration's *Women's Preventive Services: Required Health Plan Coverage Guidelines* (Aug. 1, 2011).

Acting by Executive fiat, the Administration recently purported to defer the Employer Mandate for 2014. It is unclear whether this deferral applies to PPACA's penalties for violating the Contraceptive Mandate, as opposed to the Employer Mandate's penalties for not providing insurance at all.

Factual Background

Plaintiffs are closely held, for-profit, corporate family businesses – Hobby Lobby, Inc., Mardel, Inc., and Conestoga Wood Specialties Corp. – and their officers and shareholders. The individual Plaintiffs have deeply held religious objections to the Contraceptive Mandate and seek to avoid subsidizing acts that they find sinful.

Although Plaintiffs' views derive from various religious faiths, the views themselves are standard religious doctrine:

> In this context, it is not possible to anaesthetize consciences, for example, concerning the effects of particles whose purpose is to prevent an embryo's implantation or to shorten a person's life.... In the moral domain, your Federation is invited to address the issue of conscientious objection, which is a right your profession must recognize, permitting you not to collaborate either directly or indirectly by supplying products for the purpose of decisions that are clearly immoral such as, for example, abortion or euthanasia.

Pope Benedict XVI, *Address of His Holiness Benedict XVI to Members of the International Congress of Catholic Pharmacists* (Oct. 29, 2007); *see also* Pontifical Academy for Life, *Statement on the So-Called 'Morning-After Pill'* (Oct. 31, 2000) ("the proven 'anti-implantation' action of the *morning-after pill* is really nothing other than a chemically induced abortion [and] from the ethical standpoint the same absolute unlawfulness of abortifacient procedures also applies to distributing, prescribing and taking the *morning-after pill*") (emphasis in original). Although it offers its rival interpretations, the Administration does not question the sincerity of Plaintiffs' beliefs and faith.

SUMMARY OF ARGUMENT

With respect to the free exercise of religion, the Administration has no right to impose its orthodoxy on Plaintiffs, and its ham-fisted attempt to define abortion as a matter of federal law is wrong as a matter of federal law and basic reproductive science

(Section I.A). Similarly, this Court already has rejected the Administration's attempt to deny religious freedom to corporations (Section I.B). Because government action related to – and effects correlated with – the ability to get pregnant are not necessarily sex-discrimination, the Contraceptive Mandate does not qualify as a compelling government interest to remedy sex discrimination (Section I.C).

On the merits, PPACA's delegation to the Administration is impermissibly open-ended and standardless (Section II.B), which is all the more inappropriate in this area of traditional state regulation, where the Administration has purported to adopt preemptive rules notwithstanding the presumption against preempting state laws in fields of traditional state concern; the presumption against preemption allows this Court to interpret PPACA narrowly, without resort to the Administration's interpretation (Section II.C). Indeed, if this Court views the PPACA's mandate that employers provide insurance as implementing the Taxing Power – as with the Individual Mandate – rather than the Commerce Power, the Contraceptive Mandate also violates the General Welfare Clause and the Necessary and Proper Clause because federal agencies cannot make law in their view of the general welfare without congressional authorization and findings (Section II.A). Viewed without deference to the Administration and with deference instead to the states in our federalist system, PPACA's requiring "preventive care" means preventing *disease*, not preventing pregnancy (Section II.D).

In their capacity as shareholders, the individual Plaintiffs have standing to challenge government action that would control actions that the corporate Plaintiffs must take; for their part, the corporate Plaintiffs have standing to challenge arbitrary agency action to impose the Contraceptive Mandate, even without the elevated scrutiny provided by the First Amendment and RFRA (Section III.A). The Administration's attempt to defer the Employer Mandate is *ultra vires* and thus has no effect on the justiciability of this action (Section III.B).

ARGUMENT

I. THE MANDATE BURDENS RELIGION

Plaintiffs and their other supporting *amici curiae* ably brief the right to religious freedom and Plaintiffs' entitlement to relief. *See, e.g.,* Conestoga Wood Br. at 16-32. *Amicus* Eagle Forum focuses on three issues: the relevant religious views on abortifacients; the right of entities like corporations to religious freedom; and the rationality of the Administration's imposing the Contraceptive Mandate to redress sex discrimination.

A. The Government Lacks Authority to Set the Contours of Permissible Religious Thought

In statements that unintentionally demonstrate how notice-and-comment rulemaking helps ensure "informed administrative decisionmaking," *Chrysler Corp. v. Brown,* 441 U.S. 281, 316 (1979), the Administration has repeatedly cited 62 Fed. Reg. 8610, 8611 (1997) and 45 C.F.R. §46.202(f) to argue that federal law rejects Plaintiffs' claim that the Plan B morning-after-pill and Ella week-after-pill are abortifacients. *See* Federal Br in No. 13-354, at 9-10 n.4. Under the Administration's cited authorities, pregnancy begins upon implantation of the embryo to the mother's uterus, not upon fertilization. The Administration's position is both irrelevant and false.

At the outset, conscience rights are defined by the rights holder, not by the Government:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Texas v. Johnson, 491 U.S. 397, 415 (1989) (*quoting West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 642 (1943)). Religious freedom does not "turn upon a judicial perception of the particular belief or practice in question." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.,* 450 U.S. 707, 714 (1981). Accordingly, religious freedom neither begins nor ends with government-approved religiosity. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 524 (1993) (finding unlawful restriction of a faith with animal sacrifice as a principal form of devotion). If *courts* cannot question the merits of one's religious views in religious-freedom cases, the Administration *a fortiori* cannot impose its religious views by administrative fiat or otherwise: "[Plaintiffs] drew a line, and it is not for us to say that the line [they] drew was an unreasonable one." *Thomas,* 450 U.S. at 714.

Plaintiffs have every right not to care what the Administration considers the beginning of life.

In any event, the Administration is simply wrong about federal law. The cited regulation does indeed provide that "pregnancy encompasses the time period from implantation to delivery," 45 C.F.R. §46.202(f), but that entire regulation is confined by the limitation "as used in this subpart" (*i.e.*, 45 C.F.R. pt. 46, subpt. B), which is simply inapposite to PPACA. *See* 45 C.F.R. §46.202. More importantly, in that regulation, HHS's predecessor did not reject a fertilization-based definition for all purposes, but rather adopted the implantation-based definition only "to provide an administerable policy" for the specific purpose of obtaining informed consent for participation in federally funded research:

> It was suggested that pregnancy should be defined (i) conceptually to begin at the time of fertilization of the ovum, and (ii) operationally by actual test unless the women has been surgically rendered incapable of pregnancy.
>
> While the Department has no argument with the conceptual definition as proposed above, it sees no way of basing regulations on the concept. Rather in order to provide an administerable policy, the definition must be based on existing medical technology which permits confirmation of pregnancy.

39 Fed. Reg. 30,648, 30,651 (1974). Thus, HHS's predecessor had "no argument" on the merits against recognizing pregnancy at fertilization, but declined for administrative ease and then-current technology.

The resulting "administerable policy" merely sets a federal floor for obtaining the informed consent of human subjects in federally funded research.

A decision to set an arguable floor (based on 1970s technology) for a limited purpose for administrative expedience obviously cannot translate to the conscience context, where the question is whether individuals or institutions want to avoid participating in activities against their religious beliefs or moral convictions. Indeed, the same statute that required the regulations also enacted the Church Amendment, 42 U.S.C. §300a-7, to provide conscience-protection rights. *Compare* National Research Service Award Act of 1974, Pub. L. No. 93-348, §214, 88 Stat. 342, 353 (1974) (Church Amendment) *with id.* at §§202, 205, 88 Stat. at 349-51 (informed consent in federally funded research). Significantly, the enacting Congress expressly rejected the Administration's position here by providing that the regulatory definitions would not trump an institution's religious beliefs or moral convictions:

> It is the intent of the Committee that guidelines and regulations established by ... the Secretary ... under the provisions of the Act do not supersede or violate the moral or ethical code adopted by the governing officials of an institution in conformity with the religious beliefs or moral convictions of the institution's sponsoring group.

S. Rep. No. 93-381 (1973), *reprinted in* 1974 U.S.C.C.A.N. 3634, 3655. Thus, federal law most emphatically does not define life and abortion as the Administration argues.

Indeed, quite the contrary, federal law uses a fertilization-based definition at other times: "Child means an individual under the age of 19 including the period from conception to birth." 42 C.F.R. §457.10; *see also* 67 Fed. Reg. 61,956, 61,963-64 (2002) (finding it unnecessary to define "conception" as "fertilization" because HHS did "not generally believe there is any confusion about the term 'conception'"). Indeed, the fertilization-based definition has a stronger historical, legal, and scientific foundation:

> All the measures which impair the viability of the zygote at any time between the instant of fertilization and the completion of labor constitute, in the strict sense, procedures for inducing abortion.

U.S. Dep't of Health, Education & Welfare, Public Health Service Leaflet No. 1066, 27 (1963). Scientifically, the pre-implantation communications or "cross talk" between the mother and the pre-implantation embryo establish life before implantation,[2] as recognized by embryology texts.

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[2] *See, e.g.*, Eytan R. Barnea, Young J. Choi & Paul C. Leavis, "*Embryo-Maternal Signaling Prior to Implantation*," 4 EARLY PREGNANCY: BIOLOGY & MEDICINE, 166-75 (July 2000) ("embryo derived signaling ... takes place prior to implantation"); B.C. Paria, J. Reese, S.K. Das, & S.K. Dey, "*Deciphering the cross-talk of implantation: advances and challenges*," SCIENCE 2185, 2186 (June 21, 2002); R. Michael Roberts, Sancai Xie &

(Footnote cont'd on next page)

See, e.g., Keith L. Moore & T.V.N. Persaud, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 15 (8th ed. 2008) ("Human development begins at fertilization when a male gamete or sperm unites with a female gamete or oocyte to form a single cell, a zygote. This highly specialized, totipotent cell marked the beginning of each of us as a unique individual."). This Court should have no difficulty in rejecting the Administration's ahistorical and unscientific legerdemain. This Nation was founded on principles of freedom of religion, not government-defined orthodoxy.

B. Corporations Can Assert Claims of Religious Freedom

The Administration's argument that corporations cannot assert free-exercise claims is plainly misplaced. *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 342 (2010) ("First Amendment protection extends to corporations"). "That [plaintiff] is a corporation has no bearing on its standing to assert violations of the first and fourteenth amendments under 42 U.S.C. §1983." *RK Ventures, Inc. v. City of Seattle,* 307 F.3d 1045, 1057 (9th Cir. 2002) (quoting *Advocates for the Arts v. Thomson,* 532 F.2d 792, 794 (1st Cir. 1976), alteration in *RK Ventures*); *cf. First Nat'l Bank of*

(Footnote cont'd from previous page.)

Nagappan Mathialagan, "*Maternal Recognition of Pregnancy,*" 54 BIOLOGY OF REPRODUCTION, 294-302 (1996).

Boston v. Bellotti, 435 U.S. 765, 780 n.15 (1978) ("settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment"). "The fundamental concept of liberty embodied in th[e Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment[, which] declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940). Nothing *per se* prohibits corporations from asserting religious freedom.

If anything, RFRA *extends* the ability of a corporation and its owners to assert religious-freedom rights. RFRA adopts 42 U.S.C. §2000cc-5 as its definition of the "exercise of religion," 42 U.S.C. §2000bb-2, and that definition extends to "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief," 42 U.S.C. §2000cc-5(7)(A) (emphasis added), and even includes the use of real property. 42 U.S.C. §2000cc-5(7)(B). While the corporate Plaintiffs are not real property, they are nonetheless a form of property that the individual Plaintiffs use in the exercise of their respective faiths. Because the RFRA definition extends broadly to *any* exercise of religion,[3] it plainly would be broad enough to include the individual

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[3] "Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *U.S. v. Gonzales,* 520 U.S. 1, 5 (1997) (*quoting* Webster's Third New International Dictionary 97 (1976)).

Plaintiffs' use of the corporate Plaintiffs to live their lives according to their faith.[4]

C. The Mandate Does Not Redress Sex Discrimination

In the litigation over the Contraceptive Mandate in the lower courts, the Administration and its *amici* repeatedly have argued that the Contraceptive Mandate redresses sex discrimination, *see* Federal Br in No. 13-354, at 49-50, thereby providing a compelling interest that could trump religious freedom. To the contrary, discrimination because of pregnancy or the ability to get pregnant qualifies as sex discrimination only in the employment context, *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, 684 (1983), and only there because the Pregnancy Discrimination Act expressly said so. *Id.*

Outside of that context, disparate treatment of a potentially pregnant person because of sex-neutral criteria (*e.g.*, opposition to abortion) is not discrimination *because of that person's sex. Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 271-72 (1993). "While it is true ... that only women can become pregnant, it does not follow that every ... classification concerning pregnancy is a sex-based classification." *Id.* (interior quotations omitted); *Harris v. McRae,* 448 U.S. 297, 322 (1980). Instead, discrimination requires that "the decisionmaker ... selected or reaffirmed a particular course of action at least in part *because of,* not merely *in spite of,* its adverse effects upon an identifiable group." *Bray,* 506 U.S. at 271-72 (interior quotations omitted, emphasis added); *In re Union Pacific R.R. Employment Practices Litig.*, 479 F.3d 936, 944-45 (8th Cir. 2007) (no sex discrimination if health plans deny contraceptive coverage to both women and men). Because it seeks to solve a non-existent problem, the Contraceptive Mandate is arbitrary and capricious – not compelling – as a government interest.

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[4] As indicated in Section III.A, *infra,* the entire divide between the individual Plaintiffs' roles as individuals and the corporate Plaintiffs' roles as corporations is overstated, given that the individuals' status as shareholders gives them standing to ensure that the corporations operate ethically. Although the Administration likely has its own definition of ethics, that is irrelevant because standing is measured by and under *the plaintiffs'* merits views. *Warth,* 422 U.S. at 500; *City of Waukesha v. EPA* 320 F.3d 228, 235 (D.C. Cir. 2003).

II. THE MANDATE IS *ULTRA VIRES* BOTH PPACA AND THE CONSTITUTION

With the foregoing background, *amicus* Eagle Forum now demonstrates that the Contraceptive Mandate exceeds HHS's authority under PPACA.

A. If Supported by the Congressional Power to Tax, the Mandate Violates the Necessary and Proper and General Welfare Clauses

Before *NFIB,* Congress intended PPACA's "minimum essential coverage" requirements to fall under the Commerce Clause. At least as applied to those in the individual market, however, *NFIB* makes the "minimum essential coverage" provisions merely conditions attached to a rather elaborate tax exemption, which therefore are subject to the

General Welfare Clause and the Necessary and Proper Clause. PPACA thus returns here with §5000A's wing clipped. It remains unclear whether the wound is mortal and whether it extends to the second wing (the Employer Mandate).

Clearly persons in the individual market who object to the Contraceptive Mandate could challenge it under the General Welfare Clause and the Necessary and Proper Clause as improper conditions under the Taxing Power. And there are good arguments for treating §4980H's Employer Mandate the same as §5000A's Individual Mandate, given that they are parallel provisions of the same statute and – with respect to PPACA's "minimum essential coverage" provisions – also reference the same statutory criteria. *See, e.g., Dep't of Revenue of Oregon v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) ("identical words used in different parts of the same act are intended to have the same meaning") (interior quotations omitted); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 88-89 (4th Cir. 2013) (treating the Individual and Employer Mandates alike). This Court therefore should require the Contraceptive Mandate to meet the criteria under the General Welfare Clause and the Necessary and Proper Clause.[5]

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[5] Indeed, even laws adopted under the Commerce Clause will violate the Necessary and Proper Clause when they affront the states' sovereignty: "it is not a Law ... proper for carrying into Execution the Commerce Clause, and is thus ... merely [an] act of usurpation [that] deserves to be treated as such."

(Footnote cont'd on next page)

When *Congress* enacts legislation for the General Welfare, it is "irrelevant" "[w]hether the chosen means appear 'bad,' 'unwise,' or 'unworkable'" to this Court. *Buckley v. Valeo,* 424 U.S. 1, 91 (1976). Under Article I, it is "irrelevant" because "Congress has concluded that the means are 'necessary and proper' to promote the general welfare." *Id.* But Congress made no such finding here. All that Congress did was to require "preventive care and screening," which in no way suggests abortifacients or contraceptives.[6]

This Court has never held that an administrative agency has the constitutional power to make findings under the General Welfare Clause: "Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Alexander v. Sandoval,* 532 U.S. 275, 291 (2001). Particularly in concert with the non-delegation doctrine (Section II.B, *infra*) and the presumption against preemption (Section II.C, *infra*), this Court cannot allow the Administration to invent new and unfamiliar laws out of whole cloth, without a finding (or express enactment) *by Congress.*

(Footnote cont'd from previous page.)

Printz v. U.S., 521 U.S. 898, 923-24 (1997) (interior quotations omitted, first and third alterations in original).

[6] To be clear contraceptive drugs and devices can be prescribed for medically indicated purposes, which are distinct from their role merely as contraceptives. Medically indicated uses may indeed qualify as "preventive care" for some patients.

B. The Mandate Violates the Non-Delegation Doctrine

The non-delegation doctrine derives from Article I, section 1's vesting all legislative power in the Congress. U.S. CONST. art. I, §1. Under this doctrine, Congress cannot abdicate or transfer to others the essential legislative functions with which it is thus vested. Congress can, however, delegate legislative authority, so long as it provides "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *U.S. v. Mistretta,* 488 U.S. 361, 372 (1989). To be sure, broad delegations have passed muster under the non-delegation doctrine, including the defining of "excessive profits," "unfair or inequitable distribution of voting power among security holders," "fair and equitable" commodity pricing, "just and reasonable rates," and "regulat[ing] broadcast licensing as public interest, convenience, or necessity require." *Id.* at 373-74 (interior quotations omitted). But our Constitution does not allow administrative agencies to enact regulations with the force of law contrary not only to numerous congressional enactments – *e.g.*, RFRA, the McCarran-Ferguson Act, the plain meaning of the PPACA phrase "preventive care" – but also to the presumption against preemption and the First Amendment.

PPACA provides no intelligible principle in 42 U.S.C. §300gg-13(a)(4) to guide the Administration's expansion from "preventive care and screening" to contraceptives and abortifacients, all without any congressional findings under the General Welfare Clause. *See* Section II.A, *supra.* The Constitution does not allow Congress to write the Administration a blank check to circumvent state authority.

C. This Court Should Not Read PPACA to Preempt State Law, Which Requires this Court to Reject the Mandate

As explained in Section II.C.2, *infra*, the fields of insurance generally, preventive-care coverage specifically, and conscience exceptions all are fields that the states occupied before PPACA's and the Administration's intrusions. In essence, then, the Administration takes the position that its Contraceptive Mandate preempts state law. But federal courts should "never assume[] lightly that Congress has derogated state regulation, but instead [should] address[] claims of pre-emption with the starting presumption that Congress does not intend to supplant state law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). Accordingly, under this Court's preemption analysis, all fields – and especially ones traditionally occupied by state and local government – require courts to apply a presumption against preemption. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Santa Fe Elevator*, 331 U.S. at 230.

When this presumption applies, courts do not assume preemption "unless that was the clear and manifest purpose of Congress." *Santa Fe Elevator*, 331 U.S. at 230; *Wyeth*, 555 U.S. at 565. Significantly, even if Congress had preempted *some* state action, the presumption against preemption applies to determining the *scope* of preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "[w]hen the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) (*quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). As explained in the following sections, the presumption against preemption applies here and requires this Court to reject the Administration's expansive interpretation of the statutory phrase "preventive care" in health insurance.

1. The McCarran-Ferguson Act Requires this Court to Reject the Mandate as Preempting State Law

The McCarran-Ferguson Act requires a special deference to state law in regulating the business of insurance from both dormant federal power and laws enacted by Congress:

> Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating ... the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, *whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation.*

Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429-30 (1946) (emphasis added); *accord Fabe,* 508 U.S. at 500; *Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 428 (2003). Here, nothing in PPACA suggests that the Administration has the authority to override state insurance law for contraceptives and abortifacients.

If these coverage questions relate to the business of insurance, PPACA would need to authorize the Administration's actions via a statutory command. The phrase "business of insurance" obviously includes the coverage questions at issue here:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement – these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was – it was on the relationship between the insurance company and the policyholder.

SEC v. Nat'l Securities, Inc., 393 U.S. 453, 460 (1969); *accord Fabe,* 508 U.S. at 501. While the phrase "business of insurance" clearly includes the Contraceptive Mandate's requirements, it is less clear that PPACA itself, as interpreted by *NFIB,* qualifies as an "Act [that] specifically relates to the business of insurance." 15 U.S.C. §1012(b).

Certainly as applied to those in the individual market, PPACA is merely an elaborate tax exemption, not a regulation of the business of insurance:

> imposition of [§5000A's] tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice. ... Those subject to the individual mandate may

> lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes. The only thing they may not lawfully do is not buy health insurance and not pay the resulting tax.

NFIB, 132 S. Ct. at 2600 & n.11. Under the McCarran-Ferguson Act, therefore, as applied to those in the individual market, the strong inference is that PPACA's minimum essential coverage provisions cannot override state insurance law simply by administrative fiat.

2. PPACA Intrudes into State-Occupied Fields

Although the federal government has been in the field of medical insurance under the Spending Clause for federal insurance programs paid for by the United States, PPACA represents a further federal expansion into several fields and sub-fields already occupied by the states, particularly private health insurance *not* funded under the Spending Clause. First, of course, the states long have regulated health insurance generally. *See Travelers Ins.*, 514 U.S. at 654. Second, as part of that regulation, states have regulated the types of mandatory preventive care that insurance policies in that state must cover and the terms on which they must cover them.[7] Third, as part of both forms of regulation, states have regulated the extent to which conscience rights apply to health insurance with respect to abortion and contraception.[8] Taken together, PPACA and the Contraceptive Mandate clearly intrude into fields that the states historically have occupied.

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[7] *See, e.g.*, ALA. CODE §16-25A-1(8)(iv); ARK. CODE. ANN. §23-79-141; COLO. REV. STAT. §10-16-104(18); IND. CODE §27-8-24.2-10; KY. REV. STAT. §205.6485; MASS. GEN. LAWS ch. 175 §47C; MICH. COMP. LAWS ANN. §500.3501(b)(ix); MICH. ADMIN. CODE r.

(Footnote cont'd on next page)

3. Congress Would Not Cavalierly Preempt State Law

As explained, even with obviously preemptive statutes, the presumption against preemption applies to limit the scope of that preemption. *Medtronic*, 518 U.S. at 485. Courts "rely on the presumption because respect for the States as

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(Footnote cont'd from previous page.)

325.6125(d)(ii); MINN. STAT. §§62J.01, 62J.04(3)(7), 62A.047, 62D.095(5); OKLA. STAT. tit. 36, §6907(B); *id.* tit. 63, §1-502; 72 PA. CONS. STAT. §3402b.5; W. VA. CODE §16-2J-1.

[8] *See, e.g.*, ARIZ. REV. STAT. §20-826(Z); ARK. CODE ANN. §20-16-304; CAL. HEALTH & SAFETY CODE §1367.25; CAL. INS. CODE §10123.196; COLO. REV. STAT. §25-6-102; CONN. GEN. STAT. §§38a-503e(b)(1), 38a-530e(b)(1); FLA. STAT. ANN. §381.0051; HAW. REV. STAT. §431:10A-116.7; LA. REV. STAT. §40:1299.31; 24 ME. REV. STAT. §2332-J; NEB. REV. STAT. §28-338; N.J. STAT. ANN. §17:48-6ee; N.Y. INS. LAW §§3221(l)(8), 4303(j); N.C. GEN. STAT. §58-3-178; TENN. CODE ANN. §68-34-104; *cf.* COLO. REV. STAT. §25-6-101 (public employees); W. VA. CODE §16-2B-4 (same); *see also* Erica S. Mellick, *Time for Plan B: Increasing Access to Emergency Contraception and Minimizing Conflicts of Conscience*, 9 J. HEALTH CARE L. & POL'Y 402, 419, 429-30 (2006). Although the foregoing authorities predate PPACA, states have continued to add to their regulations in these fields. *See, e.g.*, 2012 Ariz. Legis. Serv. 337 (West); 2012 Kan. Sess. Laws 112, §1, ch. 337, §1; 2012 Mo. Laws 749, §A.

independent sovereigns in our federal system leads [courts] to assume that Congress does not cavalierly pre-empt [state law]." *Wyeth,* 555 U.S. at 565 n.3 (internal quotations omitted). For that reason, "[t]he presumption ... accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Id.* For example, *Santa Fe Elevator,* 331 U.S. at 230, cited a 1944 decision where 21 states regulated warehouses. *Davies Warehouse Co. v. Bowles,* 321 U.S. 144, 148-49 (1944). Under those circumstances, the presumption applied to prevent warehouses' coming under federal regulation of "public utilities" without any apparent congressional consideration of whether warehouses should qualify as "public utilities," even if they fit the statute's literal definition. *Id.* Notwithstanding the literal application of the federal statute, the presumption prevented the federal law's overstepping traditional state regulation in the absence of something much more explicit from Congress.[9]

As explained in the previous section, the states were heavily involved in all relevant aspects of insurance generally, preventive care, and conscience rights. As such, in order to avoid preempting state laws where Congress did not provide clear and manifest evidence of its intent to preempt these state laws, this Court must interpret the statutory phrase "preventive care" narrowly in order to avoid impinging on state-protected rights of conscience as well as discretion on what preventive care to cover. Where this Court can use a narrow interpretation to avoid preemption, *Altria Group,* 555 U.S. at 77, this Court should do so.

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[9] The presumption against preemption is not limited to states with relevant laws displaced by the federal law in question. Plaintiffs in states without such laws could point to state occupation of the field, in other states, to argue for interpreting federal law narrowly in their states.

4. The Presumption against Preemption Answers the Scope of HHS Authority at *Chevron* Step One

At "*Chevron* step one," courts employ "traditional tools of statutory construction" to determine congressional intent, on which courts are "the final authority." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 n.9 (1984). Only if the attempt to interpret the statute is inconclusive does a federal court go to "*Chevron* step two," where a court would defer to a plausible agency interpretation of an ambiguous statute. *Id.* at 844. Where (as here) the presumption against preemption applies, *Chevron* deference would be inappropriate.

In a dissent joined by the Chief Justice and Justice Scalia, and not disputed in pertinent part by the majority, Justice Stevens called into question the entire enterprise of administrative preemption vis-à-vis the presumption against preemption:

> Even if the OCC did intend its regulation to pre-empt the state laws at issue here, it would still not merit *Chevron* deference. No case from this Court has ever applied such a deferential standard to an agency decision that could so easily disrupt the federal-state balance.

Watters v. Wachovia Bank, N.A., 550 U.S. 1, 41 (2007) (Stevens, J., dissenting). Significantly, *Watters* arose under banking law that is more preemptive than federal law generally. *Id.* at 12 (majority). The Courts of Appeals have adopted a similar approach against finding preemption under these circumstances.[10] Clearly federal agencies – which draw their delegated power from Congress – cannot have a freer hand here than Congress itself.

The presumption against preemption should guide the Court's allocation – here, denial – of deference to federal agencies in the face of courts' constitutional obligation to defer to independent state sovereigns, *Santa Fe Elevator*, 331 U.S. at 230, and to interpret the statute that Congress wrote, *CSX Transp.*, 507 U.S. at 664, with its presumptively controlling ordinary meaning. *Morales*, 504 U.S. at 383. In essence the presumption against preemption is the tool of statutory construction that enables this Court to answer the statutory question at *Chevron* step one, *Chevron* 467 U.S. at 843 n.9, without resort to the Administration's interpretive gloss.

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[10] *See Nat'l Ass'n of State Utility Consumer Advocates v. F.C.C.*, 457 F.3d 1238, 1252-53 (11th Cir. 2006) ("[a]lthough the presumption against preemption cannot trump our review ... under *Chevron*, this presumption guides our understanding of the statutory language that preserves the power of the States to regulate"); *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 247-51 (3d Cir. 2008); *Massachusetts Ass'n of Health Maintenance Organizations v. Ruthardt*, 194 F.3d 176, 182-83 (1st Cir. 1999); *see also Albany Eng'g Corp. v. F.E.R.C.*, 548 F.3d 1071, 1074-75 (D.C. Cir. 2008); *Massachusetts v. U.S. Dept. of Transp.*, 93 F.3d 890, 895 (D.C. Cir. 1996).

D. Abortion and Contraception Are Not "Preventive Care"

The foregoing backdrop provides several criteria with which to evaluate the scope of the Administration's authority to impose its Contraceptive Mandate under PPACA's requirement for "preventive care." Because the states already occupied the fields of insurance coverage for preventive care and conscience protections, *see* Section II.C.2, *supra,* the presumption against preemption applies here to the extent that the Administration attempts to displace either body of state law with uniform federal rules. *See* Section II.C.3, *supra.* Similarly, the McCarran-Ferguson Act further emphasizes that this Court should not interpret "preventive care" to encompass the Contraceptive Mandate. *See* Section II.C.1, *supra.* These traditional tools of statutory construction allows this Court to interpret PPACA without resort to the Administration's interpretations. *See* Section II.C.4, *supra.* Moreover, even recognizing that PPACA preempted *some* state law, the presumption against preemption applies to limit the *scope* of that federal preemption. *Medtronic,* 518 U.S. at 485. PPACA's failings under the General Welfare Clause and the non-delegation doctrine (Sections II.A-II.B, *supra*) simply amplify the Contraceptive Mandate's lawlessness.

Taking all these interpretive strands together, this Court can take one or both of the two paths: interpret "preventive care" narrowly or interpret

PPACA to include conscience protections. Under either path, Plaintiffs will prevail. Moreover, as indicated, the Court can take *both* paths. What these tools of statutory construction prohibit, however, is the Administration's attempt to avoid both paths.[11]

1. This Court Should Adopt a Narrowing Construction of PPACA that Excludes Prevention of Pregnancy from the Scope of "Preventive Care"

In order to avoid displacing state regulation of preventive care to the fullest extent possible, this Court should interpret the statutory phrase "preventive care" to connote the prevention of *disease,* which would minimize the Contraceptive Mandate's impact on pre-existing state laws on preventive care that are less expansive and less coercive than the Contraceptive Mandate. Viewed in this light, preventing pregnancies would fall outside PPACA's scope because ***pregnancy is not a disease.***

---

[11] On a related note, the "cost-free" argument – namely, that the Mandate does not burden religious employers because they need not pay anything for "free coverage" under the Mandate, given that insurers save money because abortion and birth control cost less than childbirth – is pernicious and likely wrong. At the very least, this macabre insurance-pool analysis fails to consider the offsetting long-term benefits that children provide. In any event, forcing someone to procure insurance that violates that person's conscience would violate religious freedom, even if the added *financial* cost were free. The point is that facilitating sinful action – for example, providing insurance coverage used to cause abortions – is morally wrong to Plaintiffs, *see* authorities quoted at p.7, *supra,* which represents the *moral* cost imposed on religious employers.

This Court has at least implicitly recognized that pregnancy is not a disease. *Nashville Gas Co. v. Satty,* 434 U.S. 136, 140 (1977) (upholding decision not to treat pregnancy as a disease). Medical advisers at the Food & Drug Administration – the relevant agency within HHS – have recognized as much:

> The oral contraceptives present society with problems unique in the history of human therapeutics. Never will so many people have taken such potent drugs voluntarily over such a protracted period ***for an objective other than for control of disease.***

U.S. Food & Drug Admin., Advisory Committee on Obstetrics and Gynecology, Report on the Oral Contraceptives 1 (1966) (emphasis added). Although the Eighth Circuit recently "decline[d] to address whether pregnancy is a 'disease,'" *Union Pacific,* 479 F.3d at 944-45, the Administration's Contraceptive Mandate now forces federal courts to answer that question. In doing so, this Court should reject the Administration's brave new world.

2. This Court Should Adopt a Narrowing Construction of PPACA that Subjects "Preventive Care" to a Conscience Exception

In order to avoid displacing state conscience protections to the fullest extent possible, this Court should interpret PPACA to include the fullest conscience protections allowed under state law. *Medtronic,* 518 U.S. at 485. Because such an interpretation would provide a basis for reading PPACA not to preempt state conscience protections, this Court should adopt that interpretation over the Administration's interpretation. *Altria Group,* 555 U.S. at 77. This path would minimize or even eliminate PPACA's impacts on pre-existing state laws that protect rights of conscience and freedom of religion.

III. THESE ACTIONS ARE JUSTICIABLE

With the two limited exceptions outlined here, *amicus* Eagle Forum will defer to Plaintiffs to defend the justiciability of their claims. The following two sections explain why *all Plaintiffs* have standing to challenge the Contraceptive Mandate, and why the Administration's purported deferral of the Employer Mandate has no impact here.

A. The Plaintiffs Have Standing

The Administration challenges the standing of the individual Plaintiffs to suffer injury from actions that the Contraceptive Mandate compels the corporate Plaintiffs to take. While *amicus* Eagle Forum agrees with Plaintiffs' arguments on their standing to challenge the Contraceptive Mandate on religious-freedom grounds, it may not be necessary to resolve those issues for this Court to meet the Article III threshold to review this litigation. Both sets of Plaintiffs – *i.e.,* the individual and the corporate Plaintiffs – have standing, even without resort to the corporate-law divisions between them.

First, under *Natural Res. Def. Council v. SEC,* 606 F.2d 1031 (D.C. Cir. 1979) ("*NRDC v. SEC*"), the individuals have standing in their capacity *as shareholders* of the corporate Plaintiffs to bring this action. *NRDC v. SEC* recognizes shareholders' standing to challenge government action impacting their ability to exercise their corporate-governance roles to ensure that the corporation operates in an ethically sound manner:

> All but one appellee have alleged that either they or their members own corporate shares that *they would like to vote in a financially prudent and ethically sound manner*. This allegation was sufficient to establish their standing to bring suit. Their interest was judicially cognizable, personal to them, and was arguably impaired by the lack of equal employment or environmental information. ... Moreover, we have no doubt that these appellees, as corporate shareholders concerned about environmental quality, are within the broad zones of interest of both NEPA and the securities acts.

Id. at 1042 (footnotes omitted, emphasis added).[12] Under *NRDC v. SEC,* therefore, the division that the Administration attempts to drive between individual shareholders and the corporations is overstated, particularly for close corporations.

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[12] *NRDC v. SEC* is not an informational-standing case. One appellee – the Center on Corporate Responsibility – did not own shares, and the Court expressly declined to reach whether that appellee's distinct standing argument could qualify as informational standing because it "involve[d] complex and difficult considerations," and because its standing was unnecessary, given that the share-owning appellees had standing for the reasons set out in the body of the *NRDC v. SEC* opinion (quoted *supra*). *Id.* at 1042 n.6.

Second, even assuming *arguendo* that they could not invoke the elevated scrutiny of RFRA or the First Amendment, the corporate Plaintiffs nonetheless would have standing to challenge the arbitrary and *ultra vires* Contraceptive Mandate that the Administration seeks to impose on them:

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of arbitrary or irrational zoning actions. *See Euclid v. Ambler Realty Co.*; *Nectow v. City of Cambridge*; *Village of Belle Terre v. Boraas*. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons. *Warth v. Seldin*.

Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 263 (1977) (citations omitted). As explained in Section II, *supra*, the Contraceptive Mandate is *ultra vires* as applied to *any* employer (*i.e.*, not merely to religious employers). As such, unlike in *Arlington Heights*, the plaintiffs here do not need elevated scrutiny to prevail.

B. The Administration's Purported Delay of Employers' Obligation to Provide Insurance Has No Effect

The Administration's purported deferral of the Employer Mandate for 2014 has no impact on the justiciability of this litigation. Indeed, that deferral is *ultra vires* the Administration's authority and thus has no lawful impact whatsoever.

By way of background, "[a]ny assessable payment provided by this section shall be paid *upon notice and demand by the Secretary*, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68." 26 U.S.C. §4980H(d)(1) (emphasis added). Under the cited tax-penalty provisions, "[n]o penalty shall be imposed ... unless the Secretary notifies the taxpayer in writing ... that the taxpayer shall be subject to an assessment of such penalty." 26 U.S.C. §6672(b)(1). But PPACA cabins executive authority to waive penalties by allowing that the government "*may* provide for the payment of any assessable payment provided by this section on an annual, monthly, or other *periodic* basis as the Secretary may prescribe." 26 U.S.C. §4980H(d)(2) (emphasis added). Permissively allowing periodic payments precludes across-the-board, outright waivers of penalties: Agencies "may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 485 (2001).

Unlike statutes amenable to *unreviewable enforcement discretion*, this section is mandatory, *see* 26 U.S.C. §4980H, making the deferral reviewable. *Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1032 (D.C. Cir. 2007). If directly reviewed, the deferral surely would be voided because the Executive Branch cannot lawfully amend statutes by fiat. *INS v. Chadha*, 462 U.S. 919, 956-58 (1983). As such, the current Administration's neglecting its obligation to faithfully execute the laws cannot estop the Administration – much less any *future Administrations* – from collecting the mandated penalties for 2014:

> Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

F.C.I.C. v. Merrill, 332 U.S. 380, 384 (1947). Accordingly, the claimed deferral of the Employer Mandate has no bearing on the justiciability of this litigation.

CONCLUSION

For the foregoing reasons and those argued by Plaintiffs, this Court should hold that PPACA's mandates are unenforceable against not only for-profit corporations but also anyone else.

Dated: January 28, 2014 Respectfully submitted,

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IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *ET AL.*,

Petitioners,

v.

HOBBY LOBBY STORES INC., MARDEL, INC., DAVID GREEN, BARBARA GREEN, STEVE GREEN, MART GREEN, AND DARSEE LETT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are 88 Members of Congress, representing both political parties, who share a strong interest in upholding Congress's long, bipartisan tradition of protecting religious liberty. They are in a unique position to explain the role of the Religious Freedom Restoration Act of 1993 ("RFRA") in codifying and vindicating that tradition.

Amici are:

United States Senators

Roy Blunt (R-MO)

Lamar Alexander (R-TN)

Kelly Ayotte (R-NH)

John Barrasso (R-WY)

Richard Burr (R-NC)

Tom Coburn (R-OK)

Mike Enzi (R-WY)

Deb Fischer (R-NE)

Lindsey Graham (R-SC)

John Hoeven (R-ND)

Mike Johanns (R-NE)

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[1] The parties have consented to the filing of this brief, and letters confirming such consent have either been lodged with the Clerk or accompany this brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation of this brief.

Jerry Moran (R-KS)

Marco Rubio (R-FL)

Tim Scott (R-SC)

Pat Toomey (R-PA)

Roger Wicker (R-MS)

Members of the House of Representatives

J. Randy Forbes (R-VA)

Daniel Lipinski (D-IL)

Robert Aderholt (R-AL)

Michele Bachmann (R-MN)

Dan Benishek (R-MI)

Kerry Bentivolio (R-MI)

Diane Black (R-TN)

Marsha Blackburn (R-TN)

Charles Boustany (R-LA)

Kevin Brady (R-TX)

Jim Bridenstine (R-OK)

Paul Broun (R-GA)

Tom Cole (R-OK)

K. Michael Conaway (R-TX)

Steve Daines (R-MT)

Ron DeSantis (R-FL)

House Majority Leader
Eric Cantor (R-VA)

Mike McIntyre (D-NC)

Mike Kelly (R-PA)

Steve King (R-IA)

John Kline (R-MN)

Raúl Labrador (R-ID)

Doug LaMalfa (R-CA)

Doug Lamborn (R-CO)

James Lankford (R-OK)

Bob Latta (R-OH)

Billy Long (R-MO)

Cynthia Lummis (R-WY)

Thomas Massie (R-KY)

Jeff Miller (R-FL)

Markwayne Mullin (R-OK)

Tim Murphy (R-PA)

Scott DesJarlais (R-TN)
Jeff Duncan (R-SC)
Stephen Fincher (R-TN)
John Fleming (R-LA)
Jeff Fortenberry (R-NE)
Virginia Foxx (R-NC)
Trent Franks (R-AZ)
Scott Garrett (R-NJ)
Trey Gowdy (R-SC)
Tim Griffin (R-AR)
Gregg Harper (R-MS)
Andy Harris (R-MD)
Vicky Hartzler (R-MO)
Richard Hudson (R-NC)
Tim Huelskamp (R-KS)
Bill Huizenga (R-MI)
Randy Hultgren (R-IL)
Bill Johnson (R-OH)
Walter Jones (R-NC)
Jim Jordan (R-OH)
Randy Neugebauer (R-TX)
Alan Nunnelee (R-MS)
Pete Olson (R-TX)
Steven Palazzo (R-MS)
Robert Pittenger (R-NC)
Joseph Pitts (R-PA)
Ted Poe (R-TX)
Mike Pompeo (R-KS)
Peter Roskam (R-IL)
Keith Rothfus (R-PA)
Steve Scalise (R-LA)
Austin Scott (R-GA)
Adrian Smith (R-NE)
Steve Stockman (R-TX)
Ann Wagner (R-MO)
Tim Walberg (R-MI)
Daniel Webster (R-FL)
Lynn Westmoreland (R-GA)
Joe Wilson (R-SC)
Rob Wittman (R-VA)

SUMMARY OF ARGUMENT

Carrying on the beliefs of the nation's Founders, Congress has a long and uninterrupted tradition of enacting statutory protections of religious liberty for both individuals and entities. These bipartisan legislative efforts reflect Congress's deep concern for ensuring that laws of general application do not interfere with the free exercise of religion. The Religious Freedom Restoration Act ("RFRA") should be interpreted by this Court in light of that tradition, as embodied in the plain meaning of the statutory text.

RFRA was enacted with virtually universal support from across the political and ideological spectrum. Consistent with its tradition of protecting religious liberty, Congress intentionally drafted the statute to have broad and sweeping effect. RFRA applies to all later-enacted laws unless those laws explicitly exclude RFRA's application—something Congress has never seen fit to do. RFRA is also broad substantively. It protects a wide range of religious activity and belief and an expansive universe of both individuals and entities.

Because the Affordable Care Act ("ACA") did not disclaim RFRA's applicability, RFRA applies to the ACA's implementing regulations. As religiously oriented corporations, Respondents Hobby Lobby and Mardel are among the "persons" entitled to RFRA's protections. The Government has failed to identify, as it must in order to prevail, anything in the "text surrounding" the word "person" or in the text of related statutes that requires a contrary conclusion.

The Government's attempt to frame this case as turning on the Court's Free Exercise Clause jurisprudence is misguided. The Court should avoid deciding a constitutional question when, as is the case here, the question can be disposed of on *statutory* grounds. Moreover, this case need not turn on the Court's pre-RFRA caselaw concerning the Free Exercise Clause because, as this Court has repeatedly emphasized, RFRA did not simply codify that caselaw. Rather, it established a substantive right that is, in some ways, broader than the Free Exercise rights recognized in the Court's prior decisions.

Even if the Court reaches the constitutional question, the Free Exercise Clause applies with full force to the closely held, religiously oriented corporations at issue in this case. Like the bipartisan coalition that enacted RFRA, the Founders did not intend to extend free exercise rights only to some organizations but not to others. Moreover, the legal distinction between non-profit corporations and for-profit corporations, on which the Government's argument depends, is of modern vintage and therefore could not have guided the Founders.

For these reasons, RFRA requires that Hobby Lobby and Mardel be exempted from the ACA regulations that require them to purchase employee insurance plans that cover all forms of contraception—including even those that the companies and their owners sincerely believe cannot be funded without contravening their religious missions.[2]

ARGUMENT

I. Congress Has a Long Bipartisan Tradition of Protecting and Preserving Religious Freedom

The Founders intentionally placed religious freedom guarantees first and foremost in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. CONST. amend. 1. Carrying on the Founder's beliefs and practice, Congress has a long bipartisan tradition of protecting religious liberty and moral conscience by providing individuals and groups religious exemptions from otherwise generally applicable laws. This tradition reflects a deep concern among Members of both parties that legislative enactments not in any way constrain religious liberties.

By enacting religious exceptions in many statutes, Congress has sought to protect religious exercise where a specific burden is clear. And in enacting RFRA, in keeping with its bipartisan practice of protecting religious liberty, Congress expressed its intent to protect against any burden on religious exercise—no matter the individual or entity burdened—that might arise in future, unforeseen circumstances. This Congressional intent to extend RFRA's protections to as wide a class as possible runs directly counter to the Government's attempt to read into RFRA limitations in scope that do not appear in the statutory text.

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[2] These same arguments also support the RFRA claims pursued by the petitioners in *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356 (U.S. 2013), which the Court has consolidated with this case.

A. Congress's bipartisan tradition of protecting the free exercise of religion is reflected in many statutes.

The Founders and the founding generation were deeply concerned with ensuring that the new federal government not impinge upon the right of the people to freely exercise religion. Motivated by that same concern, Members of Congress of both parties have repeatedly worked together to protect free exercise of religion by enacting specific exceptions to generally applicable laws. In each case, these exceptions were enacted after Congress identified a circumstance in which laws would collide with the religious exercise of a particular class of individuals or groups.

For example, Congress long ago codified the well-known exemption from military service for those who, "by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form." 50 U.S.C. app. § 456(j). More recently, Congress enacted a measure that protects government employees from being forced to attend or participate in the prosecution of federal capital cases or in a federal execution if such participation "is contrary to the moral or religious convictions of the employee." 18 U.S.C. § 3597(b) (1994).

A number of laws have also granted exceptions in various forms to accommodate those who, in the course of participating in federal health programs, object based on religious conviction to any action that may support or promote abortion, sterilization, contraception, or other procedures. For example, the Church Amendments to the Public Health Service Act—which passed unanimously in both houses of Congress, H.R. Rep. No. 93-227 (1973)—prohibited public authorities from discriminating against health workers who object to certain procedures for religious reasons, and from imposing upon such workers requirements that would be contrary to their religious beliefs. 42 U.S.C. § 300A-7(b)-(e). A further amendment to the Public Health Service Act in 1996 extended similar anti-discrimination protections to health care *entities*—not just individuals—that refuse to participate in abortion procedures. 42 U.S.C. § 238n(a).

In both the Medicare and Medicaid programs, Congress has similarly provided protections to ensure that a managed care organization is not required to provide coverage for counseling or referral services if the organization "objects to the provision of such service on moral or religious grounds." 42 U.S.C. §§ 1395w-22(j)(3)(B)(i) & 1396u-

2(b)(3)(B)(i). These are but a few examples of specific statutory protections related to health care.[3]

B. RFRA is a powerful example of Congress's bipartisan support for religious liberty protection.

While Congress has often identified and proactively addressed specific instances where religious exercise is burdened by generally applicable laws, Members of both parties have recognized that doing so in every instance is not practical. Conflicts between religious belief and federal enactments inevitably arise in unforeseen ways. To account for this, Congress enacted RFRA.

1. RFRA enjoyed broad bipartisan support.

RFRA enjoyed broad bipartisan support in both houses of Congress, a significant achievement for any major piece of legislation.

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[3] Further examples include, but are not limited to: protection for faith-based organizations seeking foreign assistance grant funds against being forced to support medical programs abroad that violate their religious beliefs, 22 U.S.C. § 7631(d)(1); protection for immigrants who object to the vaccination requirement for entry into the United States based upon religious conviction, 8 U.S.C. § 1182(g)(2)(C); an exception for health plans participating in the Federal Employees' Health Benefits Plan that object to contraceptive coverage, Consolidated Appropriations Act of 2012, Pub. L. No. 112-74, § 727(b), 125 Stat. 936 (Dec. 23, 2011); and a requirement that the District of Columbia provide religious and conscience protections in any District of Columbia contraceptive mandate, *id.* § 808, 125 Stat. 941.

The bill was introduced in the House by then-Representative Charles Schumer—a Democrat—and garnered 170 co-sponsors from both political parties. It was approved in committee by a unanimous 35-0 vote and was passed unanimously by the full House. H.R. Rep. No. 103-88 (1993). In the Senate, the companion bill was jointly presented by Republican Senator Orrin Hatch and Democratic Senator Edward Kennedy. It attracted a bipartisan group of 58 co-sponsors, was approved in committee by a 15-1 vote, and passed the full Senate by a vote of 97-3. S. Rep. No. 103-111 (1993).

Since then, RFRA has continued to garner the respect and support of both houses of Congress, regardless of whether they were controlled by Democrats or Republicans. RFRA contains a rule of construction that states that the law is applicable to all federal statutes adopted after November 16, 1993, unless its application is explicitly excluded in the relevant statute. 42 U.S.C. § 2000bb-3(b). Notably, in the two decades since RFRA was signed into law, in no instance has Congress ever excluded its application. Put another way, even though RFRA explicitly contemplates that Congress may pass laws that are not subject to RFRA, Congress has never done so. This deference to RFRA's broad scope indicates that the sense of Congress remains that religious liberties must continue to enjoy robust statutory protection.

2. RFRA had support from numerous organizations across the political spectrum.

The bipartisan support in Congress for RFRA's broad religious liberty protections reflected equally strong support for the legislation among a wide swath of civil society.

At the time of its passage, RFRA won the support of religiously affiliated organizations, such as the National Council of Churches, the National Association of Evangelicals, the United States Catholic Conference, the American Jewish Committee, the American Muslim Council, the Southern Baptist Convention, the Baptist Joint Committee, the Episcopal Church, the Christian Legal Society, and the Church of Jesus Christ of Latter-day Saints.

In addition to religious organizations, secular groups concerned with constitutional rights also supported RFRA. The American Civil Liberties Union, People for the American Way, Coalitions for America, Concerned Women for America, and the Home School Legal Defense Association all publicly supported the bill. 139 Cong. Rec. 4922 (1993) (statement of Sen. Kennedy).

II. Congress, in Keeping With Its Bipartisan Tradition, Enacted RFRA to Ensure Broad Protection of Religious Liberty

Consistent with Congress's long bipartisan tradition of protecting religious liberty, Congress enacted RFRA in 1993 to provide broad protections to individuals and entities engaged in the exercise of religion. RFRA provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can "demonstrate[] that [the] application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-1 (a)-(b).

Congress enacted RFRA to give the free exercise of religion broader protection than was constitutionally required under *Employment Division v. Smith*, 494 U.S. 872 (1990). RFRA created "a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). That is, the law set forth a compelling interest standard for all laws substantially burdening religious exercise, even laws that are otherwise neutral toward religion. 42 U.S.C. §§ 2000bb(a), (b); *see also* Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 256 (1995) (RFRA is "far more than a mere restoration of pre-*Smith* case law. It is a restoration of the high-water mark of free exercise accommodation, established by the cases of *Sherbert v. Verner* and *Wisconsin v. Yoder* . . . .").

By enacting RFRA, Congress took three major steps to ensure that its provisions were interpreted and applied expansively: It made RFRA a background statute applicable to every other law passed by Congress before or after RFRA's 1993 enactment; it drafted the law to protect a wide range of religious belief and activity; and it ensured that the statute applied to a broad universe of individuals and entities. Each step ultimately won the support of all Democrats and Republicans in the House and virtually all Democrats and Republicans in the Senate.

A. Congress made RFRA a background statute applicable to all later-enacted Federal laws.

Congress ensured that RFRA's "compelling interest" test would apply to all future laws and implementing regulations, 42 U.S.C. § 2000bb-3(a), unless the "law explicitly excludes such application by reference to" RFRA, *id.* § 2000bb-3(b). RFRA thus cuts "across all other federal statutes . . . modifying their reach . . .[—]a powerful current running through the entire landscape of the U.S. Code." Paulsen, *supra* at 253-54. RFRA is "both a rule of interpretation . . . and an exercise of general legislative supervision over federal agencies, enacted pursuant to each of the federal powers that gives rise to legislation or agencies in the first place." Douglas Laycock & Oliver S. Thomas, *Interpreting the*

Religious Freedom Restoration Act, 73 TEX. L. REV. 209, 211 (1994).

Congress thus intended for RFRA's compelling interest standard to apply even when that standard, or a specific religious exemption, does not appear in a particular law. Moreover, the inclusion of other religious exemptions in a statute does not exclude the statute from the reach of RFRA. Just like constitutional Free Exercise protections, RFRA protections do not turn on whether a future enactment contains an explicit religious exemption.[4] RFRA contemplates that Congress retains a choice: Congress may preemptively enact a religious accommodation in a particular law, which may be broader than (or coextensive with) RFRA. *See* 42 U.S.C. § 2000bb-4 ("Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this [Act]."); *see also* the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-3(e) ("A government may avoid the preemptive force of any provision of this chapter by . . . retaining the policy or practice [that results in a substantial burden on religious exercise] and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden."). Or, if Congress fails to include an explicit exemption (or if an exemption fails to fully alleviate the burden for all affected "persons"), a burdened individual or entity may pursue RFRA litigation and, if the government cannot justify the lack of accommodation, obtain relief.

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[4] Both RFRA and the Free Exercise Clause play roles even when there are explicit statutory religious exemptions in a particular law. Before RFRA, Congress enacted explicit religious accommodations in many different laws. *See supra* section I.A. But those laws could still be unconstitutional pursuant to the Free Exercise Clause if the religious exemptions were under-inclusive. Similarly, since RFRA, Congress has granted many religious exemptions in more recent laws. *See id.* But those laws can still violate RFRA if the exemptions are under-inclusive. RFRA is a floor below which religious protection, including religious exemptions, may not fall.

Accordingly, in enacting RFRA, Congress, acting with unusual bipartisan support, not only imposed limits on all laws enacted prior to RFRA's passage; it also restricted the ability of future Congresses to enact laws curtailing religious liberty unless they expressly disclaimed RFRA's application.

B. Congress enacted RFRA to protect a wide range of religious activity and belief.

RFRA was also intended to be broad—and deferential—in its protection of an array of sincerely held religious beliefs. First, Congress defined "religious exercise" expansively, as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7) (defining "religious exercise" for purposes of RLUIPA and RFRA); *id.* § 2000bb-2(4) (incorporating § 2000cc-5's definition).

Second, under RFRA, Congress ensured that courts are not placed in the position of having to weigh the validity of any person's religious beliefs. In the First Amendment context, this Court has long declined to second-guess the "correctness" of a claimant's interpretation of religious doctrine. *See, e.g., Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715-16 (1981) (explaining that "it is not within the judicial function and judicial competence to inquire whether the petitioner . . . correctly perceived the commands of [his] faith," and that where a claimant "dr[aws] a line, . . . it is not for us to say that the line he drew was an unreasonable one"). So long as an asserted religious belief is sincerely held, it may merit protection even if it is not "acceptable, logical, consistent, or comprehensible to others." *Id.* at 714.

The Court has also declined to second-guess the burden a claimant asserts by questioning the directness of its application. Rather, the inquiry focuses on the "coercive impact" upon the claimant who is "put to a choice" between violating religious beliefs and suffering secular consequences. *Id.* at 717. A burden on religious exercise exists wherever a law places "substantial pressure"—including financial consequences—"on an adherent to modify his behavior and to violate his beliefs"; "While the compulsion may be indirect, the infringement . . . is nonetheless substantial." *Id.* at 717-18.

In enacting RFRA, Congress did not alter these principles. Instead, Congress simply tasked the courts with applying the compelling interest test to balance the burden on religious beliefs with the government's interest and chosen means of pursuing that interest. *See* 42 U.S.C. § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.").

C. RFRA protects a broad universe of individuals and entities.

Congress intended RFRA to apply to *all* individuals and entities engaged in religious activities. RFRA's protections extend broadly to all "persons." That term, as defined in the Dictionary Act, covers "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," "unless the context indicates otherwise." 1 U.S.C. § 1.

III. Continuing its Bipartisan Tradition of Protecting Religious Liberty, Congress Chose to Subject the Affordable Care Act to RFRA's Requirements

Congress's bipartisan tradition of providing broad statutory protections for religious liberty continued after passage of RFRA. As noted above, in more than two decades since RFRA's enactment, no law has disclaimed RFRA's application to that law.

The ACA is no exception. Nothing in the ACA disclaims RFRA's application. RFRA thus commands that the ACA not substantially burden religious exercise unless the government can meet its high burden of demonstrating that "[the] application of the burden to the person" is the least restrictive means of pursuing a compelling state interest. 42 U.S.C. § 2000bb-1 (a)-(b).

Moreover, in the ACA, Congress actually sought to accommodate those religious objections that it could anticipate. For example, the ACA reaffirms prior statutory protections and exemptions related to abortion services,[5] and its Elder Justice provisions protect an elder's "right to practice his or her religion through reliance on prayer alone for healing," 42 U.S.C. § 1397j-1(b). The ACA also contains a limited religious exemption from the general requirements of the Act. *See* 26 U.S.C. §§ 5000A (d)(2)(A), (B)(ii).

That the ACA does not include a specific accommodation for those who believe facilitating access to certain kinds of contraceptives violates their sincerely held religious beliefs, however, does not indicate an intent to deny them an exemption. Again, RFRA's very purpose is to ensure that, if the government cannot satisfy its high burden, accommodations are provided to protect religious liberty, whether or not protection is explicitly granted in the text of the burdensome law.

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[5] The ACA explains that it was not intended to "have any effect on Federal laws regarding—(i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion," 42 U.S.C. § 18023(c)(2), and that the Act shall not "be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits," *id.* § 18023(b)(1)(A)(i).

In this case, it is doubtful that Congress could have anticipated the particular infringements of religious liberty at issue here. The specific mandate requiring for-profit corporations (including faith-based companies) to pay for all contraceptives stems not from statutory text enacted by Congress but from agency regulations. Congress drafted and passed only the broad, general language of the Women's Health Amendment, which requires coverage without cost sharing for, "with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." 42 U.S.C. § 300gg-13(a)(4). It was the Health Resources and Services Administration—not Congress—that, pursuant to recommendations from the Institute of Medicine, interpreted "preventive care" as requiring coverage for the contraceptives at issue in this case. *See* HRSA, HHS, *Women's Preventive Services Guidelines*, Gov't App. at 40a-45a. That recommendation was adopted by the Departments implementing this portion of the ACA. *See* 45 C.F.R. § 147.130(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 26 C.F.R. § 54.9815-2713(a)(1)(iv). Because it was not Congress itself that wrote the coverage mandate at issue here, Congress had no occasion to consider whether, aside from RFRA, to preemptively include in the ACA specific religious exemptions related to these particular drugs and devices.[6]

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[6] Members of Congress did seek to confirm that abortion would not be covered by the Women's Health provision. See 155 Cong. (continued...)

RFRA thus governs the provision of religious exemptions from the administratively determined scope of the ACA's coverage requirements, and it does so regardless of the scope of other religious accommodations that are granted in the statute or implementing regulations.[7]

Congress could have exempted the ACA from RFRA's reach. But it chose not to, continuing its bipartisan tradition of promoting free exercise rights.

IV. The HHS Regulations At Issue Do Not Satisfy the High Bar Congress Set In RFRA

A. As a matter of statutory construction, RFRA protects for-profit corporations.

RFRA, as noted above, protects the rights of every "person." 42 U.S.C. § 2000bb-1(a). The word "person" is not limited to individuals. Under the Dictionary Act, the word "person" is presumed to include corporations and other collective entities. 1 U.S.C. § 1. This presumption can be overcome only

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Rec. 29,308 (2009) (statement of Sen. Mikulski) ("This amendment does not cover abortion. Abortion has never been defined as a preventive service. . . . There is neither legislative intent nor legislative language that would cover abortion under this amendment, nor would abortion coverage be mandated in any way by the Secretary of Health and Human Services.").

[7] *See* 45 C.F.R. § 147.131(a)-(b) (exemption for "religious employers" and accommodation for "eligible organizations"); 78 Fed. Reg. 39,870, 39,874-75 (July 2, 2013) (discussing scope of accommodation for "eligible organizations").

if the "context"—meaning "the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts"—indicates that the word should be given a different meaning. *Rowland v. California Men's Colony*, 506 U.S. 194, 199 (1993).

In this case, the context supports the Dictionary Act's broad definition of "person." Nothing in "the text of [RFRA] surrounding the word at issue"—"person"—or the "texts of other related congressional Acts" supports excluding for-profit entities from the Act's protections. Indeed, RLUIPA—arguably the only "other related congressional Act" because it is the only other law to which RFRA expressly refers[8]—contains explicit "Rules of Construction" specifying that the act "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). Accordingly, RFRA should be construed exactly as the statute says, to include "any exercise of religion," 42 U.S.C. § 2000cc-5(7), including that of Hobby Lobby and Mardel. This should be the end of the inquiry.

By selectively quoting legislative history, the Government claims that for-profit corporations are excluded from the definition of "person." To begin with, the Court cannot consider legislative history when construing the word "person" because legislative history is not relevant "context." *Rowland*, 506 U.S. at 199–200 (holding that "'context' . . . has a narrow compass" and reasoning that "[i]f Congress had meant to point further afield, as to legislative history, for example, it would have been natural to use a more spacious phrase, like 'evidence of congressional intent,' in place of 'context'").

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[8] RFRA incorporates the statutory definition of "religious exercise" provided by RLUIPA. *See* 42 U.S.C. § 2000bb-2(4) ("the term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title").

In any case, the Government's attempt to shoehorn the Court's Free Exercise Clause jurisprudence into RFRA's legislative history is misguided. RFRA does not simply codify this Court's pre-*Smith* decisions. RFRA creates different, and in some ways broader, substantive protections beyond what the First Amendment requires. *See City of Boerne v. Flores*, 521 U.S. 507, 532, 535 (1997) ("RFRA...cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.... [T]he legislation is broader than is appropriate if the goal is to prevent and remedy [just] constitutional violations. ... [T]he Act imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify.").

The question whether RFRA applies to for-profit corporations, therefore, need not turn on the Court's Free Exercise Clause jurisprudence. To be sure, Congress in the "Findings" section of RFRA generally recognizes that the Framers sought to protect the free exercise of religion in the First Amendment, 42 U.S.C. § 2000bb(a)(1), and Congress in the "Purposes" section of RFRA indicates that it is seeking to "restore the compelling interest test" for Free Exercise cases established in constitutional caselaw prior to *Smith*. *Id.* § 2000bb(b)(1). But nowhere in RFRA does Congress indicate that the Free Exercise Clause informs or limits the class of "persons" RFRA protects. The term "person"—importantly—does not appear in the Free Exercise Clause. The absence of that term in the Free Exercise Clause and its presence in RFRA implies that the scope of persons to which the statute applies is independent of the Free Exercise Clause.

It is the text of RFRA itself, which reflects Congress's longstanding bipartisan practice of protecting religious liberty, that should inform the statute's construction.

B. RFRA's background supports its protections for for-profit corporations.

Even if the Court were to consider the background behind RFRA, that background supports the conclusion that Congress intended RFRA to cover for-profit entities. The Government argues that whenever Congress has created a religious exemption that might apply to corporations or other collective entities, it has expressly limited the exemption to "churches and other religious non-profit institutions." Pet. Br. at 19–20 (citing 42 U.S.C. § 2000e-1(a), which includes an exception for any "religious corporation, association, educational institution, or society"). This example actually undermines the Government's argument because it shows that Congress knows how to create a narrow exception when it wants to. Congress could have used this same language in RFRA. It chose not to. Instead, Congress, with virtual unanimity, deliberately chose to use the word "person," being fully aware of the word's meaning. *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."); *see also Mississippi ex rel Hood v. AU Optronics, Corp.*, ___ S. Ct. ___, 2014 WL 113485, at *5 (Jan. 14, 2014) ("To start, the statute says '100 or more persons,' not '100 or more named or unnamed real parties in interest.' Had Congress intended the latter, it easily could have drafted language to that effect.").

In addition, the Government's claim that Congress has never afforded religious protections to for-profit corporations is simply wrong. The Medicare Choice Program, 42 U.S.C. § 1395w-21 *et seq.*, expressly states that Medicare Choice organizations are not required "to provide, reimburse for, or provide coverage of a counseling or referral service if the Medicare Choice organization offering the plan . . . objects to the provision of such service on moral or religious grounds." *Id.* § 1395w-22(j)(3)(B). Congress included a nearly identical conscience protection clause in the law regulating Medicaid Managed Care organizations. 42 U.S.C. § 1396u-2(b)(3)(B) ("Subparagraph (A) shall not be construed as requiring a medicaid managed care organization to provide, reimburse for, or provide coverage of, a counseling or referral service if the organization . . . objects to the provision of such service on moral or religious grounds."). By including these exemptions, Congress recognized that Medicare Choice organizations and Medicaid Managed Care organizations, many of which are for-profit corporations,[9] may be guided by religious principles. Consistent with its bipartisan tradition of protecting religious liberty, Congress chose to respect those principles, regardless of whether the organizations were for-profit or non-profit corporations.

Finally, the Government contends that Congress intended to exclude for-profit entities from RFRA because, at the time of RFRA's enactment, no court cases had decided—one way or the other—whether for-profit entities were protected by the Free Exercise Clause. *See Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers) ("This Court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders alleging that the mandatory provisions of certain employee benefits substantially burdens their exercise of religion."); *but cf. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring) ("It is also conceivable that some for-profit activities could have a religious character."). From the mere absence of court cases addressing the issue, the Government asserts that Congress must have assumed that for-profit entities were excluded when it enacted RFRA. This cramped reading of RFRA is incompatible with the law's expansive language and broad protections. It is incongruous to read RFRA, a statute intended to broaden the protection of religion, as imposing unprecedented limitations on that very freedom. Congress could not have intended to impose such restrictions *sub silentio*.

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[9] The majority of beneficiaries enrolled in these programs are served by for-profit plans. *See* Eric C. Schneider et al., *Quality of care in for-profit and not-for-profit health plans enrolling Medicare beneficiaries*, 118 Am. J. Med. 1392 (2005) ("By 1998 for-profit plans enrolled the majority of approximately 4.5 million Medicare health plan enrollees."); Kaiser Commission on Medicaid and the Uninsured, *Medicaid Managed Care: Key Data, Trends, and Issues* 2 (Feb. 2012), *available at* http://kff.org/medicaid/issue-brief/medicaid-and-managed-care-key-data-trends/ ("Over half of Medicaid MCO enrollees are in for-profit plans."); *see also* Bruce E. Landon & Arnold M. Epstein, *For-Profit And Not-For-Profit Health Plans Participating in Medicaid*, 20 Health Affairs 162 (2001).

C. The canon of constitutional avoidance counsels in favor of construing "person" according to RFRA's text and statutory context.

The canon of constitutional avoidance weighs heavily in favor of construing "person" to include for-profit entities like Hobby Lobby and Mardel. Here, the Government attempts to force the Court to decide an important, novel, and delicate constitutional question even though no constitutional claim is before the Court.

When choosing between an interpretation of a statute that requires the Court to resolve a serious constitutional issue and one that does not, the Court should generally choose the latter. *See United States v. Security Indus. Bank*, 459 U.S. 70, 78 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 577 (1978) (internal quotation marks omitted) ("We consider the statutory question because of the cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.")). Constitutional questions should be resolved only if the "clearly expressed" language of the statute requires that it be interpreted in a manner giving rise to the constitutional question. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979) (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963), and *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957)).

As described above, the text of RFRA falls far short of offering any such "clearly expressed" affirmative intention to exclude for-profit corporations from the scope of persons protected by RFRA. The Court therefore should avoid constitutional questions by adhering to the plain meaning of the statutory text.

D. The Free Exercise Clause does not distinguish between non-profit and for-profit corporations.

Even if the Court nonetheless were to address the constitutional question, the Free Exercise Clause applies to both non-profit corporations and for-profit corporations. No distinction between the two corporate forms appears in the text of the Clause, which broadly and simply bars Congress from "prohibiting the free exercise" of religion.

And caselaw construing the First Amendment likewise does not distinguish between for-profit and non-profit corporations. Quite the contrary. The Court in *First National Bank of Boston v. Bellotti* stated that "[f]reedom of speech and the *other freedoms encompassed by the First Amendment* always have been viewed as fundamental components of the liberty safeguarded by the Due Process Clause . . . and the Court has not identified a separate source for the right when it has been asserted by corporations." 435 U.S. 765, 780 (1978) (emphasis added). In indicating that the bank in that case enjoyed First Amendment rights to publicize its views regarding a state income tax, the Court found no distinction in the First Amendment between for-profit and non-profit corporations. Indeed, it paid no heed to distinctions made by the dissents in that case between "profitmaking corporations" and other persons. *Id.* at 805 (White, J., dissenting); *id.* at 822 (Rehnquist, J., dissenting). This reasoning can, and should, extend to the Free Exercise Clause—one of the "other freedoms encompassed by the First Amendment."

Further, as the Court of Appeals correctly noted, the Government's argument makes every organization's constitutional Free Exercise rights dependent on Congress's or a given state legislature's malleable definition of a "non-profit" corporation. Pet. App. 39a–40a. Corporations, even unquestionably religious organizations such as incorporated churches, would gain or lose constitutional rights depending on how Congress amended the tax code or how particular state laws define "for-profit" entities. *Id.*

The Government's proposed line would give rise to many practical questions. For instance:

- State laws on non-profit status differ among each other and from federal laws governing tax-exempt and taxable entities. Which body of law controls if state and federal law are in conflict over the status of a particular corporation? Would a corporation lose Free Exercise protections if it was considered a for-profit in one state, even if it would have been considered a non-profit if it was incorporated in another state? Would a corporation lose Free Exercise protections if it was incorporated under a state non-profit corporation law but was taxable under federal income tax law?

- Federal tax law regarding tax-exempt entities has been regularly revised, establishing different requirements for organizations to gain and retain tax-exempt status. Does the Constitution empower the regulators in the Treasury Department to expand and constrict the scope of parties entitled to Free Exercise rights by issuing new rules?

- The Treasury Department will automatically revoke an organization's tax-exempt status if it fails to make required filings. By virtue of the revocation, does the organization also immediately lose its Free Exercise rights though its substantive conduct has not changed?

Moreover, the Government's proposed distinction between for-profits and non-profits would have been completely alien to the Congress that adopted, and the States that ratified, the Bill of Rights. "[T]he late twentieth-century distinction between the public, forprofit, and nonprofit sectors did not apply to the US institutional landscape until the Great Depression." Helmut K. Anheier, Nonprofit Organizations: Theory, management, policy 28 (2005) (citing P.D. Hall, Inventing the Nonprofit Sector and Other Essays on Philanthropy, Volunteerism, and Nonprofit Organizations (Johns Hopkins University Press 2001)). Federal law did not grant tax-exemptions to charitable organizations until the end of the nineteenth century. *See* Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, Statistics of Income Bulletin 105, 106 (2008). The requirement that a charitable organization operate on a non-profit basis was first introduced in the Revenue Act of 1909. *Id.* at 107. The Founders therefore could not have intended to treat for-profit corporations as disfavored persons, in comparison to non-profits, for purposes of the First Amendment.

The Free Exercise Clause reflects the Founders' intent to broadly protect the religious liberties of individuals and entities. For centuries, Congress has worked across partisan divides to protect, promote, and expand these rights. Like the

Free Exercise Clause, RFRA, a powerful example of this bipartisan tradition, does not limit its application to non-profit entities exercising these rights. Accordingly, the Court should exempt Hobby Lobby and Mardel from those ACA regulations that would infringe on the companies' free exercise rights guaranteed by RFRA.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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RECORDS AND BRIEFS

Nos. 13-354 and 13-356

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL., *Petitioners,*
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL., *Respondents*

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND TENTH CIRCUITS

BRIEF OF ELECTRIC MIRROR, LLC., JAMES V. MISCHEL, JR., JAMES V. MISCHEL, SR., SUSAN MISCHEL, AARON MISCHEL, AND MIA MISCHEL, AS AMICI CURIAE IN SUPPORT OF HOBBY LOBBY AND CONESTOGA WOOD, ET AL.

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QUESTION PRESENTED

Whether the religious owners of a family business, or their closely-held business organization, have rights to the free exercise of religion protected by the First Amendment to the U.S. Constitution and by the Religious Freedom Restoration Act of 1993 that are violated by the application of the contraceptive coverage mandate of the Patient Protection and Affordable Care Act of 2010.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

This *amici curiae* brief is submitted in support of Conestoga Wood Specialties Corp. and Hobby Lobby Stores, Inc.[1] *Amici curiae* James "Jim" V. Mischel, Jr., Aaron Mischel, and Mia Mischel, and their parents Susan "Faith" Mischel and Dr. James "Doc" V. Mischel, Sr. (collectively "the Mischels"), are a family of devout Christians who sincerely believe that their Christian faith must direct and control every aspect of their lives, including their calling to be the owners and operators of their closely held family business, amicus Electric Mirror, LLC. These amici believe it is a grave sin to participate in or facilitate the taking of innocent human life,[2] including through abortion and abortifacient drugs. Their sincerely held religious beliefs about the sanctity of human life propelled Doc and Faith Mischel to adopt Aaron from his biological mother, a fourteen-year old woman who had been a victim of rape and who had initially sought an abortion before agreeing to Aaron's adoption by the Mischels.

This Court's decision in these two cases will have a profound impact upon the Mischels and Electric Mirror. Should this Court embrace the government's position that the protections for the free exercise of religion guaranteed by the First Amendment and by the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, do not extend to for-profit entities, amici will be forced by federal regulations promulgated under the Patient Protection and Affordable Care Act of 2010 ("ACA"), 42 U.S.C. § 300gg-13(a) *et seq.*, to provide coverage for abortifacient contraceptives in violation of their deeply held religious beliefs. Amici will also face the imminent prospect of being compelled to provide coverage for voluntary surgical abortion under the requirements of HB 2148 presently being debated in the Washington state legislature.

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[1] In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties' written consents to the filing of this brief are on file with the Clerk.

[2] *See, e.g.*, Proverbs 6:16-19.

The Mischels own, operate, and control Electric Mirror, L.L.C., a manufacturing company organized as a Washington limited liability company in 1998. Founder and President, Jim Mischel, Jr. launched Electric Mirror in his parents' garage. At that time, family and workforce were one and the same. Today, Electric Mirror employs more than two-hundred people in the United States and has annual sales of more than $40,000,000, but remains a family endeavor: Jim is President; Aaron is Vice President of Sales; Mia is Vice President of Community Relations; Faith is a Vice President; and Doc serves as Chairman and Vice President of Research and Development. With Jim Mischel as the single member of the LLC, Electric Mirror is "disregarded as an entity separate from its owner for income tax purposes" according to the Internal Revenue Service. *See* Treas. Reg. § 301.7701-3(b)(1)(ii) (2014). All of Electric Mirror's profits and losses thus pass through the business to the member who reports the profits or losses on his individual federal tax return.

Shortly before setting up Electric Mirror as an LLC in 1998, Jim Mischel drafted a Statement of

Faith for the company that was signed by every member of the Mischel family. The first line proclaims the company's and family's "firm belief that faith impacts all of life." The Statement dedicates Electric Mirror to God and "establish[es] the principles by which our company will be managed and operated." Those expressly religious principles define how Electric Mirror will make its products ("As stewards we are required to create quality products that reflect integrity and commitment to our customers."), will treat its customers (with the "utmost respect" as "being created in the image of God"), and will care for its employees ("[O]ur workman are worthy of their hire" so Electric Mirror will provide an "average or above average salary" and will "take every effort to provide our employees with an excellent health and education plan"). The Statement of Faith governs even Electric Mirror's profits: "our company commits itself to supporting the Christian church and the Christian community ... by giving 10% of our company's taxable profits to further the Kingdom of God and fulfilling the Great Commission" including the support of "Christian pro-life organizations" among other enumerated Christian causes. The Statement of Faith concludes by emphasizing that the very idea of a vocation, a calling, originates not from business imperatives but from religious faith:

> The Great Commission is everyone's calling. Therefore, our company reflects Christ in deed and word. ... This mission is part of who we are in Christ.

Since moving out of the Mischels' garage in 1998, Electric Mirror has honored this faith commitment by (among other things) providing its employees with above average wages and generous health benefits (Electric Mirror pays 75% of the premiums as well as covering half of the plan's deductible and out of pocket expenses), making no-interest loans to employees in distress, limiting overtime to one hour per day so employees have time with their families, and offering educational classes to employees (including personal finance and ESOL training).

Electric Mirror's faith commitments are evident even in the products that it creates. Every product is of high quality and ships with a decal affixed quoting Deuteronomy 8:18: "But thou shalt remember the Lord thy God: for it is he that gives you the power to get wealth, that he may establish his covenant which he swore unto your fathers, as it is this day."

Electric Mirror and the Mischels have remained true to these sincerely held religious beliefs, even when faithfulness comes at great cost. In 2012, Electric Mirror moved from purchasing employee health insurance on the open market to a far more costly self-insurance regime. This change has been necessary to escape an impending Washington law mandating that all health plans covering maternity services must also cover voluntary abortion. As discussed further infra, such self-insurance may offer a temporary respite from Washington's abortion coverage mandate, but it affords no shelter from the abortifacient contraceptive requirements of the federal contraceptive mandate under the ACA. Should this Court embrace the government's erroneous position here that the free exercise of religion is inapplicable to for-profit organizations, amici would have no independent right to protection against application of the state's abortion coverage mandate to them.

Such an outcome would be abhorrent to the religious values that are foundational for the Mischel family and for Electric Mirror. The entire Mischel family has been active for decades in defending the sanctity of human life. These religious beliefs led Doc and Faith Mischel, while Doc was in dental school, to accept the challenge from a nurse at a local abortion clinic to adopt a child whose mother was a fourteen-year old rape victim. Even though they had no way to pay for the adoption or for the child's delivery, Doc and Faith immediately said "yes." They borrowed funds to adopt the child they would name Aaron. To compel Aaron, as Vice President of Electric Mirror, his family, and Electric Mirror to pay for and provide insurance coverage that violates their religious beliefs and that could have resulted in Aaron's life ending before the Mischels' could have adopted him is contrary to the free religious exercise guaranteed by the First Amendment and by RFRA.

Amici therefore respectfully request that this Court hold that for-profit organizations and their owners are protected by the Free Exercise Clause of the First Amendment and by the Religious Freedom Restoration Act. Amici respectfully submit that the judgment in *Hobby Lobby* should be affirmed and the judgment in *Conestoga Wood* should be reversed.

ARGUMENT

I. FOR-PROFIT CORPORATIONS AND THEIR OWNERS, SUCH AS AMICI HERE, ENGAGE IN THE EXERCISE OF RELIGION WITHIN THE MEANING OF RFRA AND THE FIRST AMENDMENT.

The Mischel family established Electric Mirror as a direct outgrowth of their strongly held religious faith and its teachings on the importance of the family. Their shared Christian faith guides and controls every aspect of their lives – from Doc and Faith Mischel's decision to adopt Aaron from a mother who had initially pursued an abortion, to Jim Mischel's starting Electric Mirror in the family garage, to the Statement of Faith for Electric Mirror that Jim prepared and every family member signed before setting the company up as a Washington LLC, to the involvement of each member of the family in the regular operations of the business. For these amici, all of these actions are the exercise of their religion no less than their attendance at church worship services or evangelistic religious speech.

The government would have this Court believe that companies like the Mischel family business Electric Mirror are aberrational and legally impossible. The government would have this Court believe that individuals and families cannot exercise their religious faith together in the organization and operation of a business and that a for-profit corporation cannot engage in any exercise of religion whatsoever. But it is the government's categorical exclusion of for-profit corporations from free exercise protections that is contrary both to fact and law.

The government agrees that individuals can and do exercise religion. Pet. Br. 16-17, No. 13-354. The government further acknowledges that this Court has entertained free exercise claims by businesses engaged in such commercial activities as the sale of goods and the operation of a carpentry business with employees, but it seeks to limit such claims on the grounds that the businesses were sole proprietorships. Pet. Br. 17-18 (*citing Braunfeld v. Brown*, 366 U.S. 599 (1961), *and United States v. Lee*, 455 U.S. 252 (1982)). The government also admits that corporations can engage in religious exercise, but contends that this is true only of nonprofit corporations, such as churches and religious communities, not for-profit corporations. Pet. Br. 17. The government attempts to justify these distinctions on the grounds that for-profit corporations are organized to engage in commerce and seek to make a profit, rather than pursue religious purposes. Pet. Br. 19.

A. The Differences Between For-Profit and Nonprofit Corporations Do Not Support the Government's Categorical Denial Of Free Exercise Rights to For-Profits.

Upon close examination, the government's distinctions among these different structures and its stated justifications for its position turn out to be arbitrary and unconvincing. In particular, the government's heavy reliance upon the distinction between for-profit and nonprofit corporation status fails for multiple reasons.

First, for-profit companies can and do engage in activities that the government must admit are religious in nature. As just one example, amici here include a Bible verse affixed to every product they have shipped. Other companies similarly have distributed religious scriptures to their customers.[3] Such communicative activities constitute core religious speech protected by both the Free Speech and Free Exercise Clauses of the First Amendment. Yet if these activities by these companies constitute religious exercise, it defies logic to contend, as the government does, that the companies are incapable of exercising religion within the meaning of the First Amendment and RFRA.

Second, the government appears to assume that for-profit businesses must have as their primary purpose making a profit and cannot have other purposes, such as religious ones, that may conflict with the profit motive. But in reality applicable laws enable for-profit corporations to have very broad purposes, and do not require that the only, or even the primary, purpose be maximizing profit.[4] Further, to the extent that the government may contend that profit maximization is required, the strong state law trend actually runs in the opposite direction. For example, more than thirty states have adopted "constituency statutes" that expressly permit directors to take corporate actions that do not directly benefit the shareholders.[5] Similarly, a number of states have enacted statutes creating benefit corporations and low-profit limited liability companies ("L3Cs"), both of which are designed to provide additional vehicles allowing for-profit entities to pursue purposes other than profit-maximization.[6] And the federal tax code explicitly encourages activities other than the pursuit of profit by providing that up to ten percent of a corporation's taxable

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[3] For over 30 years, Alaska Air Group, better known as Alaska Airlines, America's seventh-largest carrier in terms of passenger traffic, handed out prayer cards with its in-flight meals, before ending the practice in 2012. *See* Nicole Neroulias, Alaska *Airlines ends decades-old prayer card tradition*, REUTERS, Jan. 26, 2012, at: http://www.reuters.com/article/ 2012/01/26/us-alaska-airlines-prayercards-idUSTRE80P03Y20120126. Since the 1980s, In-N-Out Burgers has printed a scripture citation on its packaging and cups. *See* Lynn Arave, *In-N-Out serves burgers with a side of scripture*, DESERET NEWS, Dec. 26 2009, http://www.deseretnews.com/article/705379755/In-N-Out-serves-burgers-with-a-side-of-scripture.html?pg=all.

[4] The Model Business Corporation Act provides that "[e]very corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation." Model Business Corporation Act §3.01. Most states permit, and the vast majority

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of corporations adopt, very broad purpose clauses. *See* Michael A. Schaeftler, *The Purpose Clause in the Certificate of Incorporation: A Clause in Search of a Purpose*, 58 ST. JOHN'S L. REV. 476, 482 (1984).

[5] *See* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85 (1999). For example, the Connecticut statute requires that a director "shall" consider not only the long-term as well as the short-term interests of the corporation, the shareholders, and its employees, but also "community and societal considerations…." *See* CONN. GEN. STAT. § 33-756 (2008). *See also* N.Y. BUS CORP. L. §717 (2008).

[6] Benefit corporations have the dual purpose to create general public benefit and create a profit for shareholders, and have been recognized in Maryland, California, Hawaii, Vermont, Virginia, New Jersey and New York. The L3C has the same liability protection and pass- through tax treatment as an LLC but has a primarily charitable purpose with profit making as a secondary purpose. Vermont, Rhode Island, Maine, Michigan, Illinois, North Carolina, Utah, Louisiana, and Wyoming recognize the L3C.

income is deductible as charitable contributions. *See* 26 U.S.C. § 170(b)(2).

Moreover, in the case of a closely held entity, such as amici here, the close or complete overlap between the shareholders and those controlling the company should allow them to pursue whatever lawful purposes they choose rather than being forced to maximize profits. In light of the pass-through tax treatment of the profits and losses of a subchapter S corporation or of a single member limited liability company such as Electric Mirror, the owners' right to determine whether or not they wish their business to maximize profits or to pursue other objectives must be entirely their own.

Amici provide a good example of such corporate religious exercise. Their closely held family-operated business was established expressly on the basis of their shared "firm belief that faith impacts all of life" and dedicated to God. Amici intentionally have made choices that reduce their profits in order to provide better wages, working conditions, and benefits to their employees or create better products for their customers. They have no less right to make choices that place promotion of the religious purposes described in the Electric Mirror Statement of Faith before maximization of their profits.[7]

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[7] In considering how companies may have mixed-profit-making and religious purposes, it is worth noting that the charter companies that established the first English colonies in North America were businesses expressly incorporated to carry out at the same time both religious and profit-making purposes. The most prominent example is the First Charter of Virginia, granted to the Virginia Company by the British Crown. It expressly stated the corporate purposes of the Company as to

Perhaps most importantly, though, the government's categorical standard misunderstands the crucial distinction between nonprofit and for-profit organizations. The critical difference is not *whether* the organization realizes profits, but rather *how* those profits may be used. Nonprofit organizations may also pursue and realize profits, but their profits must be applied to advance the organization's nonprofit purposes, and not for the benefit of any private individual.

Nonprofit corporations routinely operate hospitals, museums, colleges, conference centers, and the like, and engage in other activities that are commercial in character, produce income, and result in profits, often substantial. The Internal Revenue Code recognizes that even tax-exempt nonprofit organizations may engage in such commercial activities. *See* Treas. Reg. § 512(a)(1) (2014). Where such activities are directly related to advancing the organization's exempt purposes, such as a hospital charging fees for its rooms, a museum charging admission fees or selling copies of its collection in a gift shop, or a private college charging tuition, the organization can derive substantial profits without altering its nonprofit and exempt status. Even when such activities are unrelated to the organization's tax-exempt purposes, they do not threaten the organization's tax-exempt status unless they are

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"propagat[e] Christian Religion to such People, as yet live in Darkness and miserable Ignorance of the true Knowledge and Worship of God" and "to dig, mine, and search for all Manner of Mines of Gold, Silver, and Copper, ... And to have and enjoy the Gold, Silver, and Copper, to be gotten thereof...." *See* 1 HENING'S VIRGINIA STATUTES AT LARGE 56-58.

substantial. If insubstantial, such profits simply result in unrelated business income on which the nonprofit must pay tax.

The government never explains why this difference in the uses to which profits may be put is meaningful and justifies denying for-profits equal free exercise rights while granting such rights to nonprofits engaged in similar or identical profit-making activities. The government similarly overlooks the many examples of nonprofit organizations that engage in clearly commercial activities and that make substantial profits but nonetheless retain their nonprofit exempt status and therefore would satisfy the government's primary requirement to engage in religious exercise. One timely and telling example is that of the National Football League ("NFL"), which is organized as a nonprofit corporation and recognized as a tax-exempt under IRC §501(c)(6).[8] To qualify under §501(c)(6), a business or football league must not be organized for profit and no part of its net earnings may inure to the benefit of any private shareholder or individual. *See* 26 U.S.C. § 501(c)(6). Yet in 2012 the NFL claimed annual revenues of $255 million on assets worth more than $822 million, constructed new offices at a cost of $36 million, and paid its top employee, Commissioner Roger Goodell, $29.5 million in annual salary. During the same period, the NFL made grants to other nonprofit organizations in a total amount of only $2.3 million.[9] Despite commercial activity that far exceeds that of amici here and most other for-profit companies and owners seeking to exercise their religious faith, it is instead corporations like the NFL that satisfy the government's nonprofit status requirement.

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[8] *See* Act of Nov. 8, 1966, Pub. L. 89-800, § 6(a), 80 Stat. 1515.

[9] *See* National Football League IRS Form 990 for Fiscal Year 2012, available at: http://www.guidestar.org/FinDocuments/2012/131/922/2012-131922622-0907a8cd-9O.pdf.

B. The Government Is Applying an Arbitrary and Erroneous Standard to Determine If a Corporation Is Engaged in the Exercise of Religion.

Applying the government's analysis to amici here vividly illustrates that it is arbitrary. It exalts form over substance and results in strangely inconsistent outcomes.

The government's position recognizes that the Mischel family *as individuals* can exercise religion in a variety of ways. For example, the Mischels can engage in religious speech such as evangelism or worship. And as employees of Electric Mirror, they can engage in religious exercise in the workplace sufficient to trigger Title VII's religious antidiscrimination and religious accommodation requirements.

The government also appears to concede that a sole proprietorship can exercise religion sufficient to support review under the Free Exercise Clause, even though engaged in the sale of products or the operation of a business. *See* Pet. Br. 18. Accordingly, had Jim Mischel established Electric Mirror as a sole proprietorship rather than a single member LLC, it would be similarly situated to the claimants in *Braunfeld* and *Lee* whom the government acknowledges were exercising religion.

Similarly, the Mischel family could incorporate as a religious nonprofit, using the same Statement of

Faith used in establishing Electric Mirror, and that nonprofit entity would be exercising religion under the government's view. In fact, such a nonprofit could engage in significant commercial activity, even giving rise to unrelated business taxable income under Treas. Reg. § 512(a)(1) (2014), yet, because it would retain its nonprofit status, by the government's standard it would remain capable of exercising religion within the meaning of RFRA and the First Amendment.

Consistent with the government's position, even if organized as a for-profit corporation, Electric Mirror could exercise a panoply of First Amendment rights other than free religious exercise, such as free speech. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342, 354 (2010); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). And even as a for-profit corporation, Electric Mirror, and the Mischels as its owners and managers, could engage in religious exercise to the extent that they could be found to have committed religious discrimination in employment in violation of Title VII.

Yet under the government's analysis, simply by electing to establish Electric Mirror as a for-profit limited liability entity, the Mischels have rendered Electric Mirror incapable of engaging in the exercise of religion and thus beyond the protections of RFRA and the Free Exercise Clause.

The government's categorical standard, which ignores a claimant's actual exercise of religion in favor of a bright-line one-size-fits-all rule, would result in wildly inconsistent outcomes depending upon modest differences in corporate form and the particular First Amendment right being exercised. Viewed in this light, it is clear that the government is applying the wrong initial analysis to assess free exercise claims. The correct initial inquiry is the well-established test under RFRA whether a claimant's objections are sincerely held religious beliefs that are burdened by the government's actions.

In the case of a closely-held entity such as amici, this is quite easily established. The government need only consider, as RFRA instructs, whether the claim by the company or its owners that their religious beliefs are being burdened by government action is sincere and not dishonest. Once that initial inquiry has been satisfied, the normal RFRA analysis can then consider whether that burden is substantial, whether the governmental interest at issue is compelling, and whether there is a less restrictive means to achieve a compelling governmental interest.

But if the government is asserting a bright-line rule because it is concerned about the potential for fraud or unprincipled and inconsistent manipulation of a business's corporate structure, such problems are easily addressed. The organization pursuing religious purposes can articulate those purposes (along with other corporate purposes) in its organizing documents, such as articles of incorporation, bylaws, mission statements, statements of faith (such as that of amici here), and the like. The government can make the neutral facial inquiry whether the organization holds itself out – to the public and internally – as having religious purposes and engaging in religious activities. Indeed, this is essentially the approach used by the Ninth Circuit in *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988).

If the company is not closely held, it may also provide formal notice of its religious purposes, activities, and requirements to potential investors prior to any investment and in public corporate filings. Such notice of the corporation's religious purposes and statements of faith can be provided not only in the corporation's organizational documents, but also in corporate filings, in information provided to prospective investors, and on certificates evidencing any ownership interests. Such documents may state that maximization of shareholder profit is not the corporation's only or even primary purpose and that, in certain instances, the corporation's governing board may subordinate maximization of the corporation's short-term economic value in order to pursue the corporation's other stated purposes, including its stated religious purposes.[10]

Ironically, the government itself has already articulated the criteria that it considers sufficient to demonstrate that an organization is religious in promulgating its religious accommodation under the contraceptive mandate. Apart from the requirement, which amici challenge here, that the organization be a nonprofit, the accommodation regulations require only that a claimant need (a) hold itself out to the public as religious, (b) have a religious objection to compliance with the mandate, and (c) provide notice to those affected by its decision (that is, its employees, health insurance issuers, and third party administrators) that it has such a religious objection to the mandate. *See* Treas. Reg. § 54.9815-2713A (2014). Although amici disagree with the limited nature and scope of the remedy provided under this accommodation, this accommodation is compelling evidence of the elements that the government considers sufficient to establish that a claimant has sincere religious objections to the mandate.

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[10] This approach has been used successfully and without incident by one of the few religious for-profit corporations to be listed on a public exchange. *See, e.g.*, DIDAX, Inc., Form 10K-B dated December 31, 1997, available at http://www.sec.gov/Archives/edgar/data/1037599/0000950133-98-000831-index.html.

II. THE GOVERNMENT'S CATEGORICAL DENIAL OF FREE EXERCISE RIGHTS TO FOR-PROFIT BUSINESSES WOULD PERMIT FEDERAL AND STATE GOVERNMENTS TO MANDATE ANY MEDICAL SERVICE, PROCEDURE, OR TREATMENT, INCLUDING ELECTIVE ABORTION.

If the government's categorical denial of free exercise protections to for-profit businesses and their owners is upheld, it is a single small step from requiring coverage for abortifacient contraceptives to requiring coverage for elective abortions. That single step is not a mere theoretical "slippery slope"; in the case of these amici and many others, it is imminent. Washington State, where Electric Mirror is headquartered, is poised to enact legislation, the Washington Reproductive Parity Act ("RPA"), HB 2148 (2014), that will require any health plan that provides coverage for maternity care or services to also provide coverage for the voluntary termination of a pregnancy. For Aaron Mischel, whose life nearly ended in an abortion clinic, and for his adoptive parents and siblings, forcing their closely-held family business Electric Mirror to implement such a mandate would be a severe violation of their most deeply held religious beliefs.

The impact of the Washington Reproductive Parity Act is magnified by the fact that current federal law requires almost all employers to cover maternity services and requires all individual health plans to do the same. The Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k), requires any business employing more than 15 persons to cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions. This effectively encompasses all corporations in the large group market, all of whom are mandated by the ACA to provide insurance to their employees.[12] Additionally, section 1302(b) of the ACA defines maternity and newborn care as "essential health benefits" that must be covered by all non-grandfathered plans in the individual and small group markets both inside and outside of the ACA exchanges. In essence, federal law requires employers and individuals to provide health insurance covering maternity care while Washington State is poised to mandate coverage of elective abortion on businesses that provide the federally required maternity care in their federally mandated health insurance.

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[12] The ACA's employer mandate that requires "large employers" to offer their full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan or face an assessable payment, 26 U.S.C. § 4980H(a), applies to any employer who employed an average of at least 50 full-time employees on business days during the preceding calendar year, 26 U.S.C. § 4980H(c)(2)(A). All of these employers are therefore subject to the requirements of the Pregnancy Discrimination Act of 1978 and must cover maternity care services whether they purchase insurance on the open market or self-insure.

When the RPA was first introduced in 2012, amici were faced with the untenable choice either of violating their religious convictions by providing the objectionable coverage for elective abortions or of failing to offer Electric Mirror's employees health care coverage through a group health plan. To forestall the requirement to provide coverage for elective abortions, Electric Mirror implemented a self-insurance program. In doing so, it incurred substantially increased costs and embraced significant added potential risks[13] in order to avoid being forced to violate its religious beliefs under the impending Washington law.[14]

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[13] As one example, if multiple employees incur substantial medical costs in the same plan year, the added financial burden for covering such expenses could be more than Electric Mirror can pay.

[14] Subsection 8(a) of H.B. 2148 currently contains conscience provisions that purport to protect individuals and organizations who have a religious or moral tenet opposed to a specific service from being required to purchase coverage for that service. *See* H.B. 2148, 63rd Legislature § 8(a) (2014). However, the immediately following subsection 8(b) nullifies this apparent protection by stating that an objection under subsection 8(a)

But despite these increased costs and risks, self-insuring affords Electric Mirror no protection from the ACA's mandate to provide abortifacient contraceptives.[15] Nor will self-insuring protect Electric Mirror from being required to provide coverage for elective abortion in the near future if Washington State adopts the ACA's coverage mechanisms or the ACA is expanded to cover elective abortion.

If this Court embraces the government's position that corporations and their owners forfeit their free exercise rights when they enter into commerce for profit, businesses like Electric Mirror and families like the Mischels will be left with an untenable choice. On the one hand, they face violating their religious belief that as stewards they are called to support their employees and encourage families through providing generous health benefits and

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"shall not result in an enrollee being denied coverage of, and timely access to, any service or services excluded from their benefits package as result." The obvious conflict between these two subsections is acknowledged by the following subsection 8(c), which directs the State Insurance Commissioner to attempt to reconcile these conflicting provisions, but that has proved unworkable in implementing similar language in past legislation. Given the ambiguity and uncertainty attending these contradictory provisions, *amici* concluded that the only way to protect their sincere religious convictions not to provide coverage for elective abortions was for Electric Mirror to self-insure for so long as that option remains.

[15] The contraceptive mandate applies to all group health plans and any health insurance issuer offering group or individual health insurance coverage. 42 U.S.C. § 300gg–13(a). A group health plan is broadly defined as any plan established or maintained by an employer and that provides medical care including both purchased and self-insured plans.

maternity care. This is the same conviction that compelled Faith and Doc Mischel to provide a loving family to Aaron after his 14 year-old mother was raped and made the heroic decision to relinquish him for adoption). On the other hand, once HB 2138 is enacted, they face being forced to violate their religious belief in the inherent value and sanctity of all human life as a creation in the image and likeness of God, thereby compelling Aaron and his family to fund the very procedure that would have ended his life. Contrary to the government's assertion, the choice of exactly *how* the Mischels and Electric Mirror would like to violate their deeply held religious beliefs is no choice at all.

CONCLUSION

For the foregoing reasons, this Court should hold that for-profit organizations and their owners are protected by the Religious Freedom Restoration Act of 1993 and by the Free Exercise Clause of the First Amendment. Amicus respectfully submits that the judgment in *Hobby Lobby* should be affirmed and the judgment in *Conestoga Wood* should be reversed.

Respectfully submitted,

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JANUARY 2014

AMICUS
CURIAE
BRIEF

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OFFICE OF THE CLERK

Nos. 13-354 & 13-356

IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, *et al.*,
Petitioners,
v.
HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,
v.
KATHLEEN SEBELIUS, *et al.*,
Respondents.

**On Writs of Certiorari
to the United States Courts of Appeals
for the Third and Tenth Circuits**

BRIEF OF *AMICUS CURIAE* ETHICS AND PUBLIC POLICY CENTER IN SUPPORT OF RESPONDENTS IN NO. 13-354 AND PETITIONERS IN NO. 13-356

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INTEREST OF THE *AMICUS CURIAE*[1]

The Ethics and Public Policy Center ("EPPC") is a nonprofit research institution dedicated to defending American ideals and to applying the Judeo-Christian moral tradition to critical issues of public policy. A strong commitment to a robust understanding of religious liberty pervades EPPC's work. For example: EPPC's American Religious Freedom program is devoted to protecting and strengthening the inherent religious freedoms of Americans of all faiths. EPPC's Faith Angle Forum aims to strengthen reporting and commentary on how religious believers, religious convictions, and religiously grounded moral arguments affect American politics and public life. EPPC scholars, such as EPPC Distinguished Senior Fellow George Weigel, write prolifically in defense of religious freedom. EPPC scholars have extensively criticized the HHS mandate for its intrusions on religious liberty.

SUMMARY OF ARGUMENT

The Government's argument that for-profit corporations are not "persons" capable of the "exercise of religion," *see* U.S. Br. in No. 13-354, at 16 ("U.S. Br."), misconstrues both the text of the Religious Freedom

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The Respondents in No. 13-354 have consented to the filing of this brief in an accompanying letter, and the remaining parties in both cases have filed letters with the Clerk of the Court providing blanket consent to the filing of *amicus curiae* briefs.

Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"), and the scope of the Free Exercise Clause.

1. The Government is wrong in contending that the "exercise of religion" under RFRA must be construed as narrowly limited to the scope of the constitutional concept of the "free exercise" of "religion" that was explicitly recognized in this Court's case law prior to *Employment Div. v. Smith*, 494 U.S. 872 (1990).

a. The Government overlooks the fact that Congress—motivated by its disagreement with some courts' use of a narrow reading of the Free Exercise Clause to limit RFRA's coverage—specifically amended RFRA in 2000 to *decouple* its definition of the "exercise of religion" from the strictures of the Free Exercise Clause. *See* Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, § 7, 114 Stat. 803, 806 (2000). Thus, Congress struck the prior language from RFRA that had equated the "exercise of religion" under RFRA with "the exercise of religion under the First Amendment of the Constitution." 42 U.S.C. § 2000bb-2(4) (1994 ed.). Instead, Congress inserted into RFRA a cross-reference to the definition of "religious exercise" under RLUIPA—a broader definition that explicitly covered "*any* exercise of religion" (without any requirement that it be recognized as triggering the Free Exercise Clause), 42 U.S.C. § 2000cc-5(7)(A). Moreover, Congress further directed that this statutory phrase—which applied both to RLUIPA and to RFRA—was to be broadly construed "to the maximum extent permitted by [its] terms" so as to favor "a broad protection of religious exercise." RLUIPA, Pub. L. No. 106-274, § 5(g), 114 Stat. at 806, *partially codified* at 42 U.S.C. § 2000cc-3(g). This intentional decoupling and broadening of the *statutory* definition was the only way that Congress could achieve its objective of abrogating a line of cases that had used the Free Exercise Clause to construe RFRA too narrowly.

Moreover, the Government is wrong when it claims that "'any reference to for-profit corporations' is '[e]ntirely absent from the legislative history.'" U.S. Br. 21 (citation omitted). On the contrary, the House Report analyzing the predecessor bill to RLUIPA specifically noted that its provisions were "*equally applicable whether a claimant is a natural person or a corporation*." H.R. REP. NO. 106-219, at 13, n.49 (1999) (emphasis added).

b. Where, as here, those who control the corporation have formally announced the corporation's adherence to a particular religious idea and have sought to conform the corporation's conduct to those enunciated beliefs, the corporation's actions in conformity with those religious views constitute the "exercise of religion" under RFRA's broad definition.

2. Even if the Government were correct that RFRA must be construed as protecting only those exercises of religion that are covered by the Free Exercise Clause, a for-profit corporation's exercise of religion is still covered.

a. Nothing in RFRA's definition of the "exercise of religion" suggests that Congress intended that concept to be artificially truncated as embracing only those specific results that had been recognized in this Court's pre-*Smith* case law. In any event, this Court's decision in *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961), supplies a pre-*Smith* basis for recognizing free exercise rights by a for-profit corporation. The Government emphasizes that a *plurality* in *Gallagher* reserved the question whether the for-profit corporation could assert a free exercise claim. U.S. Br. 18. But the Government overlooks the fact that the remaining five Justices *did* accept that the corporate plaintiff's free exercise rights were burdened.

b. The "exercise" of "religion" under the Free Exercise Clause (and RFRA) extends to the exercise of religion by a for-profit corporation.

The "free exercise" of religion under the First Amendment extends to "acts or abstentions ... engaged in for religious reasons." *Smith*, 494 U.S. at 877. The Government is wrong in arguing that for-profit corporations cannot meet this test because they supposedly cannot have *religious* views. U.S. Br. 25.

The Government's concession that *some* corporations exercise religion within the meaning of the Free Exercise Clause confirms that there is nothing intrinsic to the corporate form that precludes for-profit corporations from exercising religion. But it makes no sense to then say that when a nonprofit corporation and a for-profit corporation engage in the same conduct, only the nonprofit corporation has Free Exercise protection. Moreover, this Court has already recognized, in Free Exercise cases involving individuals, that profit-making activities (*e.g.*, carpentry, farming, and shopkeeping) may involve the exercise of religion if the person performing them undertakes to do so in conformity with a sincerely held religious belief. The Government provides no coherent basis for concluding that profit-making conduct is religious exercise when conducted by an individual but not when conducted by a corporation.

3. Upholding the claims in this case will not

result in widespread corporate immunity from federal laws, because the number of for-profit corporations that will be able to demonstrate a corporate adherence to a religious belief that is sincerely held is limited and because various laws, even as applied to such corporations, will survive RFRA's scrutiny. Here, the corporations before the Court do exercise religion and the obligation in question does not survive scrutiny under RFRA or the Free Exercise Clause. It is the Government's misreading of RFRA and the Free Exercise Clause that would raise disturbing implications.

ARGUMENT

RFRA's protections are triggered if the Government "substantially burden[s] a *person's* exercise of religion." 42 U.S.C. § 2000bb-1(a) (emphasis added). The Dictionary Act, in turn, states that, "unless the context indicates otherwise," the term "person" in any Act of Congress "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Here, the context does *not* indicate that "person" includes only "individuals," because even the Government concedes that some corporations (*viz.*, religious non-profit corporations) have rights under RFRA. And because the text of the Dictionary Act does not draw any distinction between types of corporations, it is clear that "person," for purposes of RFRA, includes all corporations.

The Government does not directly dispute that conclusion, but instead argues that, even if for-profit corporations are "persons," they are not "persons" capable of the "exercise of religion" and therefore lack any rights under RFRA. The Government's argument essentially proceeds in two steps. First, the Government contends that, because RFRA was intended to reinstate the pre-*Smith* "compelling interest test as set forth in prior Federal court rulings" under the Free Exercise Clause, 42 U.S.C. § 2000bb(a)(5), the operative phrase used in RFRA—"a person's exercise of religion"—must be construed as being limited to the pre-*Smith* understanding of the scope of the "free exercise" of religion under the First Amendment. U.S. Br. 22. Second, the Government asserts that, because this Court's pre-*Smith* case law supposedly shows that free exercise rights were "reserved to individuals and religious non-profit institutions," for-profit corporations therefore lack such rights under RFRA. U.S. Br. 18-19. The Government's argument misconstrues both the text of RFRA and the scope of the Free Exercise Clause.

I. By Amending RFRA to Decouple Its Definition of the "Exercise of Religion" From the Free Exercise Clause, and Instead Directing That the Phrase Should be Given the "Maximum" Breadth Permitted by Its Terms, Congress Confirmed That For-Profit Corporations Are Covered

The Government's first assumption—that RFRA extends *only* to those exercises of religion that would qualify as the "free exercise" of religion under the Free Exercise Clause—was correct under the original version of RFRA, but is no longer true. To be sure, the corporate Plaintiffs' actions here qualify as the "exercise of religion" even under the standard of the Free Exercise Clause, as explained below. *See infra* at 25-28. But the Court need not reach the question whether the Free Exercise Clause protects a for-profit corporation's exercise of religion, because RFRA's language goes beyond the constitutional standard and clearly covers this case.

A. The Government's Arguments Overlook Congress's Explicit Amendment to RFRA's Definition of the "Exercise of Religion"

As originally enacted, RFRA explicitly defined the scope of the "exercise of religion" protected by RFRA as being co-extensive with the identical concept under the Free Exercise Clause. Specifically, Section 5 of RFRA provided that "the term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution." Pub. L. No. 103-141, § 5(4), 107 Stat. 1488, 1489 (1993), *codified at* 42 U.S.C. § 2000bb-2(4) (1994 ed.).

However, in enacting RLUIPA, Congress amended the definition of "exercise of religion" in RFRA to match the broader formulation used in RLUIPA. Thus, Congress struck the phrase "the exercise of religion under the First Amendment of the Constitution" from RFRA's definition of "exercise of religion" and instead inserted the phrase "religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. § 2000cc-5]." RLUIPA, § 7(a)(3), 114 Stat. at 806; *see* 42 U.S.C. § 2000bb-2(4) (2006 ed.) (current Section 5 of RFRA). The definition of "religious exercise" in Section 8 of RLUIPA—which thus also defines the meaning of "exercise of religion" in RFRA—likewise lacks any language restricting that concept to the constitutional scope of the "free exercise" of religion under the Free Exercise Clause. Instead, RLUIPA defines religious exercise to "include[] *any* exercise of religion," without regard to whether it is, strictly speaking, within the scope of the constitutional meaning of "free exercise" under the First Amendment. 42 U.S.C. § 2000cc-5(7)(A) (emphasis added).

The decoupling of RFRA's statutory definition from the constitutional understanding was no accident, as is confirmed by two additional aspects of RLUIPA's broader definition. RLUIPA's definition of "religious exercise" specifically provides that (1) it includes any exercise of religion regardless of "whether or not [it is] compelled by, or central to, a system of religious belief"; and (2) it specifically defines the "use, building, or conversion of real property for the purpose of religious exercise" as an exercise of religion. *Id.*, § 2000cc-5(7)(A), (B). The unmistakable import of this language is that Congress intended RFRA to employ these two rules without regard to whether they correspond to the constitutional lines that would apply under the Free Exercise Clause.

In particular, by enacting the first of these rules, Congress statutorily abrogated cases that had (wrongly) held that, because the Free Exercise Clause supposedly requires a showing of interference with a belief that is "central" to and "mandated" by religious belief, such requirements also apply to limit RFRA. *See, e.g.*, *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995). Other cases had (correctly) rejected that reading of the Free Exercise Clause and of RFRA. *See, e.g.*, *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 801 (1997). Congress lacks the authority to decide which of these readings of the Free Exercise Clause was correct, *see City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (Congress lacks the power to "alter[] the meaning of the Free Exercise Clause"), but it certainly had the authority to do what it did in

RLUIPA—namely, to amend RFRA to specifically *decouple* RFRA's definition from the Free Exercise Clause and then to mandate which rule it wanted to apply as a statutory matter. *See* H.R. REP. NO. 106-219, at 30 (1999) (discussing H.R. 1691, a predecessor bill to RLUIPA) (amended definition of "religious exercise" was intended to "clarify[] issues that had generated litigation under RFRA").[2]

Moreover, Congress included in RLUIPA a rule of construction that specifically requires that "[t]his Act shall be construed in favor of a broad protection of *religious exercise*, to the maximum extent permitted by the terms of this Act and the Constitution." Pub. L. No. 106-274, § 5(g), 114 Stat. at 806 (emphasis added). RLUIPA's definition of that term must therefore be broadly construed, and that broad construction would likewise apply to RFRA, which incorporates RLUIPA's definition by cross-reference. *See* 42 U.S.C. § 2000bb-2(4). Moreover, the provision of law that amended RFRA to include a cross-reference to RLUIPA's broad definition of "religious exercise"—Section 7(a)(3) of RLUIPA—is *itself* part of "[t]his Act," Pub. L. No. 106-274, § 5(g), 114 Stat. at 806, thereby further confirming that RLUIPA's rule of broad construction applies to RFRA's definition of "exercise of religion."[3]

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[2] After the predecessor bill (which applied to a wide range of state and local laws beyond those concerning land use and institutionalized persons) failed to pass the Senate, a new bill containing the final version of RLUIPA (which was changed to be largely limited to those two topics) was introduced, brought immediately to the floor of each house, and passed with almost no debate. *See Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827 (S.D. Ohio 2002). The final definition of "religious exercise" in RLUIPA (and, by amendment, in RFRA) largely tracked that of the predecessor bill, whose legislative history thus remains pertinent on that point. *See, e.g.*, *Begier v. I.R.S.*, 496 U.S. 53, 59 n.3 (1990) (consulting legislative history of predecessor bill).

Given that (1) Congress specifically struck from RFRA the prior reference to the constitutional understanding of the "exercise" of "religion"; (2) Congress instead adopted a purposely sweeping statutory definition; and (3) Congress further provided that this sweeping definition must be construed "in favor of a broad protection of religious exercise, *to the maximum extent permitted by the terms of this Act* and the Constitution,"[4] Pub. L. No. 106-274, § 5(g), 114 Stat. at 806, the text of RFRA refutes the Government's core presumption that a "person's exercise of religion" under RFRA must be construed as being limited only to those situations in which the Free Exercise Clause would protect the particular activities in question by the particular persons before the court. And, for the same reasons, there is no textual justification whatsoever for narrowly construing RFRA as limited only to those exercises of religion that were expressly recognized in this Court's pre-*Smith* case law. *See also infra* at 15.

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[3] In classifying RLUIPA to the unenacted Title 42 of the U.S. Code, the codifier replaced "[t]his Act" with "[t]his chapter," a wording that could be misread to suggest that RLUIPA's broad rule of construction applies only to "Chapter 21C" (where most of RLUIPA is classified) and not to "Chapter 21B" (where RFRA is classified). The codifier, however, flagged this issue, pointing out in a note that parts of RLUIPA were classified elsewhere and that this provision would therefore apply to them as well. *See* 42 U.S.C. § 2000cc-3, *note*. In any event, the text of the public law controls. *See* 1 U.S.C. §§ 112, 204.

[4] The reference to constitutional limitations obviously refers to the limitations imposed by *Boerne*, because parts of RLUIPA apply to state and local governments. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709 (2005). With respect to burdens imposed by *federal* law, Congress in RFRA had the authority to require accommodation of religion to a degree beyond what the Free Exercise Clause would require, *see, e.g.*, *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 424 & n.1 (2006), and RFRA's broader accommodation does not violate the Establishment Clause, *id.* at 436 (citing *Cutter*).

B. The Corporate Plaintiffs Here Are Clearly Protected by RFRA's Amended Language

RFRA's sweeping definition of "exercise of religion" amply covers the actions at issue here. Because RFRA's definition of the "exercise of religion" must be broadly construed "to the maximum extent permitted" by the statutory language, so as to give "a broad protection of religious exercise," 42 U.S.C. § 2000cc-3(g), RFRA extends to any action or inaction by a person that "bring[s] into play" or "realize[s] in action" that person's religious beliefs. *See* WEBSTER'S THIRD NEW INT'L DICTIONARY 795 (1966) (defining the "exercise of" something). Of course, to count as a *religious* belief, and not simply an opportunistic preference about how to act, the view must be both a religious one (as opposed to a philosophical one) and it must be sincerely held. *See id.* at 1918 (defining "religion" as, *inter alia*, "conduct in accord with divine commands"; "a way of life recognized as incumbent on true believers"; and "the profession or practice of religious beliefs"). Where, as here, those with authority under state law to control the corporation's actions and to set its overall policy have taken formal steps to announce the corporation's adherence to a particular religious idea and to conform the corporation's conduct to those enunciated beliefs (thus confirming the sincerity of those beliefs), the corporation's actions in conformity with those religious views constitute the "exercise of religion." *See infra* at 29-31 (explaining the various prerequisites that must be satisfied before a corporation may be said to exercise religion). Indeed, as explained below, the corporate Plaintiffs' actions here would qualify as the "exercise" of "religion" even under the Free Exercise Clause's standards, and they therefore necessarily satisfy RFRA's *broader* definition. *See infra* at 25-28.

What is more, the legislative history of RLUIPA confirms the intended breadth of Congress's rewriting of RFRA's definition of "exercise of religion," and it also confirms RFRA's applicability to for-profit corporations. In its Report discussing the predecessor bill to RLUIPA (H.R. 1691), *see* note 2 *supra*, the House Judiciary Committee noted that the bill broadened RFRA by clarifying that the "burdened religious activity need not be compulsory or central to a religious belief system as a condition" for a claim under either Act. *See* H.R. REP. NO. 106-219, at 13. The Committee then made the following observation in a footnote attached to that comment:

> One issue raised during the Subcommittee Markup was *whether a business corporation could make a claim* under H.R. 1691. The requirement of H.R. 1691 that the claimant demonstrate a substantial burden on religious exercise *is equally applicable whether a claimant is a natural person or a corporation.* Most corporations are not engaged in the exercise of religion, but religious believers, such as people in the Kosher slaughter business, should not be precluded from bringing a claim under H.R. 1691 simply because they incorporated their activities pursuant to existing law.

Id. at 13 n.49 (emphasis added).[5] The Government is thus simply wrong when it says that "'nowhere' in RFRA's legislative history 'is there any suggestion that Congress foresaw, let alone intended that, RFRA would cover for-profit corporations.'" U.S. Br. 21 (citation omitted). The legislative history shows that, in amending RFRA's definition of "exercise of religion," Congress foresaw and intended what the text plainly indicates—that RFRA applies to an exercise of religion by a for-profit corporation.

II. Even If RFRA's Definition of the "Exercise of Religion" Is Co-Extensive With the First Amendment, It Still Covers a For-Profit Corporation's Exercise of Religion

Even if the Government were correct that RFRA must be construed as protecting only those exercises of religion that are covered by the Free Exercise Clause, the result would be the same—a for-profit corporation's exercise of religion is covered.

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[5] This issue was raised again when H.R. 1691 was considered on the House floor. That bill had sought, *inter alia*, to create a new post-*Boerne* remedy against a wide array of state and local laws. H.R. REP. NO. 106-219, at 9-12. A floor amendment was offered to provide that, in certain civil rights cases, the *new* remedy created by the bill—but *not* RFRA's existing remedies—would have applied only to very small employers and to any "religious corporation, association, educational institution ..., or society." 145 CONG. REC. H5597 (July 15, 1999). Supporters of the amendment argued that it was necessary to prevent corporations such as "General Motors" from using the bill to defeat the application of state and local civil rights laws. *Id.* at H5598. Notably, however, even the amendment's sponsor conceded that, *except* for the amendment's specific carve-outs, "[a]ny person would have standing" to assert a claim, so that "*businesses of any size could bring any free exercise claims.*" *Id.* (emphasis added). The amendment was defeated in the House, *id.* at H5607, but the House bill then failed in the Senate. Subsequently, in 2000, the prior bill's new remedy was narrowed in RLUIPA to generally apply only to state and local laws concerning land use and institutionalized persons, but thus-narrowed, RLUIPA contains *no* carve-out of corporations and imposes none on RFRA.

A. The Government Wrongly Limits the Constitutional Inquiry to Pre-*Smith* Case Law, But Fails Even Under That Test

As an initial matter, the Government wrongly contends that the only way that RFRA can be construed to embrace a for-profit corporation's exercise of religion is to identify a pre-*Smith* decision of this Court affirmatively upholding that. U.S. Br. 16-18. The extraordinary implication of the Government's constricted focus is that, even if the Court were to conclude *today* that the Free Exercise Clause applies to for-profit corporations, RFRA would still not apply because the Government claims that the Court had not said that before *Smith*. In effect, the Government seeks to engraft onto RFRA a temporal limitation that is reminiscent of that imposed on habeas corpus relief by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which in many cases restricts a habeas petitioner to relying only on "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also Williams v. Taylor*, 529 U.S. 362, 412 (2000) (AEDPA limits reliance to "the holdings, as opposed to the dicta, of *this* Court's decisions *as of the time* of the relevant state-court decision") (emphasis added). But in contrast to AEDPA, nothing in the text of RFRA suggests that Congress sought to limit RFRA in such a way.

Both as originally enacted and as broadened by

RLUIPA's amendments, RFRA *at least* extends to any exercise of religion within the meaning of the Free Exercise Clause. As noted above, the original version of RFRA made its definition co-extensive with the "exercise" of "religion" under the Free Exercise Clause. *See* 42 U.S.C. § 2000bb-2(4) (1994 ed.); *see also supra* at 7. Under the amended and broader version of RFRA's definition, the Act extends to "*any* exercise of religion"—a phrase that at the very least sweeps in *anything* that would qualify as the exercise of religion under the Free Exercise Clause. 42 U.S.C. § 2000cc-5(7)(A) (emphasis added); *see also* 42 U.S.C. §§ 2000bb-2(4) (2006 ed.).

Accordingly, nothing in either version remotely suggests that Congress intended that concept to be artificially truncated as embracing only those specific results that had been recognized in this Court's pre-1990 case law. On the contrary, both versions lack any temporal language whatsoever. And by directing that the "exercise of religion" is to be given the broadest reading that the terms will bear, *see* Pub. L. No. 106-274, § 5(g), 114 Stat. at 806, Congress adopted an interpretive rule that is inconsistent with the Government's constricted approach.

The Government claims that RFRA's declaration of purpose supports the Government's narrow temporal approach, noting that Congress expressly sought "'to restore the compelling interest test'" applied in this Court's pre-*Smith* decisions. U.S. Br. 15-16 (quoting 42 U.S.C. § 2000bb(b)(1)). This argument fails. Even as to its restoration of the compelling-interest test, Congress did not seek to confine RFRA to only those results that had been recognized in this Court's pre-1990 decisions. Rather, Congress enacted general statutory language embodying the compelling-interest test and left the future elaboration and application of that language to case-by-case analysis. 42 U.S.C. § 2000bb-1(b); *see also* S. REP. NO. 103-111, at 9 (1993) (RFRA "is not a codification of the result reached in any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions"). But even if (contrary to the reality) Congress had intended to freeze the explication of the compelling-interest test to that reflected in pre-1990 decisions, that would not establish that Congress similarly sought to constrain *all other* elements of a RFRA claim, such as what counts as an "exercise of religion."

Accordingly, to the extent that the "exercise of religion" is construed as co-extensive with the constitutional understanding of the "free exercise" of religion, the question is simply whether the Free Exercise Clause does in fact protect a corporation's exercise of religion, *regardless* of whether the Court had occasion to decide that specific issue prior to 1990. As explained below, the answer to that question is "yes." *See infra* at 20-29.

In any event, even if it were necessary to identify a basis in this Court's pre-1990 case law for concluding that a for-profit corporation can engage in the exercise of religion, this Court's decision in *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961), supplies that basis.

In *Gallagher* and three companion cases, a variety of plaintiffs asserted free exercise challenges to so-called "Blue laws" requiring most shops to be closed on Sundays. Specifically, in *Gallagher*, a for-profit kosher supermarket, several of its customers, and a local rabbi contended that, because their religious obligations required the market to be closed from sundown Friday until sundown Saturday, Massachusetts' Blue laws requiring the market to also be closed on Sunday imposed an "extreme economic disadvantage" on the market on account of religion. 366 U.S. at 630. On appeal in this Court, Massachusetts argued, *inter alia*, that a "soulless corporation," which cannot "be baptized," lacks any "religious commitment in its artificial person which permits it to assert religious freedom as if it were one of the schoolchildren in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)." *See* Appellants' Br. 29, 31, *Gallagher* (No. 11). The plaintiffs responded, *inter alia*, that this Court had already recognized that corporations may directly challenge state statutes under the Fourteenth Amendment's due process clause "because of violations of freedoms of the First Amendment," and that there was no basis for treating the Free Exercise Clause differently. *See* Appellees' Br. 17, *Gallagher* (No. 11).

The Government emphasizes that a *plurality* of the Court in *Gallagher* expressly reserved the question whether the for-profit corporation could assert a free exercise claim. U.S. Br. 18. Instead, as the Government notes, the plurality summarily concluded that the result was controlled by the Court's rejection of an identical claim on the merits in the companion case of *Braunfeld v. Brown*, 366 U.S. 599 (1961), in which the plaintiffs were individual shopkeepers. *Gallagher*, 366 U.S. at 631. But the Government overlooks the fact that the remaining five Justices *did* accept that the corporate plaintiff's free exercise rights were burdened, although they differed as to whether that claim was meritorious.

The three dissenting Justices in *Gallagher* obviously agreed that the plaintiff for-profit corporation could assert what they concluded was a meritorious free exercise claim. 366 U.S. at 642 (Brennan, J., joined by Stewart, J., dissenting) (concluding that the statute, "*as applied to the appellees in this case*, prohibits the free exercise of religion") (emphasis added); *see also McGowan v. Maryland*, 366 U.S. 420, 578-79 (1961) (Douglas, J., dissenting as to four related cases, including *Gallagher*) (concluding that the burdens imposed by the Blue laws constituted "state interference with the 'free exercise' of religion" and that he therefore "dissent[ed] from applying criminal sanctions against *any* of these complainants") (emphasis added).

In an 85-page separate opinion that exhaustively examined the claims presented in the four related cases (including *Gallagher*), Justice Frankfurter, joined by Justice Harlan, did not follow the *Gallagher* plurality in relying on *Braunfeld* as the sole vehicle for analyzing the merits of the free exercise claims presented. Instead, Justice Frankfurter analyzed the claims of both "the *Gallagher* appellees and *Braunfeld* appellants," without in any way suggesting that he was following the plurality's approach of *omitting* from his analysis the closely held for-profit corporation that was the *only* retailer plaintiff in *Gallagher*. *McGowan*, 366 U.S. at 514 (op. of Frankfurter, J.).

In examining those claims on the merits, Justice Frankfurter concluded that any burden that the Blue laws placed on the "*customers* of the Crown Kosher Super Market in the *Gallagher* case" consisted of only a minor "inconvenienc[e] in their shopping" and was "not considerable." *Id.* at 521 (emphasis added). By contrast, the "burden on retail sellers"—which would include *both* the closely held corporate plaintiff in *Gallagher* and the individual merchants in *Braun-*

feld—"is considerably greater." *Id.* Nonetheless, Justice Frankfurter concluded that the free exercise challenge failed on the merits. *Id.* at 521-22. He acknowledged that, to offset the competitive disadvantage resulting from being closed two days a week (*i.e.*, both Saturday and Sunday), there would be a need for greater industry and initiative by the various individuals who ran the small shops in *Gallagher* and *Braunfeld*. *Id.* But he concluded that this "disadvantage," and the law's "imposition on the Sabbatarian's religious freedom" was outweighed by the countervailing "community interests which must be weighed in the balance." *Id.*

Justice Frankfurter's treatment of the corporate retailer in *Gallagher* stands in sharp contrast to his agreement that a *different* corporate plaintiff in another companion case *did* lack standing to assert a free exercise claim. *Id.* at 468 n.6. In *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961), the Court held that the particular corporate plaintiff in that case lacked standing to raise a free exercise challenge. The Court reached that conclusion, not because the plaintiff was a corporation, but rather "[f]or the same reasons stated in *McGowan v. Maryland*" with respect to the *individual* plaintiffs in the latter case. *Id.* at 592. In the cited discussion in *McGowan*, the Court held that the plaintiffs could not raise a Free Exercise Clause claim because "the record is silent as to what appellants' religious beliefs are" and therefore they failed to "allege any infringement of their own religious freedom due to Sunday closing." 366 U.S. at 429. Justice Frankfurter agreed with this conclusion, and in doing so contrasted the corporate plaintiff in *McGinley* with the corporate plaintiff in *Gallagher*:

> As appellant retailers and retail employees in the *McGowan* and *McGinley* cases have urged neither here nor below any question of infringement of their own rights of conscience, I agree with THE CHIEF JUSTICE that they have no standing to raise the 'free exercise' issue. … Unlike appellants in *Braunfeld* and appellees in *Gallagher*, they have not urged that their remaining shut on *any* day of the week for *any* reason causes Sunday closing to disadvantage them peculiarly. They assert a right to operate seven days a week—a right in which they claim an economic, not a conscientious interest.

366 U.S. at 468 n.6 (op. of Frankfurter, J.).

A majority of the Justices in *Gallagher* thus concluded that the corporate plaintiff in that case *had* asserted a cognizable burden on free exercise rights, but differed as to the merits of that claim. Accordingly, the Government's construction of RFRA must still be rejected even if the Government were correct in insisting that there must be a pre-*Smith* decision from this Court recognizing that a corporate plaintiff may assert a free exercise claim.

B. The Protections of the Free Exercise Clause Extend to a For-Profit Corporation's Exercise of Religion

In addressing the question of whether corporations may exercise religion within the meaning of the Free Exercise Clause, the proper analysis, and the one indicated by the text of the clause, is the same one that the Court took in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), with respect to the Free Speech Clause. Like the Free Speech Clause, the Free Exercise Clause protects an *activity* without specifying or limiting *whose* activity is protected. *See* U.S. CONST. amend. I ("Congress shall make no law ... prohibiting the free exercise [of religion]; or abridging the freedom of speech, or of the press...."). Accordingly, the appropriate inquiry is (1) to identify the *behavior* that is embraced within the scope of the clause's language, (2) to determine whether corporations are capable of performing that behavior, and (3) to examine whether there is any reason why the performance of that behavior by a corporation should remove those instances of such behavior from the scope of the clause. *See Bellotti*, 435 U.S. at 784 (rejecting the view that, under the Free Speech Clause, "speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation"); *see also Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 342 (2010) (same). That analysis confirms that the Free Exercise Clause protects the exercise of religion by a for-profit corporation.

1. The Free Exercise Clause Protects Action or Inaction Motivated by Religious Belief

The "free exercise of religion" includes the expression of adherence to religious doctrine, *Smith*, 494 U.S. at 877, but that aspect of free exercise is also (and perhaps more amply) protected by the Free Speech Clause, which fully protects the expression of a wide variety of ideas, including religious ones. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (both "'the Free Speech and Free Exercise Clauses protect'" any "'private speech endorsing religion'") (citation omitted). The distinctive aspect of the Free Exercise Clause, and the aspect at issue here, is the protection it extends to the "*exer-*

cise" of religious beliefs in one's *conduct*. *See* U.S. CONST. amend. I (emphasis added).

This Court has repeatedly recognized that, in addition to protecting adherence to religious ideas and doctrines, the exercise of religion also includes "acts or abstentions" that "are engaged in for religious reasons." *Smith*, 494 U.S. at 877; *see also Thomas v. Review Bd. of Indiana Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981) (Free Exercise Clause's protection extends to abstention from "conduct proscribed by a religious faith" and to "conduct mandated by religious belief"); *Braunfeld*, 366 U.S. at 603 (plurality) ("action ... in accord with one's religious convictions"). Moreover, the religiously motivated conduct protected is *not* limited to participation in acts of worship, but extends to any conduct that is engaged in, or avoided, because of a sincerely held religious belief. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 257 (1982) (operation of carpentry business in conformity with Amish religious principles); *Braunfeld*, 366 U.S. at 603-07 (analyzing burden of Sunday closing laws on retailers whose religious beliefs also required closing stores on Saturday). That is, of course, not to say that the Free Exercise Clause precludes all burdens on religiously motivated conduct; rather, the point is that a restriction on religiously motivated conduct is sufficient to *trigger* the Free Exercise Clause and to require application of the proper constitutional standards for determining whether that restriction is valid. *Lee*, 455 U.S. at 257 (burden on religiously motivated conduct "is only the beginning, however, and not the end of the inquiry"); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Thomas*, 450 U.S. at 718-19.

Accordingly, the irreducible elements of the conduct that qualifies as the "free exercise" of religion under the First Amendment are (1) action or abstention from action (2) motivated by (3) adherence to a religious belief. *See Smith*, 494 U.S. at 877 ("acts or abstentions ... engaged in for religious reasons"). Consideration of these elements confirms that the Government is wrong in contending that a for-profit corporation can *never* engage in the "free exercise" of religion.

2. There Is No Basis to Deny Protection to an Exercise of Religion Merely Because It Is Done by a For-Profit Corporation

The Government does not really contest that for-profit corporations can take actions and that they can have motivations, nor could it. Corporations obviously are capable of taking or refraining from actions; indeed, the whole point of the mandate at issue in this case is to coerce corporations to take the *action* of providing insurance coverage that includes contraceptives. And in making decisions as to what actions to take or not to take, corporations (through those who act for them) are capable of forming intention and of acting *because of* a particular motivation or purpose. *Cf.*, *e.g.*, W. FLETCHER, ET AL., CYCLOPEDIA OF THE LAW OF CORPORATIONS § 4944 (2013) ("a corporation acts with a given mental state in a criminal context only if at least one employee who acts (or fails to act) possesses the requisite mental state at the time of the act (or failure to act)").

The Government instead disputes only the third element, arguing that for-profit corporations are incapable of having *religious* beliefs. U.S. Br. 25. This is so, the Government contends, because in light of the distinction between a corporation and its owners, there is "no basis on which to impute the individual-respondents' religious beliefs to the corporate-respondents." *Id.* This contention fails.

As an initial matter, it is difficult to fathom how the Government's argument could support its proffered distinction between "religious non-profit institutions" (which it concedes have free exercise rights, despite their corporate form, *see* U.S. Br. 18-19) and "for-profit corporations" (which it claims lack such rights, because of their corporate form, *id.*). If the problem is that the religious views of the founders and owners of a corporation cannot be imputed to a corporation, then that point would equally apply to religious non-profits. But as the Government concedes (U.S. Br. 17), this Court has repeatedly and explicitly recognized the free exercise rights of corporate plaintiffs who happened to be religious non-profits, *see, e.g.*, *Gonzales*, 546 U.S. at 425; *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 525. That the Government's argument—taken to its logical conclusion—would conflict with established precedent confirms that it is wrong.

Moreover, the Government's concession that *some* corporations exercise religion within the meaning of the Free Exercise Clause confirms that there is nothing intrinsic to the corporate form that precludes for-profit corporations from exercising religion. Yet under the Government's view, while a religious non-profit would be engaged in the corporate exercise of religion by running a religious bookstore propagating its views, there would be no corporate exercise of religion if that very same bookstore instead were owned by a closely-held for-profit corporation whose devout owners had committed the corporation to the same mission. It makes no sense to say that the first corporation would have RFRA and free exercise rights, but that the second corporation—even though it is engaged in the same activities—would not.

The Government's categorical position that for-profit corporations are incapable of having religious beliefs is illogical in a further respect. The distinction between a corporation and its owners, directors, or officers means that, without more, the views of such persons are not *automatically* attributable to the corporation. But it does no violence to the distinction between a corporation and its owners, directors, or officers to recognize that those who under the applicable state law have the power to control the corporation's activities can take affirmative steps to commit *the corporation* to a particular idea (such as a clean environment, support for particular legislation, etc.). *See, e.g.*, *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 n.1 (1980) (recognizing right of a *corporation* to express "opinions on critical public matters"). The Government's premise that corporations can ascribe to beliefs on all subjects *other* than religious ones makes no sense.

More fundamentally, the Government's contention that there is "no basis on which to impute the individual-respondents' religious beliefs to the corporate-respondents" (U.S. Br. 25) ignores basic principles of corporate law. The applicable state corporate law will identify the specific group of persons who possess the ultimate ability to control the overall actions of the corporation and to set policies for it; exactly who those persons are will depend upon the specific manner in which the corporation is structured. Here, those persons have in fact exercised their authority over the corporations before the

Court, by formally announcing the corporation's adherence to a religious view and by taking steps to ensure that the corporation's actions are to be carried out in conformity with those religious principles. As a result, *these* corporations do have religious beliefs and their actions in conformity with those beliefs are an exercise of religion.

Thus, for example, the terms of the management trust that controls the voting stock of Hobby Lobby and Mardel require that the trust assets be used "to create, support, and leverage the efforts of Christian ministries," and trustees are required to sign a "Trust Commitment" affirming a statement of faith and "to maintain a close intimate walk with the Lord Jesus Christ." Joint App. in No. 13-354, at 134. Hobby Lobby's "statement of purpose" further affirms that its Board of Directors "is committed" to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." *Id.* at 135. Mardel, whose activities are specifically focused on "Christian materials, such as Bibles, books, movies, apparel, church and educational supplies," has described itself as "a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support." *Id.* at 138. Conestoga, which is a closely held company owned by "practicing and believing Mennonite Christians" (Pet. App. in No. 13-356, at 9g), likewise has adopted a formal statement of its "Vision and Values" that commits the corporation to conducting its profit-making activities "in a manner that reflects our Christian heritage." Joint App. in No. 13-356, at 94. And Conestoga's Board of Directors adopted a formal statement endorsing a Biblically-based view of the sanctity of human-life from the moment of conception. Pet. App. in No. 13-356, at 22g-23g; Joint App. in No. 13-356, at 100.

Despite these corporations' public commitment to conducting their operations in accordance with particular tenets of Christian belief, the Government argues that their pursuit of profit is inconsistent with the promotion of religious values and that the corporations therefore are not protected by the Free Exercise Clause. U.S. Br. 19. But as noted above, this Court has already recognized, in cases involving individuals, that activities that are commercial in nature (*e.g.*, carpentry and farming (*Lee*); shopkeeping (*Braunfeld*)) may involve the exercise of religion if the person performing them undertakes to do so in conformity with the strictures of a sincerely held religious belief. In particular, the Court's recognition that the obviously profit-making activities at issue in *Braunfeld* involved the exercise of religion, *see* 366 U.S. at 605 (plurality); *id.* at 520-21 (op. of Frankfurter, J.), confirms that the profitable nature of an activity does not exclude it from the exercise of religion. The Government provides no coherent basis for concluding that conduct that is religious exercise when conducted by an individual is suddenly not religious exercise when conducted by a corporation. The Government's argument would mean, for example, that if an Orthodox Jewish family that runs a neighborhood kosher market (like the proprietors in *Braunfeld*) later chose to incorporate its business (so as to obtain the valuable protections of limited liability associated with the corporate form), it would lose its free-exercise right to challenge laws impinging on its ability to comply with the dictates of its faith. It is absurd and deeply problematic to construe the Free Exercise Clause, as the Government urges, as having the effect of conditioning the availability of the corporate form on the surrender of otherwise-available free exercise rights.

Indeed, the Government's position here is directly analogous to the argument made in *Bellotti*—and rejected by this Court—that free speech rights extend only to "media corporations and corporations otherwise in the business of communication or entertainment." 435 U.S. at 781. The Court agreed that the press has a "special and constitutionally recognized role ... in informing and educating the public, offering criticism, and providing a forum for discussion and debate," but the Court held that "the press does not have a monopoly on either the First Amendment or the ability to enlighten." *Id.* at 782. So too here. The fact that churches and other similar religious nonprofits have a special and constitutionally recognized role in the exercise of religion, *see*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & School*, 132 S. Ct. 694, 706 (2012) (right to free exercise includes a "special solicitude to the rights of religious organizations"), obviously does not mean that *only* such entities are capable of engaging in religious exercise.

Moreover, the Government's assertion that trying "'to make a profit'" is incompatible with "'a religious values-based mission,'" U.S. Br. 19 (citation omitted), is itself ultimately an impermissible value judgment on a point of religious doctrine. *Cf. Psalm* 90:17 (NRSV) ("Let the favor of the Lord our God be upon us, and prosper for us the work of our hands—O prosper the work of our hands!"). Contrary to the Government's restrictive view of what counts as a "religious values-based mission," neither an individual nor a corporation need take a vow of poverty in order to claim the protection of the Free Exercise Clause.

The Government notably does not rely on the district courts' erroneous theory that, because corporations cannot "pray, worship, [or] observe sacraments," for-profit corporations are incapable of *any* exercise of religion. Pet. App. in No. 13-354, at 187a; *see also* Pet. App. in No. 13-356, at 19b-20b (same). The argument is a *non sequitur*. The fact that a corporation cannot perform *all* actions that constitute the free exercise of religion does not provide a basis for denying protection to the free exercise in which they *can* and *do* engage. Corporations likewise cannot be cast for the starring role in a movie or as the lead dancer in a ballet, but that does not mean that corporations lack free speech rights for the speech and expressive activities in which they *do* engage.

In sum, even if the phrase "a person's exercise of religion" in RFRA were to be construed as co-extensive with the "free exercise" of "religion" under the First Amendment, RFRA would still cover the corporate Plaintiffs in this case.

III. The Government's Parade of Horribles Is Illusory

Lastly, the Government contends that extending RFRA to corporate entities would lead to widespread exemptions from numerous statutes. U.S. Br. 19, 26. That the Government does not like the implications of RFRA's clear statutory language provides no basis for departing from it, but in any event the Government vastly overstates the implications of extending RFRA's protections to corporate entities. Whether or not the "exercise of religion" under RFRA is viewed as being strictly co-extensive with the First Amendment, *see supra* at 11-12, RFRA would only apply to a corporation that could demonstrate (1) a *corporate* adherence (2) to a *religious* belief (3) that is *sincerely* held. Each of these legal requirements operates as a significant practical constraint on a corporation's ability to assert a free exercise claim.

First, absent some indicia that the corporation itself adheres to certain religious principles, it cannot be said that the *corporation* (as opposed merely to individuals within it) has a religious belief, much less one that is sincerely and consistently held. Obviously, incorporation as a *religious* corporation under state law would be sufficient (as the Government concedes), but so too would be (for example) a formal statement of belief adopted on behalf of the corporation itself by those persons with the power to control the corporation. But the Government is wrong to the extent that it suggests that any religious employee (however low-level) who merely seeks to invoke religion in the course of performing his or her duties would cause the corporation to subscribe to that religion. U.S. Br. 30. Likewise, the suggestion that recognizing corporate free exercise rights would require intractable inquiries into the possibly diverse beliefs of a corporation's owners and managers, *see Korte v. Sebelius*, 735 F.3d 654, 704 (7th Cir. 2013) (Rovner, J., dissenting), is a red herring. The applicable state corporate law will neutrally determine who has authority to announce whether the corporation will adhere to a particular religious view, and if the requisite persons specified by state law cannot agree to do that (or decline to do that), then the corporation will have no religious beliefs and will be incapable of exercising religion. *See McGinley*, 366 U.S. at 592.

Second, because "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause," *Thomas*, 450 U.S. at 713, a corporation's commitment to principles that are "based on purely secular considerations" is insufficient to invoke the protection of the Clause, *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

Third, this Court has long held that a free exercise claim requires a showing of action or inaction "based on a *sincerely held* religious belief." *Frazee v. Illinois Dep't of Emp't Sec.*, 489 U.S. 829, 834 (1988) (emphasis added). Just as an individual's belief that is haphazardly invoked only when convenient is unlikely to be found to be sincere, so too for a corporation. *See, e.g.*, *International Soc. for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) ("For example, an adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief, ... or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine") (citations omitted). Thus, one consequence of the sincerity requirement is that, unless those with ultimate authority over the corporation have taken steps to attempt to ensure that the corporation will generally *act* in conformity with the corporation's stated religious principles, it is unlikely that the corporation's religious belief would be found to be sincerely held.[6] *See also supra* at 11-12.

Few, if any, publicly traded corporations have undertaken, or likely ever would undertake, to ascribe to a sincerely held religious belief in the conduct of their operations, much less endeavor to achieve company-wide conformity of the corporation's actions to those beliefs. And although the Government raises the specter that all of the very largest privately held companies will suddenly get religion, *see* U.S. Br. 26, it is hardly surprising that the Government did not identify any large closely-held corporation other than Hobby Lobby (which is only #276 on the Forbes list of "private" companies that the Government cites) that had asserted a claim to exercise religion. On the contrary, most of the cases that have been brought concerning the mandate at issue in this case have been filed by much smaller closely-held corporations (such as Conestoga). *See* Pet. App. in No. 13-356, at 1*l*-4*l*.

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[6] As the district court correctly concluded, and the Government agrees, an inadvertent or insubstantial deviation from an otherwise sincerely held belief does not defeat its sincerity. *See* Pet. App. in No. 13-354, at 174a (noting that Hobby Lobby previously had unwittingly covered drugs it subsequently excluded on religious grounds); U.S. Br. 12 (expressly agreeing that the sincerity of the religious beliefs of Hobby Lobby's owners "is not subject to question in these proceedings").

Moreover, it bears repeating that recognizing a corporation's exercise of religion under RFRA or the Free Exercise Clause does not mean that the corporation's free exercise rights will always prevail under the applicable standard. To be sure, the application of the HHS mandate here *does* violate the RFRA and Free Exercise Clause rights of these corporate Plaintiffs, *see* Pet. App. in No. 13-356, at 69a-89a (Jordan, J., dissenting) (RFRA and Free Exercise Clause); Pet. App. in No. 13-354, at 44a-61a (RFRA); Petitioners' Br. in No. 13-356, at 32-65. But if the Government is correct in its dire predictions as to the harmful consequences that will supposedly follow from upholding religiously-based corporate exemptions from various other statutes not at issue here, then presumably it will be able to defeat such claims by demonstrating that those statutes serve compelling interests and employ the least restrictive means.

Indeed, if there is any reading of RFRA and the Free Exercise Clause that raises disturbing implications, it is the Government's. According to the Government, it can make any market for goods or services a Free-Exercise-Free Zone simply by the artifice of placing whatever obligations it wants on *corporate* entities rather than on natural persons. In the Government's view of the matter, an incorporated kosher deli could be forced to carry non-kosher goods; an independent Catholic hospital with a lay board could be required to provide abortions; a closely-held market owned by Seventh-day Adventists could be required to open on Saturdays; and an incorporated retail store owned by Muslims could be forced to carry liquor. As Judge Jordan recognized in dissent below in the *Conestoga* case, there is a word to describe the Government's position: "Remarkable." Pet. App. in No. 13-356, at 67a.

CONCLUSION

The Court should affirm the judgment in No. 13-354 and reverse the judgment in No. 13-356.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

Nos. 13-354 & 13-356

In The Supreme Court of the United States

KATHLEEN SEBELIUS, *ET AL.*, *Petitioners*,
v.
HOBBY LOBBY STORES, INC., *ET AL.*, *Respondents*.

CONESTOGA WOOD SPECIALTIES CORP., *ET AL.*, *Petitioners*,
v.
KATHLEEN SEBELIUS, *ET AL.*, *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

BRIEF OF THE FAMILY RESEARCH COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, *ET AL.*

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Family Research Council is a non-profit organization located in Washington, D.C., that exists to develop and analyze governmental policies that affect the family. FRC is dedicated to the promotion of marriage and family and the sanctity of human life in national policy. FRC believes in protecting the rights of religious persons to adhere to and pursue their religious beliefs in all aspects of their lives, and regardless of the legal structures they use to organize their commercial activities.

SUMMARY OF ARGUMENT

Religious exercise is not confined to the home, to church, or to non-profit activities with expressly religious purposes. Rather, it can be present in all aspects of living one's life faithfully, including the commercial aspects of life. The decision of the businesses in this case to adhere to, and affirmatively advance, the religious principles of their owners and themselves in the operation of their businesses reflects long-held religious tenets regarding the interaction between faith and work.

While *Amicus* agrees with the Tenth Circuit that the exercise of religion can be burdened in the business environment no less than in other contexts, particularly where the government seeks to coerce action directly contrary to a business's religious principles, this brief goes further. Underlying the government's distinction between for-profit entities and religious and non-profit entities is the notion that merely having a purpose to engage in profitable commercial activities necessarily divorces the participants from the exercise of their religion or negates any simultaneous purpose to exercise religion. That notion is incorrect.

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the accompanying consent letter of Respondents in Hobby Lobby and the blanket consent letters of the remaining parties, on file with this Court.

Under a variety of religious doctrines, a person's participation in the economic activity of his or her community can involve just as full a part of exercising religion as solitary prayer, attending church, keeping the Sabbath, or seeking to bring one's faith to others. Two examples of this are the Christian concept of vocation and the Jewish Halacha, or collective body of religious law drawn from the Torah, the Talmud, and rabbinic law.

The idea of vocation concerns living a life of faith in the world by engaging in work that allows you to realize your God-given talents while at the same time improving the world, serving your community, and honoring God. Doing that which you are "called" to do in a faithful manner can be no less an expression of religion than overt prayer and for many is the more difficult, more persistent, and more complete means of exercising their religion.

The Jewish Halacha, or Jewish law, has much to say concerning how you should conduct yourself in business. Though it can go into great detail and specificity, in the end it starts from and can be summarized as an obligation to conduct your business dealings in "holy" manner, with honesty and integrity, faithful to the Torah. Jews attentive to Halacha thus exercise their religion in and through their business as much as they do in other activities.

The suggestion that those who elect to honor God through vocation or faithful dealings in all aspects of life rather than through ordained ministry or exclusively charitable activities face less of a burden from identical government commands simply demeans those who would live their religion *in* all aspects of the world rather than only in some aspects of or apart from the world. Accordingly, for those who view their work as a vocation or as yet another arena in which they should act according to religious obligations, the government's distinction between commercial and other activities is meaningless and does not minimize or negate the *burden* on their religious exercise. Such religious exercise is equally possible in commercial enterprises that are not overtly religious as it is in overtly religious or charitable enterprises. Forcing businesses and their owners to violate their religious principles in connection with their work is as much of a burden as forcing them to take the same actions in any other context. While the *government*'s interests in imposing a requirement may sometimes be different as between the two contexts, the burden on the private parties exercising religion is not.

The government's attempted distinctions relating to the corporate form and separate corporate existence are equally unavailing. Although not *natural* persons, corporations nonetheless possess purpose, can have multiple purposes including some that involve religious exercise, and may have religious constraints upon their economic conduct. The very existence of incorporated churches and other non-profit corporations covered under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb, *et seq.* ("RFRA"), demonstrates this truism.

Furthermore, a corporation's purposes and "beliefs" can be discerned from its founding documents and policies or actions adopted by its board of directors and officers acting within the scope of their authority. It is neither inappropriate veil-piercing nor even surprising that a corporation's religious views match those of its directors and the owners whose interests those directors serve, particularly in a closely-held corporation where those are the same people. The government's distinctions based on the corporate form thus are as inapplicable as its distinction based on profit-seeking.

Because two irrelevant distinctions do not combine to make a meaningful argument, this Court should hold that RFRA covers the business claimants in these cases and that the HHS mandate substantially burdens their exercise of religion.

ARGUMENT

RFRA provides, as a general rule, that the "Government shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). *Amicus* will leave to others whether the HHS mandate requiring insurance coverage for certain contraceptives to which there is a sincere religious objection constitutes a substantial burden as applied to individuals, religious institutions, and non-profits, though it agrees that the mandate *does* impose such a burden.[2] *Amicus* instead focuses on why imposing an otherwise burdensome requirement on a *for-profit* business does not eliminate the burden on religious exercise.

Amicus also will discuss why the corporate form of the claimants does not preclude them from exercising religion when acting in a manner intentionally consistent with religious tenets or acting to advance religious purposes. There can be no serious dispute that corporations can exercise religion given that incorporated churches, religious non-profit corporations, and at least some other non-profit corporations with religious objections are covered under RFRA as "persons" that engage in the "exercise of religion." The extended debate regarding corporate identity and the relationship between shareholders and the corporation is unwarranted given that such issues apply equally to non-profit corporations and many churches. The government's arguments regarding corporate form thus fail in light of RFRA's coverage of those entities.

In the end, the government's arguments in this case amount to an extended bait-and-switch. It concedes that restrictions or requirements on *commercial* activity can burden the religious exercise of persons engaged in for-profit commerce as individuals or unincorporated business entities. Yet it argues that the for-profit nature of a corporation somehow distinguishes it from a non-profit corporation subject to identical restrictions and requirements that burden religious exercise. Similarly, it concedes that corporate "persons" – incorporated churches and other religiously minded non-profit corporations – engage in the exercise of religion and are protected under RFRA in their own right. Yet it argues that for-profit corporations are discrete legal entities that cannot themselves exercise religion. The government never explains why those two independent distinctions – profit-seeking and corporate form – each separately irrelevant, somehow combine to deny the corporate parties in this case coverage under RFRA. Rather, when one distinction is refuted it simply points to the other in a daisy-chain of avoidance.

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[2] The challengers in these cases object to the HHS mandate insofar as it requires them to pay for and facilitate the use of contraceptives that can act to prevent implantation of an embryo, thus causing the termination of a human life according to their sincere and strongly held religious views concerning when human life begins. The government does not dispute the sincerity of those religious beliefs or the fact that the contraceptives at issue can have that consequence, even if that is not their exclusive means of operation. *See* Sebelius Pet. Br. 8, 9-10 n. 4.

I. Commercial Activity Does Not Preclude or Excuse Religious Observance and Often Can Be a Means of Exercising Religion.

Any attempt to distinguish for-profit and non-profit corporations for purposes of RFRA turns on the question whether a corporation that has as at least part of its purpose the making of profit is nonetheless incapable of also exercising religion. But just as individuals may pursue and advance their beliefs in many ways, including by the manner in which they conduct their business activities, corporations likewise may pursue more than one goal or interest simultaneously. Given that it is conceded that *some* corporations engage in religious exercise, Sebelius Pet. Br. 7, 13, 17, the fact that a for-profit corporation *also* engages in commercial activities does not negate its ability to do likewise.

The government advances a false dichotomy between religious and business activities with its claim that requirements that would burden religious exercise by non-profit corporations somehow impose no such burden on for-profit corporations. It argues, for example, that "for-profit corporations conducting commercial enterprises are not persons exercising religion" under RFRA. Sebelius Pet. Br. 13; *see also id.* 16 (no Supreme Court case holding "that for-profit corporations exercise religion within the meaning of the Free Exercise Clause"). It then seeks to distinguish for-profit and non-profit corporations by arguing that for profit corporations " 'are different from religious non-profits in that they use labor to make a profit, *rather than* to perpetuate a religious values-based mission.' " Sebelius Pet. Br. 19 (citation omitted) (emphasis altered); *see also id.* (" '[U]nlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not *simply to engage in commerce.*' ") (citation omitted) (emphasis added).

As can be seen from the above quotes, the government's argument assumes that business corporations can have only *one* purpose – to make-profit – that is necessarily mutually exclusive with any purpose to "perpetuate a religious values-based mission." According to the government, therefore, while non-profit corporations can exercise religion by pursuing a religious mission, for-profit corporations are by definition incapable of likewise exercising religion based solely on the fact that they also pursue profits.

The government's position constitutes an incorrect understanding of religious exercise and in particular the interaction between work and faith. Commercial activities, whether merely conducted in a manner compatible with religious obligations and prohibitions, or conducted in a way that affirmatively advances religious faith, are no less occasions to exercise one's religion than prayer, charitable endeavors, or seeking to bring one's faith to others.

At the most basic level, government action compelling or coercing a business to affirmatively violate what it views as a religious obligation presents no less a burden on religious exercise for having been done in connection with business activities than if done in any other context. *Amicus* thus agrees with the holding of the Tenth Circuit that a requirement compelling persons to violate their religious beliefs burdens their exercise of religion regardless of its connection to for-profit activities. *See* Sebelius Pet. App. 39a (Tymkovich, J.) ("sincerely religious persons could find a connection between the exercise of religion and the pursuit of profit. Would an incorporated kosher butcher really have no claim to challenge a regulation mandating non-kosher butchering practices? * * * A religious individual may enter the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values. As a court, we do not see how we can distinguish this form of evangelism from any other."); *see also id.* at 36a (citing Free Exercise claims in *United States* v. *Lee,* 455 U.S. 252 (1982) (Amish employer), and *Braunfeld* v. *Brown,* 366 U.S. 599 (1961) (plurality opinion) (Jewish merchants)).

Beyond that agreement, however, *Amicus* would make the broader point that religious exercise does not necessarily confine itself to discrete locations, activities, or aspects of participation in the life of a community, but can permeate a person's daily behavior, from the mundane to the commercial, as well as his or her expressly religious endeavors.

Two particularly direct examples of religious exercise suffusing commercial activity are the Christian concept of "vocation" and parts of the body of Jewish law known as Halacha.

The concept of "vocation," generally associated with certain Christian teachings, involves viewing the " 'act of making a contribution through our work * * * an act of devotion to the divine.' " Ted Cross, *Putting God Back into Work: Calling, Vocation and Service to the Divine*, CANYON J. OF INTERDISCIPLINARY STUDIES, available at http://www.gcu.edu/Ken-Blanchard-College-of-Business/The-Canyon-Journal-of-Interdisciplinary-Studies/Putting-God-Back-into-Work-Calling-Vocation-and-Service-to-the-Divine.php (visited Jan. 24, 2014) (quoting J. Neal, *Work as Service To the Divine: Giving Our Gifts Selflessly and with Joy*, 43 THE AM. BEHAVIORAL SCIENTIST 1316, 1319 (2000)). For persons of faith, work can not only be "meaningful and viewed as making a difference in the world at large, it also may become an expression of spirituality" and "a way to serve others and through that service serve God." *Id.*

Some religious views, particularly those associated with Martin Luther, see a potentially broader and deeper connection between work and religious exercise. Through the "faithful execution of one's duties" in "any station that one might occupy in the world of productive work * * *, one both pleased God and contributed to the general welfare of humankind. So by working diligently to make shoes that will cover and warm human feet, the cobbler serves God in his or her station with just as much divine approbation as the person whose station it is to preach the word of God." *Id.*

As one observer has characterized it, "on one level, faithfulness in Christian vocation involves being about the ordinary living out of our commitments and projects that arise from our membership and specific stations in our families, workplace and general society." Stephen A. Hein, ***Luther on*** Vocatio: ***Ordinary Life for Ordinary Saints***, Issues, Etc., available at http://www.mtio.com/articles/aissar17.htm (visited January 24, 2014). To Luther, the call to live a life of faith "always touches us within our space – where we live already," and godliness "is the obedience of extraordinary faith expressed in the ordinary life." *Id.*

Catholic teaching also sees no religious separation between private and commercial activities. The vocation of the laity consists of three things: "to sanctify work, to sanctify themselves in work, and to sanctify others through work," according to Saint Josemaria Escriva, founder of the Prelature of the Holy Cross and *Opus Dei*. CONVERSATIONS WITH JOSEMAIRA ESCRIVA, Section 10 (Scepter Publishers 2003). He explained that " 'a Christian should do all honest human work, be it intellectual or manual, with the greatest perfection possible: with human perfection (professional competence) and with Christian perfection (for love of God's Will and as a service to mankind). Human work done in this manner, no matter how humble or insignificant it may seem, helps to shape the world in a Christian way." *Id.* After giving the example of "Christ, who spent most of His life on earth working as a craftsman in a village," he noted that work not only advances human values and social progress, but reflects men's "love for God" and is a "way to sanctify." *Id.*; *see also* Josemaria Escriva, FURROW, section 517, (Scepter Publishers 1988) ("Sanctifying one's work is no fantastic dream, but the mission of every Christian"); CATECHISM OF THE CATHOLIC CHURCH, *Economic Activity and Social Justice*, ¶ 2427, available at http://www.vatican.va/archive/ENG0015/__P8D.HTM (visited Jan. 26, 2014). ("Work can be a means of sanctification and a way of animating earthly realities with the Spirit of Christ.").

In addition to work itself having religious significance, the Catholic Church teaches that work must be performed in a manner consistent with belief, explaining that "Economic activity, conducted according to its own proper methods, is to be exercised within the limits of the moral order, in keeping with social justice so as to correspond to God's plan for man." *Id.* ¶ 2426. As Cardinal Peter K. A. Turkson, head of the Pontifical Council for Justice and Peace, explained, "the vocation of the Christian business leader [is] to practice love and justice and to teach the business household for which he or she is responsible to do likewise." Catholic News Agency, *Live your faith in the marketplace, cardinal tells business leaders* (Apr. 9, 2012), available at http://www.catholicnewsagency.com/news/live-your-faith-in-the-marketplace-cardinal-tells-business-leaders/ (visited Jan. 26, 2014). Discussing the Pontifical Council's document entitled "Vocation of the Business Leader: A Reflection," the Cardinal explained that the "separation of faith from professional life 'is a fundamental error which contributes to much of the damage done by businesses in our world today' – including the neglect of family life, an 'unhealthy attachment to power,' and the 'abuse of economic power' that disregards the common good." *Id.* He directed business leaders to "focus on doing God's will in the private sector * * * [and to] organiz[e] work 'in a manner that is respectful of human dignity.' " *Id.*

The concept of vocation thus combines "the spiritual with the secular," consists of finding " 'that place in the world of productive work that one was created, designed, or destined to fill by virtue of God-given gifts and talents and the opportunities presented by one's station in life' " and involves "occupations that contribute toward the greater good and God's glory." Cross, *Putting God Back into Work, supra* (quoting J. Stuart Bunderson & Jeffrey A. Thompson, *The Call of the Wild: Zookeepers, Callings, and the Double-edged Sword of Deeply Meaningful Work*, 54 ADMINISTRATIVE SCI. QUARTERLY, 32, 33 (March 2009), and citing Daniel T. Rodgers, THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920 (University of Chicago Press 1978)).

While not all religions necessarily view any and all work as itself being a form of or occasion for affirmative religious exercise, the larger point for purposes of this case is that there is no conceptual line separating commercial activity from religious exercise. And that observation takes on special relevance where the businesses in question overtly adhere to a principle of religious service and a commitment to act according to religious tenets, as is true in this case.

Another example of how work and religious exercise can be intertwined is the Jewish Halacha. Halacha is the collection of Jewish law contained in or evolved from the Torah, the Talmud, and subsequent rabbinic law. Halacha covers all aspects of life and in particular has much to say regarding business and economic conduct. *See* Rabbi David Golinkin, *The Basic Principles of Jewish Business Ethics*, Vol. 3, No. 1 (October 2003), available at http://www.schechter.edu/insightIsrael.aspx?ID=59 (visited Jan. 26, 2014) ("Contrary to what many think, Jewish law and ethics have much to say about the world of business: accurate weights and measures, overcharging, verbal deception, false packaging and much more."); Business Halacha, *Hilchos Chosen Mispat Vol. III, No. 19: Fair Profits and Measures*, available at http://www.torah.org/advanced/business-halacha/5757/vol3no18.html (visited Jan. 26, 2014) (giving examples of how halachic rules often exceed secular legal rules on profit, weights and measures, and economic remedies).

While Halacha contains much detailed guidance on a wide range of business behavior, in the end the essence of that guidance is the obligation to conduct one's business honestly and honorably, in accordance with the religious tenets of the Torah as interpreted over the centuries. Halacha commentators point to observations by the Sages that when you die and are brought for final judgment God asks "were you faithful in your business dealings." Golinkin, *Jewish Business Ethics, supra*; *see also* Rabbi Yitzchok Breitowitz, *Jewish Business Ethics: An Introductory Perpective* (Part I), available at http://www.jlaw.com/Articles/JewBusEthI.html (visited Jan. 26, 2014) (In the Talmud's discussion of "what types of questions people are asked by God after their deaths," the "very first question that we are held accountable for * * * is 'Nasata V'netata Be'emunah' which means 'did you conduct your business affairs with honesty and with probity? ' ").

Following Halacha and hence the Torah in commercial aspects of life is considered no different than following the Torah and derived rules in any other area of life. As Rabbi Breitowitz has remarked, it is in how we respond to the confrontation between the "ethereal transcendent teachings of holiness and spirituality" and the "often grubby business of making money" that is the "acid test of whether religion is truly relevant" and where we can show that "God coexists in the world rather than God and godliness being separate and apart." *Jewish Business Ethics, supra*. Thus, similar to some of the principles of vocation, the command in the Jewish prayer the Shema that "'You shall love the Lord your God with all of your heart, with all of your soul, and with all of your might," has been interpreted as including serving God with all of your possessions and that "in the conduct of our business in the accumulation of wealth, there is also a mechanism to serve God." *Id.*

The example of Halacha, like vocation, serves to illustrate the point that for many people of faith, there is no line separating the exercise of religion in private or non-profit activities from its exercise in commercial activities. Such persons exercise their religious principles throughout the whole of their lives and any commands to abjure their religious principles impose identical burdens regardless whether they are conducting commerce, tending to the needy, visiting a place of worship, or raising a family.

While some may hold the view that "spirituality and business [are] exact opposites," one concerned with "questions of meaning and ultimate significance" and the other "devoted to making money and to affairs of this world," Cross, *Putting God Back into Work, supra*, that is not the view taken by many people of faith across a range of religious traditions. Where to draw any line regarding if and where religious exercise ends and secular behavior begins is itself a question of religion not appropriately answered by the government. Secular law may indeed take precedence over religious exercise in various cases – ancient traditions of human sacrifice will not be accommodated, no matter how sincere the belief – but the line is drawn not by denying the scope of religious belief and exercise, but by demonstrating, if and where true, that the government's compelling interests outweigh the burden imposed on religious exercise.

Returning to the context of these cases, therefore, if the substantial burden imposed by the HHS mandate is to be denied, it cannot be on the ground that while it imposes a burden on religious and non-profit entities, it imposes no such burden on commercial entities. Any line between supposedly secular commercial activity and religious non-commercial activity is ephemeral at best, and smacks of the government imposing its own religious views on those who see no necessary separation between the two.

Furthermore, while not every religion may share the same views regarding vocation or religiously derived business ethics, certainly all would agree that the mere fact one is engaged in work for profit does not excuse a person from abiding by religious obligations. A Jew who believed in an obligation to be Kosher and so acted at home would not automatically be excused from that obligation merely because he was at work. The universal religious prohibition against murder (however defined) is not excused merely because done for hire or in the context of some other business activity. Thus, for example requiring a doctor (who charged for her services and thereby was engaged in a for-profit activity) to perform abortions if that violated her religious beliefs concerning when life begins would certainly "substantially burden" her exercise of religion even if the requirement were expressed only as a condition on engaging in the for-profit practice of medicine.[3]

Similarly, there seems little question that a for-profit business engaging in direct religious expression is exercising religion no less than a non-profit entity doing the same. Surely a law that forbade all commercial businesses from engaging in religious expression (or from selling religious texts) would "substantially burden" the exercise of religion.

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[3] Note that this point does not turn on whether the government might ever have a sufficiently compelling interest to justify such a burden (though that seems unlikely). It only observes that such a requirement or condition in fact constitutes a burden on the exercise of religion regardless of the for-profit nature of the doctor's practice.

That commercial endeavors have as a purpose and consequence earning money to support one's own material needs and activities, providing for one's family, and providing jobs to others, no more precludes them from also involving religious exercise than do any intertwined benefits a person receives from other forms of indisputably religious activities. For example, various religions encourage or require their adherents to go on a mission to spread the word of their faith to others. That a person chooses to perform her mission in a foreign country because she likes to travel and visit new places, and thus derives personal as well as religious benefits from the mission, does not convert such a mission into a secular activity. Similarly, any personal benefits one might receive from attending church – standing in the community, business opportunities, an increased likelihood of being elected to public office by a constituency that values faith, for example – likewise does not convert church attendance into a secular activity.

In the end, the government's attempted distinction between for-profit businesses and non-profit or overtly religious entities cannot be squared with Christian traditions of faith through vocation and the Jewish beliefs in righteousness through obedience to Halacha in business dealings as in other areas of life. Because business practices are not separate or excused from religious doctrines regarding faithful or righteous conduct, the challengers in this case are exercising religion by insisting that their provision of health insurance as part of their business practices must also be consistent with their religious tenets. Requiring them to provide insurance to pay for activities incompatible with those religious tenets constitutes a burden on their exercise of religion. Accordingly, this Court should reject the government's claim that the tax code's mere for-profit categorization of an entity precludes it from exercising religion, having that exercise burdened, or being covered by RFRA.

II. The Corporate Parties in this Case Themselves Exercised Religion and thus Are Entitled To Invoke RFRA.

In the second component of the government's bait-and-switch, it argues that because corporations are distinct legal entities from their owners, they do not exercise religion on their own behalf and that the claim for relief in this case improperly "attributes the religious beliefs of the corporate shareholders to the corporate respondents themselves." Sebelius Pet. Br. 13; *id.* 22, 25 (nothing in RFRA or the Dictionary Act suggests that "for-profit corporations are 'person[s]' that themselves engage in the 'exercise of religion' in the sense Congress intended"; a "corporation is legally distinct from its owners" and there is "no basis on which to impute the individual respondents' religious beliefs to the corporate respondents").

That argument misconceives the nature of corporate governance and conduct, misconceives what constitutes religious exercise, and is incompatible with RFRA's recognition and the government's concession that incorporated churches and other non-profit corporations can and do "exercise religion" themselves and may bring a claim for burdens on such exercise in their own right.

First, the concession that incorporated churches and non-profits can sue as "persons" under RFRA and hence exercise religion in their own right fully rebuts any relevance of corporate structure to religious exercise. Merely noting that such corporations have a primary or even exclusive purpose of advancing religion or doing religiously motivated charitable work says nothing about the corporate *form*, and in fact illustrates that the constructed "personhood" of such entities is not a barrier to religious exercise. A corporation's existence as a person distinct from its owners thus does not imply that the corporation cannot have its own religious purposes or engage in religious exercise, it just requires an inquiry into whether it does *indeed* have such purposes and engage in such conduct, not that they are the *exclusive* purposes and conduct of the corporation. Whatever relevance such the latter inquiry may have for the tax code, it has nothing to do with whether a corporation exercises religion, no more than it controls whether a natural person, an unincorporated business, or a mixed-purpose non-profit exercises religion.

The government's suggestion that "when corporations enter the commercial world for profit, they necessarily " 'submit themselves to legislation * * * designed to protect the health, safety, and welfare of employees,' " Sebelius Pet. Br. 19 (citation omitted), is a complete non-sequitur. Non-profit corporations are likewise subject to much of the same legislation to protect *their* employees, as are individual for-profit employers operating in non-corporate form. Yet the government acknowledges that both such categories of employers may raise RFRA claims. Indeed, RFRA exists precisely to require some religious exemptions from "legislation" to which claimants have otherwise "submit[ted]" themselves by their activities as employers, businesses, or merely as citizens.

Second, the government's argument that the values and the beliefs of corporate owners cannot be attributed to the corporation also misconceives the nature of corporations, how they act, and what they "think" or "believe." That a corporate "person" can act, can have intent, can have principles, and can follow or violate those principles is a basic truism reflected in corporate law and in civil and criminal laws applicable to corporations.

A corporation obviously can engage in myriad forms of conduct through its directors, officers, employees and agents. It can likewise have "purposes." *See, e.g.*, DEL. GEN. CORP. L. § 101(b) ("a corporation may be incorporated or organized under this chapter to conduct or promote any lawful business or purposes"). While the government claims to find *different* purposes between non-profit and for-profit corporations, it necessarily concedes that corporations *have* such purposes. A corporation can also have beliefs, or at least a state of "mind." Numerous civil and criminal laws applicable to corporations ask whether a corporation acted with "knowledge," scienter, or culpable intent. Civil and criminal sanctions for a corporation may turn on whether the corporation "knew" of a particular fact or whether it acted with discriminatory or other prohibited intent. *See, e.g.*, 42 U.S.C. § 2000e(a) & (b) (defining "person" under Title VII to include "corporations" and "employer" as a "person" meeting various conditions); *id.* § 2000e-5(g)(1) (providing for injunction where "respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice") (emphasis added).

The more meaningful question is where to look to determine a corporation's purposes and what it thinks or believes. Again the answer turns out to be fairly straightforward: One looks to corporate documents and to the corporation's directors and officers acting within the scope of their authority. Corporate documents such as articles of incorporation and bylaws typically identify a range of corporate purposes and at least *authorize* other corporate purposes not inconsistent with the ones expressly identified. *See, e.g.*, DEL. GEN. CORP. L. § 102 (requirement that articles of incorporation state corporate purposes satisfied if the articles state, "either alone or with other business purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized). Within the range of those identified or allowed purposes, statements of corporate policy can identify more specific purposes, including social, charitable, and religious purposes.

As for how to identify what a corporation knows or "believes," cases involving potentially culpable conduct have repeatedly answered that question – a corporation believes what its directors and officers, acting within the scope of their authority, know and believe (either directly or through imputation). Where corporate "belief" concerns broader issues relating to the overall purposes and direction of the corporation, however, the board of directors generally acts as the corporate "mind" and determines (potentially subject to a shareholder vote, on the issue or eventually on the directors themselves) what a corporation officially believes. DEL. GEN. CORP. L. § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors"). When the directors express themselves as a body, for example by adopting a statement of purpose, the corporation's belief is articulated directly. But the fact that the directors have not articulated the corporate view on every conceivable question does not mean that the corporation does not *have* such views. To find out what the corporation's views are, all one has to do is ask.

In this case, fortunately, one need not ask very much. Hobby Lobby has adopted a policy statement of expressly religious purpose. It has also, as a corporation, elected to challenge the HHS mandate and asserted that parts of the mandate violate its religious principles. Given that there is no suggestion that the directors and officers acted outside the scope of their authority, contrary to the corporation's purposes, contrary to the interests of the shareholders, or in any other improper manner, such official corporate action is itself sufficient to identify what the corporation believes. The corporation believes what its directors, acting within the scope of their authority, say it believes.

Thus, while the corporation indeed shares the religious beliefs of its owners, it does so not simply by virtue of their ownership *per se*, but because they are also the organizers, directors, and officers of the corporation. Sebelius Pet. App. 8a (Tymkovich, J.). Those individuals, when acting collectively, in their official capacities, *are* the corporation for current purposes, or at least the corporation's "mind" and arguably its soul. Attribution of their beliefs to the corporation is not some improper veil-piercing but rather fully consistent with the nature and structure of the corporation.

Because the government concedes that at least some corporations exercise religion, because even for-profit corporations can have religious purposes, and because the directors of a corporation effectively constitute the "mind" of the corporation and can, within the scope of their authority, direct it to act based on religious beliefs, the government's arguments based on the corporate form fail.

Neither the profit-seeking nor the corporate-form arguments advanced by the government are relevant to RFRA coverage in this case. Their combined irrelevance does not change the result.

CONCLUSION

For the foregoing reasons, this Court should rule in favor of Hobby Lobby and Conestoga and against the government.

Respectfully submitted,

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IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH
AND HUMAN SERVICES, *et al.*,
Petitioners,
v.
HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORPORATION, *et al.*,
Petitioners,
v.
KATHLEEN SEBELIUS, SECRETARY OF HEALTH
AND HUMAN SERVICES, *et al.*,
Respondents.

On Writs of Certiorari
to the United States Courts of Appeals
for the Third and Tenth Circuits

BRIEF OF FOUNDATION FOR MORAL LAW AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, *ET AL.*

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QUESTION PRESENTED

Whether the Court of Appeals erred by failing to rule that the Affordable Care Act violates the Origination Clause of Article I, Section 7 of the U.S. Constitution and in ruling that the Affordable Care Act does not violate the Free Exercise Clause of the First Amendment?

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*, FOUNDATION FOR MORAL LAW

Amicus Curiae Foundation for Moral Law[1] (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the liberties guaranteed under the Constitution of the United States. The Foundation promotes a return in the judiciary and other branches of government to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the moral foundation of this country's laws and justice system.

The Foundation has an interest in this case because it believes that this nation's laws should reflect the moral basis upon which the nation was founded and the ancient roots of the common law, the pronouncements of the legal philosophers from whom this nation's Founders derived their view of law, the views of the Framers themselves, and the views of those who ratified the Constitution.

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[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this amicus brief. The consent of the counsel for Hobby Lobby and Conestoga is attached; all other parties have issued blanket consent. Further, pursuant to Rule 37.6, this amici curiae states that no counsel for any party authored this brief in whole or in part, and no party and no counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

The Foundation also believes that the Framers, because of their skeptical view of human nature, feared the concentration of government power in any one individual, branch, or level of government, and that they especially fear the power to tax. Like the Framers, the Foundation believes the power to propose new taxes should rest with that branch of Congress that most directly represents the people.

SUMMARY OF ARGUMENT

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills. *Article I, Section 7, Clause 1*

The Origination Clause of Article I, Section 7 of the Constitution is not a mere formality. It reflects the Framers' fear of government power and their concern that one of the foremost government powers, that of taxation, should be carefully limited. The slogan, "no taxation without representation," was a rallying cry of the defenders of English common law and a major grievance of the American colonists. They enshrined this principle in the Constitution with the requirement that all bills for raising revenue had to originate in the House of Congress that most directly represented the people—the House of Representatives, as the Senate was composed of people chosen by their state legislators, not by the people.

In *National Federation of Independent Business [NFIB] v. Sebelius,* ___ U.S. ___, 132 S.Ct. 2566 (2012), the Supreme Court ruled that exaction imposed by the Affordable Care Act upon persons who choose not to purchase health insurance is a tax, because it has the basic characteristics of a tax rather than of a penalty: it raises substantial revenue, it does not punish illegal activity, it does not involve a *scienter* requirement. *Amicus* also notes that the tax is paid into the general fund of the Treasury and it is not paid in exchange for government services.

The Senate cannot use a "shell bill" to circumvent the Origination Clause. Although the Senate has the authority to amend a House revenue bill, the amendment must be germane to the subject matter of the House bill. In this case, Senate Majority Harry Reid took H.R. 3590, a six-page double-spaced bill granting tax credits to military personnel seeking to purchase their first homes and increasing estimated taxes for certain corporations, deleted its language entirely, and substituted a 906-page single-spaced health care bill that was totally unrelated to anything in the original H.R. 3590. In no realistic sense did the Affordable Care Act originate in the House.

Because the individual mandate of the Affordable Care Act is a tax, and because it did not originate in the House, this Court should uphold the Constitution and strike down the statute.

The ACA also violates the Free Exercise Clause by forcing Hobby Lobby and Conestoga and their owners to either violate their religious convictions or give up a substantial state benefit, the right to do business as a private corporation.

ARGUMENT

I. THIS COURT SHOULD CONSIDER THE ORIGINATION CLAUSE ISSUE.

On June 28, 2012, when this Court announced its decision in *National Federation of Independent Business v. Sebelius,* ___ v. ___ (2012), it opened a new issue concerning the constitutionality of the

Patient Protection and Affordable Care Act (ACA). By ruling that the fees imposed by the ACA are in fact a tax—which the Administration and the ACA's supporters had steadfastly denied—the Court raised an issue that Hobby Lobby and Conestoga and other plaintiffs could not have anticipated when they filed their lawsuit: that the ACA is unconstitutional because it originated in the Senate instead of in the House as required of "All Bills for raising Revenue" according to Article I, Section 7.

Amicus recognizes that, as a general rule, federal appellate courts do not consider issues that were not raised in the lower courts. However, this Court has recognized that there are exceptions to this general rule, *Singleton v. Wulff,* 428 U.S. 106,120 (1986). As this Court said,

> Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, *see Turner v. City of Memphis,* 369 U. S. 350 (1962), or where "injustice might otherwise result." *Hormel v. Helvering,* 312 U.S. at 312 U. S. 557. [Footnote 8].

As the Court said in *Hormel* at 557,

> Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure

> do not require sacrifice of the rules of fundamental justice.

This Court further stated that "It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here." And *Blair v. Oesterlein Machine Co.*,275 U.S. 220, 225 (1927), held that "It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here."

In *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir. 1999), the Fourth Circuit noted an exceptional circumstance that justifies review of an issue not raised below—

> when there has been an intervening change in the law recognizing an issue that was not previously available. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 142-45, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (plurality opinion); *Holzsager v. Valley Hosp*., 646 F.2d 792, 796 (2d Cir.1981); *see also Pacific Ins. Co. v. American Nat'l Fire Ins.* Co., 148 F.3d 396, 403 (4th Cir.1998) (explaining that although a Rule 59(e) motion may be granted based on, inter alia, "an intervening change in controlling law," such "motions may not be used . to raise arguments which could have been raised prior to the issuance of the judgment . [or] to argue a case under a novel legal theory that the party had the ability to address in the first instance"), cert. denied, 525 U.S. 1104, 119 S.Ct. 869, 142 L.Ed.2d 771 (1999). The intervening law exception to the general rule that the failure to raise an issue timely in the district court waives review of

> that issue on appeal applies when "there was strong precedent" prior to the change, Curtis Publ'g Co., 388 U.S. at 143, 87 S.Ct. 1975 (plurality opinion), such that the failure to raise the issue was not unreasonable and the opposing party was not prejudiced by the failure to raise the issue sooner, id. at 145, 87 S.Ct. 1975.

Curtis Publishing Co. involved a libel suit. At the time *Curtis* was tried in the district court, the prevailing state of defamation law was that the defendant must have acted negligently in publishing something that was false. But after the district court trial, the Court decided *New York Times v. Sullivan,* 376 U.S. 254 (1964), holding that a plaintiff who is a public official must show not just simple negligence but actual malice, that is, that the defendant published the statement either knowing that it was false or with reckless disregard for the truth. Curtis Publishing Co. then argued on appeal that they, like the New York Times, were entitled to the defense that they had not acted with reckless disregard for the truth. The Fifth Circuit held that Curtis was barred from raising this argument because it had not been raised in the district court; 351 F.2d 702, 713.

However, this Court held that "it was our eventual resolution of *New York Times,* rather than the facts and the arguments presented by counsel, which brought out the constitutional question here. We would not hold that Curtis waived a 'known right' before it was aware of the *New York Times* decision." *Curtis* at 388 U.S. 145. This Court came to this conclusion even though Curtis's attorneys were at trial fully aware of the pending *New York Times* litigation and the arguments raised therein, and some of them were even involved in the *New York Times* litigation. *Curtis* at 144. This Court also noted in *Curtis* that it is much less likely to find a waiver when a constitutional right is involved:

> As our dispositions of *Rosenblatt v. Baer,* 383 U. S. 75, and other cases involving constitutional questions indicate, [Footnote 5] the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground. Of course, it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time, *Michel v. Louisiana, supra,* at 350 U. S. 99, [Footnote 6] but an effective waiver must, as was said in *Johnson v. Zerbst,* 304 U. S. 458, 304 U. S. 464, be one of a "known right or privilege."

Curtis at 142-43.

The case at hand is similar to *Curtis* and the other cases cited above. This case was tried in the district court before this Court decided *NFIB v. Sebelius,* and *NFIB* represented a dramatic change in the case law concerning the Affordable Care Act. Although counsel for Hobby Lobby may have been aware of the *NFIB* litigation, this Court's conclusion in *NFIB* that the ACA could be justified as a tax was a complete surprise to everyone, probably even including the Obama Administration which had insisted throughout the passage of the ACA in Congress and thereafter that the ACA was *not* a tax. Hobby Lobby could not be expected to have anticipated this change in the case law.

Amicus urges this Court to consider this Origination Clause issue in this case because:

(1) The subsequent *NFIB* decision has effected a fundamental change in the case law affecting the ACA that Hobby Lobby and its counsel could not possibly have anticipated.

(2) Numerous lawsuits concerning the ACA are pending in many jurisdictions across the nation.

(3) The federal district courts and circuit courts of appeal have rendered many conflicting decisions concerning the constitutionality of ACA.

(4) As of this writing Congress and the President are at odds over whether to delay the implementtation of ACA, and questions concerning its constitutionality are a major part of this controversy.

(5) The lower courts, Congress and the President, state governments, and the American people are looking to this Court to resolve these constitutional issues so the Nation can proceed accordingly.

(6) The constitutionality of the ACA cannot be fully resolved until the Origination Clause issue is resolved.

The Origination Clause is based upon a cherished principle of the common law that Americans argued for in the Declaration of Independence, fought for in the War for Independence, and enshrined in the Constitution: **no taxation without representation.** The Origination Clause is therefore a central pillar of the American constitutional system.

II. THE HOUSE OF COMMONS IN ENGLAND

Parliament developed in medieval times from the Great Council (Magnum Concilium) which consisted of clergy, nobles, and "knights of the shire" who represented the various counties.[2] Their duty was to approve taxes proposed by the Crown. But often the Council demanded the redress of the people's grievances before they would vote on taxation, and thus legislative powers developed.[3]

The House of Commons developed into an legislative body distinct from the House of Lords in the late 1200s or early 1300s, when the "knights of the shire" who represented the counties and the burgesses who represented the towns began sitting in a separate chamber (later called the House of Commons) from that used by the nobles and high clergy (later called the House of Lords). During the "Good Parliament" of 1376, the Commons appointed Sir Peter de la Mare to convey to the House of Lords their complaints about excessive taxation, lack of accounting for royal expenditures, and mismanagement of the armed forces. This led to the creation of the office of Speaker of the House.[4]

According to the *Oxford Dictionary of Politics,* "House of Commons," "The 1689 Bill of Rights established for the Commons the sole right to authorize taxation and the level of financial supply to the Crown." Actually, the Commons had this authority as early as the reign of King Edward III (1327-1377)[5]; in 1348 the Commons gave a conditional grant of money to the King, but one of the conditions was that the king should thenceforth levy no "imposition, tallage, or charge by way of loan or in any other manner, without the grant and assent of the commons in parliament," and that this condition was to be entered on the roll "as a matter of record, whereby they may have remedy if anything should be attempted to the contrary in time to come."[6] The basic principle that underlay this concern was that the people who pay the taxes should have a voice in the adoption of those taxes.

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[2] Thomas Pitt Taswell-Langmead, *English Constitutional History from the Teutonic Conquest to the Present Time* (Houghton Mifflin 1946) 168-73.

[3] Brent Winters, *The Excellence of the Common Law* (Mountain Press 2006) 176-79; Taswell-Langmead 170.

[4] Taswell-Langmead 184-85.

III. THE CONCERNS OF THE AMERICAN COLONISTS

The American colonists shared the view of the Commons that there should be no taxation without representation and argued that because they had no representatives in Parliament, Parliament had no authority to tax them. As early as 1640-41 members of Parliament urged the Massachusetts Bay Colony to send delegates to Parliament, but the colonists refused, saying "if we should put ourselves under the protection of the Parliament, we must be then subject to such laws as they should make...[which] might prove very prejudicial to us."[7]

In the 1760s the taxation issue was fanned into flame with the Stamp Act of 1765, the Townshend Acts of 1767, the Tea Act of 1773, and the Intolerable Acts.

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[5] Winters 179-80.

[6] Taswell-Langmead 179.

[7] John Winthrop, *The Journal of John Winthrop 1630-1649* ed. Richard S. Dunn and Laetitia Yeandle (Harvard University Press 1996) 182-83.

Their opposition was based not on the amount of the taxes, but on the principle that Parliament had no authority to tax the colonists because the colonists had no representatives in Parliament. In 1765 the Virginia House of Burgesses adopted a resolution introduced by Patrick Henry which asserted that taxation without representation is tyranny:

> Resolved, that the taxation of the people by themselves, or by persons chosen by themselves to represent them, who can only know what taxes the people are able to bear, or the easiest method of raising them, and must themselves be affected by every tax laid on the people, is the only security against a burdensome taxation, and the distinguishing characteristic of British freedom, without which the ancient constitution cannot exist.[8]

These taxes comprised one of the major grievances raised by the colonists in the Declaration of Independence ("For imposing Taxes on us without our Consent"). And the colonists took up arms to defend this principle.

IV. THE CONCERNS OF THE CONSTITUTIONAL CONVENTION

Taxes were a major concern of the delegates to the Constitutional Convention. When the delegates adopted the Sherman Compromise by which they established a two-house legislature, many wanted to be sure that only the house that represented the people who pay taxes would be allowed to initiate taxes. Elbridge Gerry of Massachusetts declared,

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[8] Patrick Henry, Virginia Resolves on the Stamp Act, 1765.

> Taxes and representation are strongly associated in the minds of the people, and they will not agree that any but their immediate representatives shall meddle with their purses.[9]

James Madison cited Benjamin Franklin of Pennsylvania as saying,

> [I]t was always of importance that the people should know who had disposed of their money, and how it had been disposed of. It was a maxim that those who feel, can best judge. This end would, he thought, be best attained, if money affairs were to be confined to the immediate representatives of the people.[10]

The report of the Compromise Committee on Representation chaired by Elbridge Gerry recommended this language:

> [A]ll Bills for raising or appropriating money and for fixing the salaries of the Officers of the Government of the United States, shall originate in the first Branch of the Legislature, and shall not be altered or amended by the second branch—and that no money shall be drawn from the public

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[9] Elbridge Gerry, quoted in Max Farrand, ed., *The Records of the Federal Convention of 1787* (Yale University Press 1937) II:278; James Madison, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America,* ed. Gaillard Hunt and James Brown Scott (Oxford University Press, 1920) 391.

[10] Benjamin Franklin, quoted in James Madison, *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Ohio University Press 1984) 251.

> Treasury but in pursuance of appropriations to be originated by the first Branch.[11]

This language was adopted in July but stricken August 8. Subsequently, Edmund Randolph of Virginia offered similar language, adding that "the Senate will be more likely to be corrupt than the H. of Reps and should therefore have less to do with money matters."[12] George Mason declared that

> The arguments in favor of the proposed restraint on the Senate ought to have the full force. First, the Senate did not represent the *people,* but the *states,* in their political character. It was improper therefore that it should tax the people. ...Again the Senate is not, like the House of Representatives, chosen frequently and obliged to return frequently among the people. They are to be chosen by the states for six years.... In all events ... the purse strings should be in the hands of the representatives of the people.[13]

But this language was rejected on August 13, partially because his language restricted the Senate's authority to amend a tax proposal. On August 15 Caleb Strong of Massachusetts proposed that only the House of Representatives could initiate revenue bills but that the Senate could "propose or concur with amendments as in other cases."[14] On September 8 Strong's proposal was accepted with revised language, and the

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[11] Report of Compromise Committee on representation, quoted in Farrand I:524.

[12] Edmund Randolph, quoted in Madison, *Notes* 448.

[13] George Mason, quoted in Madison, *Notes* 443.

[14] Caleb Strong, quoted in Farrand II:298.

Origination Clause in its present form was adopted 9-2.[15]

As James Madison explained in *Federalist No. 58,*

> ...[A] constitutional and infallible resource still remains with the larger States, by which they will be able at all times to accomplish their just purposes. The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse -- that powerful instrument by which we behold, in the history of the British Constitution an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government.[16]

And James Iredell, who would later serve as a U.S. Supreme Court Justice 1790-1799, argued in the first North Carolina ratifying convention that

> The House of Representatives...will represent the immediate interests of the people. They will originate all money bills, which is one of the greatest securities in any republican government. ... The authority over money will do everything. A government cannot be supported without money. Our representatives may at any time compel the

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[15] Farrand II:552.

[16] James Madison, *Federalist No. 58, The Federalist* ed. Michael Loyd Chadwick (Global Affairs 1987) 317.

> Senate to agree to a reasonable measure, by withholding supplies till the measure is consented to.[17]

The Framers placed the Origination Clause in the Constitution for a very important purpose -- to ensure that revenue bills must originate in the people's House -- the House of Representatives.

V. THE EFFECT OF THE SEVENTEENTH AMENDMENT

The ratification of the Seventeenth Amendment in 1913 did not change the meaning of the Origination Clause. It provides that the States shall choose their U.S. Senators by popular elections rather than by the state legislators. The Senators still represent the States, and they still serve six-year rather than two-year terms. The House of Representatives remains the body that most directly represents the people and that can be most quickly turned out of office by the people.

If the Framers of the Seventeenth Amendment had intended to repeal or modify the Origination Clause, they could have done so. But they left it intact. From this we must infer that they intended that its meaning and effect remain unchanged.

VI. THE COURTS, THE ORIGINATION CLAUSE, AND THE AFA

Court cases involving the Origination Clause are few, but from them several principles can be drawn.

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[17] James Iredell, quoted in Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Lippincott Co. 1901) IV:39,129.

First, although the House of Representatives can enforce the Origination Clause by "blue-slipping" a bill and sending it back to the Senate, or simply by refusing to pass it, the House's failure to do so does not mean the Court should refuse to exercise judicial review:

> Although the House certainly can refuse to pass a bill because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments .... Nor do the House's incentives to safeguard its origination prerogative obviate the need for judicial review.

United States v. Munoz-Flores, 495 U.S. 385, 392 (1990).

Second, the Fifth Circuit has rejected the claim that Origination Clause cases are nonjusticiable political questions, *Texas Ass'n. of Concerned Taxpayers, Inc. v. U.S.,* 772 F.2d 163 (5th Cir. 1985).

Of all Origination Clause issues, the Courts have wrestled most with the question of what constitutes a "Bill for raising Revenue." *Amicus* urges a "plain meaning" construction and suggests that, to the reasonable man-on-the-street, a bill that takes money out of his pocket and places it in the government's coffers and/or is redistributed to other persons, is a bill for raising revenue. This is the way a reasonable person would have understood the Clause in 1787; this is the way a reasonable person would understand it today.

And in fact, the U.S. Supreme Court ruled in *National Federation of Independent Business [NFIB] v. Sebelius,* ___ U.S. ___, 132 S.Ct. 2566 (2012), that the exaction imposed on persons who decline to purchase health insurance is a tax. *Id.* 2601. Distinguishing the Affordable Care Act (AFA) tax from the penalty imposed by the Child Labor Tax Law and invalidated by the Court in *Bailey v. Drexel Furniture Co.,* 259 U.S. 20 (1922), the Court noted that:

(1) Unlike the "extremely heavy burden" imposed by the Child Labor Tax Law, the AFA tax will for most Americans be "far less than the price of insurance, and by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the 'prohibitory' financial punishment in *[Drexel].*" *NFIB* 2595-96. The Court noted that the Congressional Budget Office has estimated that four million people each year will elect to pay the tax rather than purchase health insurance. *NFIB* 2597.

(2) Unlike the *scienter* requirement of the Child Labor Tax Law which applied the penalty only to those who "knowingly employed underage laborers," there is no scienter requirement in the Affordable Care Act. As the Court said, "Such scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law." *Id* 2595. As the Court stated,

> In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States v. Reorganized CF & I Fabricators of Utah, Inc.,* 518 U.S. 213, 224, 116 S.Ct. 2106, 135 L.Ed. 506 (1996); see also *United States v. La Franca,* 282 U.S. 568, 572, 51 S.Ct. 278, 75 L.Ed. 551 (1931) ("[A] penalty, as the word is here used, is an

> exaction imposed by statute as a punishment for an unlawful act"). While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chose to pay rather than obtain health insurance, they have fully complied with the law.

Id. 2596-97. The Court said further, "We do not make light of the severe burden that taxation -- especially taxation motivated by a regulatory purpose -- can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice." *Id.* 2600.

(3) The penalties under the Child Labor Tax Law were enforced in part by the Department of Labor, "an agency responsible for punishing violations of labor laws, not collecting revenue." The tax on those who elect not to purchase insurance is "collected solely by the IRS through the normal means of taxation -- except that the Service is *not* allowed to use those means suggestive of a punitive sanction, such as a criminal prosecution." *Id.* 2596 (emphasis original).[18]

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[18] The Administration's gyrations over whether to call the ACA a tax suggest that the title given to the exaction in the Act bears little credibility. In late 2010, as the Administration arm-twisted and steamrollered to pressure Congress into passing the legislation, the Administration insisted it was not a tax, presumably because an additional tax would not be popular with congressmen and their constituents. During the *NFIB* litigation,

The Court in *NFIB* also noted that "Congress's choice of label" does not "control whether an exaction is within Congress's constitutional power to tax." *Id.* 2594. In *Drexel,* what Congress called a tax the Court determined was a penalty. In *United States. v. Sotelo,* 436 U.S. 268, 275 (1978), what Congress called a penalty the Court determined was a tax.

The Court also noted that the AFA tax was expected to raise substantial revenue for the U.S. Treasury. The tax would amount to about $60 per month ($720 per year) for individuals earning $35,000 per year and about $200 per month ($2,400 per year) for individuals earning $100,000 per year. *NFIB* 2596 fn 8. If the CBO estimate that four million people each year will pay the tax rather than h$2,880,000,000 per year if they all earn $35,000 per year or $9,600,000,000 per year if they all earn $100,000 per year. In either event, this is substantial revenue. Furthermore, the

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the Administration asked the Court "to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution." *Id.* 2594. Now, facing the possibility that a tax might violate the Origination Clause, the Administration again argues that it is not a tax.

The plain fact is, the Administration started with the Senate because if it had originated in the House before Senate approval, it would never have passed the House. The Administration wants to "have its cake and eat it too," and wants this Court to rule that the ACA *is* a tax under the Taxing and Spending Clause but that it *is not* a tax under the Origination Clause. The American taxpayers deserve better than this. If a bill is within the authorized powers of Congress under the Taxing and Spending Clause, it is subject to the constraints upon those powers under the Origination Clause.

Affordable Care Act involves multiple other taxes that will also raise revenue.[19]

Amicus notes, further, that the Court in *NFIB* upheld the ACA as a tax while also concluding that it could not be justified under the Commerce Clause or other portions of the Constitution. The Court's reasoning that led it to conclude that the ACA exaction is a tax is therefore central to its conclusion and therefore must be considered holding rather than dicta.

Other Supreme Court cases are distinguishable. *United States v. Munoz-Flores,* 495 U.S. 385 (1964), involved an assessment on persons convicted of federal misdemeanors which went to the Crime Victims Fund established by the Victims of Crime Act. The Court ruled that the assessment did not violate the Origination Clause because the assessments were not placed in the general treasury but rather were used to compensate crime victims. By contrast, taxes collected under the Affordable Care Act go directly to the general treasury as revenue.

Twin City National Bank of New Brighton v. Nebecker, 167 U.S. 196 (1897), involved a banking tax of $73.08. The bank argued that this tax was not in the bill as it was originally passed by the House but was added in an amendment by the Senate, with which the House later concurred. The Court upheld the tax, noting that the bill had originated in the House, and the Origination Clause specifically says "but the Senate may propose or concur with

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[19] Letter from Congressional Budget Office to Sen. Harry Reid, Nov. 18, 2009, available at http://cbo.gov.sites/default/files/cbofiles/ftpdocs/107xx/doc10731/reid_letter_11_18_09.pdf. *Amicus* notes that estimates of the actual amount vary.

Amendments as on other bills." Unlike this banking bill, the Affordable Care Act originated in the Senate. Therefore, *Nebecker* does not apply to this case.

Millard v. Roberts, 202 U.S. 429 (1906), involved a law for the elimination of grade crossings and for a railway station in the District of Columbia. To finance this, the bill instituted a property tax in the District of Columbia. The primary issue was whether the law appropriated public funds for private purposes, but the Court dismissed an Origination Clause challenge on the ground that the funds raised were not for the general fund but for a specific project and were incidental to that project. Under the Affordable Care Act all tax moneys will go to the general treasury as revenue; thus *Millard* does not apply.

VII. CONGRESS INTERPRETS THE ORIGINATION CLAUSE

To some extent, Congress has policed itself concerning Origination Clause violations, although as noted earlier, Congress's failure to do so does not absolve the Court of its duty to exercise judicial review. *Munoz-Flores* 392.

The Senate has considered some of the finer points of what constitutes raising revenue:

* A bill is not for the purpose of raising revenue under the Origination Clause if it sets fees for services. The Senate has determined that a bill which included postal rates was not subject to the Origination Clause, reasoning that postal charges are not revenue because they are made in exchange for specific services.[20] The

tax imposed by the Affordable Care Act is not in exchange for any government services.

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[20] Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States Including References to Provisions of the Constitution and Laws, the Laws, and Decisions*

* A bill is more likely to be subject to the Origination Clause if the revenues are paid into the general fund of the Treasury rather than set aside for a specific purpose. The Senate has sustained a point of order against such a bill.[21] Revenues from the tax imposed by the AFA are paid into the general fund of the Treasury.

* The Senate has declined to consider a bill dealing with international oil commerce because import restrictions directly affect tariff revenues.[22] The AFA tax doesn't just affect tax revenues; it provides tax revenues.

The House has also protected its prerogatives under the Origination Clause by adopting resolutions "blue-slipping" legislative proposals, that is, returning them to the Senate without action. James V. Saturno, Specialist on the Congress Government and Finance Division, has written,

> Overall, House precedents indicate a wide spectrum of tax and tariff actions that have been excluded on the basis of the origination clause. [23]

The House and Senate themselves have invoked the Origination Clause in circumstances similar to the

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of the United States Senate, Vol. VI. Ch. CLXXXX (Washington: Government Printing Office 1977), § 317.

[21] Cannon § 316.

[22] Cannon § 320.

[23] James V. Saturno, *The Origination Clause of the U.S. Constitution: Interpretation and Enforcement* (Congressional Research Service, The Library of Congress 2002) CRS-6.

case at hand. But the fact that the leadership of a Congress controlled by the same political party as the President, in a high-pressure and highly-partisan vote, failed to do so, does not absolve the courts of their duty to enforce the Constitution. *Munoz-Flores* 392.

VIII. THE USE OF A "SHELL BILL"

The Administration may justify its violation of the Origination Clause by claiming that, in fact, the Affordable Care Act did originate in the House. They will note that Senate Majority Leader Harry Reid (D-NV) took a bill that had been passed by the House, struck out all of its language, and inserted what became the Affordable Care Act in its place.

Amicus contends that the "shell game" of using a "shell bill" does not satisfy the Origination Clause, for the following reasons:

(1) The Affordable Care Act is completely unrelated to the original House bill. The House bill was House Resolution 3590, titled the Service Members Home Ownership Tax Act of 2009. The purpose of the bill was to grant tax credits to military personnel seeking to purchase their first homes and to increase corporate estimated taxes for certain corporations by 0.5%. It had nothing whatsoever to do with anything related to health care. The Senate's "amendment" deleted the House Resolution in its entirety and substituted the Affordable Care Act in its place. H.R. 3590 was a six-page, double-spaced bill. Senator Reid's "amendment" was a 906-page[24], single-spaced bill that bore no relationship whatsoever to the original House Bill.

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[24] The exact number of pages varies with the printing and formatting of the bill.

(2) A basic principle of parliamentary law is that an amendment must be germane to the main measure. According to *Robert's Rules of Order, Newly Revised,* "An amendment must always be *germane* -- that is, closely related to or having bearing on the subject of the motion to be amended. this means that no new subject can be introduced under pretext of being an amendment (see pp. 129-31)."[25] *Robert's* further states on pp. 129-31:

> DETERMINING THE GERMANENESS OF AN AMENDMENT. As already stated, an amendment must be *germane* to be in order. To be *germane,* an amendment must *in some way involve* the same question that is raised by the motion to which it is applied.[26]

Amicus cites *Robert's,* not necessarily because the Senate is strictly bound thereby, but because *Robert's* sets forth universal principles of fairness and orderliness by which deliberative bodies conduct their business. "Amending" a bill by striking its language entirely and inserting instead a totally new bill that bears no relationship whatsoever to the former, is simply not what people commonly understand the term "amend" or "amendment" to mean.

Let us also examine definitions from dictionaries published close to the founding era. Samuel Johnson's *A Dictionary of the English Language* (1768) defines "amendment" as "in law, a correction of an error committed in a process."[27] Deleting a 6-page bill about tax credits for military personnel purchasing homes and inserting in its place a 906-page bill about health care hardly constitutes "correcting an error committed in a process." Noah Webster's *An American Dictionary of the English Language* (1828) uses a definition similar to Samuel Johnson's but adds an additional definition, "A word, clause or paragraph, added or proposed to be added to a bill before a legislature."[28] Clearly, the common understanding of the term "amendment" did not include substitution of a totally unrelated bill.

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[25] General Henry M. Robert, 1876; rev. Sarah Corbin Robert, Henry M. Robert III, William J. Evans, Daniel H. Honemann, and Thomas J. Balch, *Robert's Rules of Order, Newly Revised* (Perseus Publishing 2000) Art. VI, § 12, p. 125.

[26] *Robert's,* VI:12, pp. 129-31.

The Framers were deeply concerned that the power to tax be carefully and strictly limited to the legislative body that represents the people who pay the taxes. They would not have been impressed by the sophist argument that a "shell bill" fulfills the requirements of the Origination Clause.

IX. THE AFA ITSELF TREATS THE EXACTION AS A TAX.

Finally, Congress seems to have considered this Affordable Care Act exaction a tax. The AFA, § 10106(b)(1) states:

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[27] Samuel Johnson, *A Dictionary of the English Language 3rd. Ed.* (Dublin: W.G. Jones, 1768), "Amendment." *books.google.com / ... / A_Dictionary_of_the_English_Language.html.*

[28] Noah Webster, *1828 An American Dictionary of the English Language* (1828; reprinted Foundation for American Christian Education 1995), "Amendment." Webster was younger than most of the Framers of the Constitution, but he knew many of them personally, sometimes dined with them during the Convention of 1787, and was commissioned by them to write a defense of the Constitution.

124 STAT. 909

PUBLIC LAW 111–148—MAR. 23, 2010 ...

(b)(1) Section 5000A(b)(1) of the Internal Revenue Code of 1986,

as added by section 1501(b) of this Act, is amended to read as

follows:

"(1) IN GENERAL

—If a *taxpayer* who is an applicable individual, or an applicable individual for whom the taxpayer is liable under paragraph (3), fails to meet the requirement of subsection (a) for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the *taxpayer* a penalty with respect to such failures in the amount determined under subsection (c).".

(2) Paragraphs (1) and (2) of section 5000A(c) of the

Internal Revenue Code of 1986, as so added, are amended

to read as follows:

"(1) IN GENERAL

.—The amount of the penalty imposed by

this section on any *taxpayer* for any *taxable* year with respect

to failures described in subsection (b)(1) shall be equal to the lesser of— ...[29]

Amicus notes that:

(1) The exaction is paid, not by a "person" or a "citizen," but by the "taxpayer."

(2) As noted earlier, the amount varies according to the taxpayer's income; this is more characteristic of a tax than of a penalty.

(3) Those whose income is so low that they do not have to file a federal tax return are exempt from the tax.

(4) Those who have not worked for the previous three months, those who have religious objections, those who are undocumented immigrants, those who are incarcerated, and those who are members of Indian tribes are exempt from the tax.

(5) The taxpayer pays this exaction, not at the courthouse, but on his/her regular federal income tax return.

(6) The AFA forbids the IRS from collecting the tax by aggressive efforts that are normally associated with penalties.

And, (7) Congress called this portion of the AFA an amendment to the Internal Revenue Code, and it is codified with the Internal Revenue Code at 26 U.S.C. All of this suggests that Congress, while using the cosmetic term "penalty," recognized that it is in fact a tax.

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[29] Public Law 111-148, March 23, 2010, www.gpo.gov/fdsys.pkg/ PLAW-111publ148/pdf/PLAW-111publ148.pdf (emphasis added).

X. THE ACA FORCES UPON RESPONDENTS AN UNCONSTITUTIONAL FREE EXERCISE DILEMMA.

Because other parties and amici have addressed the Free Exercise issue, *Amicus* will do so only briefly.

Thomas v. Review Board, 450 U.S. 707 (1981), involved a Jehovah's Witness who was fired from his foundry job for refusing because of religious conviction to build tank turrets. The Review Board refused to pay unemployment compensation, saying he had been fired for refusing to do the work assigned to him.

In keeping with its holding in *Sherbert v. Verner,* 374 U.S. 398 (1963), this Court reversed, holding at 717-18:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Citing *Wisconsin v. Yoder,* 406 U.S. 205, 220 (1972), this Court also noted that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."

The ACA forces Hobby Lobby and Conestoga, their owners, incorporators, officers and shareholders, into the same dilemma as Thomas, Sherbert, and Yoder. They must either

(a) violate their religious convictions by providing contraception/aborfacients, or

(b) give up a substantial government benefit, the right to do business as a corporation, in these instances a private corporation.

This is precisely what the Free Exercise Clause prohibits, as this Court said in *Thomas* and *Sherbert*. And as in *Yoder,* even if this ACA provision could be considered neutral on its face, its application to Hobby Lobby and Conestoga is a free exercise and RFRA violation.

CONCLUSION

Speaking for a unanimous Court in 1819, Chief Justice John Marshall declared that "the power to tax involves the power to destroy." *McCulloch v. Maryland,* 17 U.S. 316, 431 (1819). Like their predecessors in England and in the colonies, the Framers of our Constitution were wary about taxing powers and strove to limit those powers to the House of Congress that most directly represents the people who pay the taxes.

Despite the Administration's gyrations, the Supreme Court has spoken clearly and unmistakably: the insurance mandate of the Affordable Care Act constitutes a tax. It is therefore subject to the Origination Clause, and this Court should not allow a "shell game" subterfuge to defeat the intent and purpose of those who drafted and ratified that clause.

Amicus urges the Court to rule that the Affordable Care Act is unconstitutional, both in the insurance mandate and in its entirety, in violation of the Origination Clause and the Free Exercise Clause.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 13-354

In The Supreme Court of the United States

◆

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioner,
v.
HOBBY LOBBY STORES, INC., ET AL.
Respondents.

◆

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

◆

BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION, BISHOPACCOUNTABILITY.ORG, CHILDREN'S HEALTHCARE IS A LEGAL DUTY, THE CHILD PROTECTION PROJECT, THE FOUNDATION TO ABOLISH CHILD SEX ABUSE, SURVIVORS FOR JUSTICE, AND THE SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

◆

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INTEREST OF AMICI CURIAE[1]

The Freedom From Religion Foundation ("FFRF"), an I.R.C. § 501(c)(3) (2006), national nonprofit organization based in Madison, Wisconsin, is the largest association of freethinkers in the United States, representing nearly 20,000 atheists and agnostics. Founded nationally in 1978, FFRF is a growing organization, with members in every state, the District of Columbia, and Puerto Rico. FFRF's two primary purposes are to educate the public about nontheism and to defend the constitutional separation between state and church.

FFRF's interest in this case arises from its position that the radical redefinition of "religious freedom" to include a right to impose one's religious beliefs on others is arguably the greatest threat to individual freedom of conscience. This alarming redefinition is embodied in the Religious Freedom Restoration Act and arguments demanding strict scrutiny under the Free Exercise Clause of the First Amendment for neutral, generally applicable laws. The contraceptive mandate cases are prime examples of this new argument that believers have a right to force their religious beliefs on others.

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[1] On December 5, 2013, Counsel for Petitioner, Kathleen Sebelius, filed a consent to the filing of *amicus curiae* briefs, in support of either party or of neither party. On January 21, 2014, Counsel for Respondent, Hobby Lobby Stores, Inc., granted consent to the filing of an *amicus curiae* brief in support of the Petitioner. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the Amici or their counsel made a monetary contribution to this brief 's preparation or submission.

This case is particularly important to FFRF, as its two principal founders, Anne and Annie Laurie Gaylor, formed the organization partly in response to unwarranted governmental and religious intrusion into a woman's reproductive health decisions. Thus, FFRF was organized in part to fight what it believes to be some of the root causes of women's oppression — patriarchal religion and its incursions upon our secular laws.

BishopAccountability.org is a § 501(c)(3) corporation that maintains a library in Waltham, MA, and a large online archive of documents, reports, and newspaper articles documenting the sexual abuse of children by persons employed by religious institutions, and the mismanagement by religious leaders of abuse allegations. Their collection of newspaper articles covers sexual abuse in all religions and denominations worldwide. Their document and report collections focus on sexual abuse and mismanagement by employees of Roman Catholic dioceses in the United States and Ireland, but the institutional problems revealed by those documents and reports are common to all religious organizations and to corporations and institutions generally. They also maintain an extensive database of Catholic priests, brothers, nuns, deacons, and seminarians who have been accused of abuse. Their holdings and database are often used by law enforcement personnel in their efforts to protect children from future abuse. Their collection offers ample documentation of the barriers that victims of child sexual abuse encounter in coming forward, seeking justice in the courts, and the growing awareness in recent years that institutions have covered up the sexual abuse of children by their personnel and thereby created risk for children in the future. Their interest in this case lies in the fact that RFRA, and its state counterparts, create even more barriers to transparency and justice for the child sex abuse victims who have been harmed by religious organizations and individuals.

Children's Healthcare Is a Legal Duty, Inc. ("CHILD") is a nonprofit §501(c)(3) and national membership organization with members in 45 states and three foreign countries. Our mission is to stop child abuse and neglect related to religious beliefs and cultural traditions.

CHILD opposes religious exemptions in state law when they privilege religious practice above the best interests of children. Though the U.S. Supreme Court invalidated the Religious Freedom Restoration Act as it applied to state law, we remain opposed to RFRA as applied to federal law because it compromises the welfare of children in the District of Columbia and on federal property. Moreover, we oppose any religious exemptions in federal law that compromise the health and safety of children.

During the three years that RFRA was applicable to the states, several courts relied on it to reach outcomes detrimental to the interests of children. These include *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995); *DeBose v. Bear Valley Church of Christ*, 890 P.2d 214 (Colo. 1995) (as modified on denial of rehearing); *Hunt v. Hunt*, 648 A.2d 843 (Vt. 1994); and *Murphy v. Murphy*, 574 N.W.2d 77 (Minn. App. 1998). Besides limiting the states' ability to protect children, these decisions also constricted litigation between private parties, as in DeBose v. Bear Valley, supra, limiting other means of protecting children's welfare.

In the instant case, CHILD believes that RFRA is unconstitutional because it permits religious exemptions to generally applicable federal law. RFRA therefore privileges religious practice above the best interests of children. In addition, CHILD believes that access to contraceptives is a public good and that it is certainly in the best interests of all children for their mothers to have access to contraceptives and for girls to have access to emergency contraception, particularly when they are victims of rape.

The Child Protection Project ("CPP") is a § 501(c)(3) nonprofit organization that recognizes that many heinous abuses occur when religious organizations seek and hide behind specific religious exemptions under the law. Religions must be good corporate citizens and held to the same standard as secular organizations when dealing with children in their care. Strict scrutiny, particularly the least restrictive means test, endangers children and women in religious settings. As has been documented, too often religious organizations will provide faith healing only, allowing children and others to suffer or die from preventable illnesses, and permit the cover up of underage plural marriages, statutory rape, and the abandonment of children. CPP's interest in this case is to ensure that our laws do not make it easier for religious organizations and individuals to endanger the vulnerable.

The Foundation to Abolish Child Sex Abuse ("FACSA") is a nonprofit I.R.C. § 501(c)(4) that has a mission to influence state and federal governments, courts, the criminal justice system and the media to (1) protect children from sexual abuse; (2) hold those who sexually abuse children accountable; (3) hold institutions which condone and enable the sexual abuse of children accountable; and (4) help child sex abuse victims find justice. Its interests in this case are directly correlated with its mission. Their interest in this case lies in the fact that RFRA, and its state counterparts, create even more barriers to justice for child sex abuse victims who have been harmed by religious organizations and individuals. Further, RFRA, and its state counterparts, makes it more challenging for perpetrators, and the institutions that condone them, to be held accountable.

Survivors for Justice ("SFJ"), is a not-for-profit organization founded by advocates from within the strict Orthodox Jewish community dedicated to providing emotional support and legal assistance to victims of sexual abuse. One of SFJ's main goals is to ensure that within our insular community abuse is dealt with in a manner that complies with secular law.

Indeed, while Jewish law (*halacha*) mandates compliance with civil law under the principle that the "law of the land is binding," (*dina demalchusa dina*,) in practice such compliance is discouraged by the religious leadership within the Orthodox Jewish community. Certain rabbis invoke ancient cultural taboos against "informing" on a fellow Jew to the secular authorities—and other misrepresentations of Jewish doctrine—to ensure that abuse is dealt with "internally," with disastrous consequences for society. Those rare community members who do report can expect to face intimidation, threats and ostracism.

Many of SFJ's clients reported their abuse to rabbis and administrators of religious schools and institutions only to be summoned to religious courts (*bet dins*) ill equipped to conduct a meaningful investigation and often compromised by myriad conflicts of interest and no real power to enforce their "verdicts." These proceedings have invariably resulted in the protection of the abuser and no recourse for the victim.

Government-funded Orthodox Jewish organizations such as Agudath Israel of America and Ohel Children's Home and Family Services openly defy civil and criminal statutes with impunity. Recently, Agudath Israel of America sponsored a CLE conference where participants were advised to defy New York State law obligating them to report sexual abuse to the authorities. Instead they were directed to report sexual abuse to their rabbis. These are but a few glaring examples of the danger to society inherent in allowing religious doctrine to trump civil law.

SFJ's interest in this case is that it stands for the belief that only adjudication by the civil justice system, without interference or involvement of religion, can protect society from the abuse of power that allows predators to thrive and operate freely within our schools and religious institutions.

The Survivors Network of those Abused by Priests ("SNAP"), is a § 501(c)(3) not-for-profit agency and the oldest and largest self-help support group run by and for survivors. The mission of the organization is to heal the wounded and protect the vulnerable. SNAP provides peer counseling in person, on the telephone, by mail. SNAP also hosts conferences and gatherings and provides education and advocacy about clergy sexual abuse. SNAP works to reform secular and church laws and structures to better safeguard children. Founded in 1988, the organization now has groups meeting in 65 cities in the United States with over 15,000 members. SNAP has an interest in this case as many perpetrators of its members still pose a risk to children and the law at issue, the Religious Freedom Restoration Act, and its state counterparts, create even more barriers than already exist for victims to safeguard children, expose predators and obtain justice from religious organizations and individuals, and, therefore, a ruling in this case that RFRA is unconstitutional is needed to more securely protect our nation's children.

SUMMARY OF ARGUMENT

This case is testimony to the extreme religious liberty rights accorded to believers by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (2012), at the expense of others. The intense passions about religious freedom and women's reproductive health in this case have obscured the issue that should be decided before this Court reaches the merits: RFRA is unconstitutional.

RFRA is Congress's overt attempt to takeover this Court's role in interpreting the Constitution. "Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)." *Boerne v. Flores*, 521 U.S. 507, 512 (1997). Accordingly, it "contradicts vital principles necessary to maintain separation of powers . . . ." *id.* at 536, and Article V. *Id.* at 529. RFRA also is beyond Congress's power, as an illegitimate exercise of power under the Commerce Clause.

RFRA also accords religious believers extreme religious liberty rights that yield a political and fiscal windfall in violation of the clearest commands of the Establishment Clause in a long line of cases. *Amici Curiae*, who are united in their concern that RFRA endangers the vulnerable—who would otherwise be protected by the neutral, generally applicable laws of this country—respectfully ask this Court to hold that RFRA is unconstitutional once and for all, and to restore common sense to United States religious liberty guarantees.

ARGUMENT

This amicus brief makes an argument that has been lost in the intense public debate between claimed religious liberty for for-profit corporations and women's reproductive health: the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb , is unconstitutional.

The issue of RFRA's constitutionality has not been raised in this case, or the vast majority of other RFRA cases involving federal law, because the religious claimants do not challenge it, the federal government has chosen not to,[2] and courts rarely take up the issue *sua sponte*. Thus, there have only been a few federal courts reaching the issue. *See, e.g., Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) (holding RFRA as applied to Age Discrimination in Employment Act is constitutional as it did not violate the separation of powers principles nor the Establishment Clause, and was a proper exercise of Congressional power under the Commerce Clause, in response to Plaintiff minister invoking age discrimination claim and that RFRA was unconstitutional); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) (holding RFRA constitutional as applied to federal law under Art. I powers, after the district court raised question of RFRA's constitutionality).

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[2] The Attorney General determines when to defend a federal statute and when not to. The default position is to defend acts of Congress, but this is not a hard and fast rule, and the Attorney General owes fealty to the Constitution, not Congress. Recently, Attorney General Eric Holder refused to defend the constitutionality of the Defense of Marriage Act, Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Rep. (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html, in *United States v. Windsor*, 133 S.Ct. 2675, 2683 (2013). *Windsor*, 133 S.Ct at 2683. The issue was neither raised nor addressed in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 544 U.S. 973 (2005), which is

The decision in *Emp't Div. v. Smith*, 494 U.S. 872 (1990), is a landmark, summary, and straight explanation of this Court's entire free exercise jurisprudence, in which this Court carefully considered and weighed the various possibilities and the most appropriate balance between history, doctrine, and the Court's experience over 100 years with free exercise cases. With a simple majority vote for RFRA ,[3] Congress shoved the Court aside

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this Court's only other RFRA case other than *Boerne v. Flores*, 521 U.S. 507 (1997).

[3] RFRA was not passed unanimously in either the House or Senate, despite its proponents' claims. It was passed in the House by a procedure euphemistically called "unanimous consent." 139 CONG. REC. H8713 (daily ed. Nov. 3, 2003).

and handed believers the most extreme religious liberty regime ever in place in the United States.

This Court correctly held in *Smith* that under the Free Exercise Clause, "the approach in accord with the vast majority of our precedents, is to hold the [strict scrutiny] test inapplicable to [free exercise] cases" involving neutral, generally applicable laws. *Id.* at 885. For the Court, the case was essentially a case of first impression in that it involved a demand for accommodation where the underlying religious conduct was illegal, which distinguished it from the *Sherbert v. Verner*, 374 U.S. 398 (1963), line of cases. Marci A. Hamilton, Employment Division v. Smith *at the Supreme Court: The Justices, The Litigants, and the Doctrinal Discourse*, 32 CARDOZO L. REV. 1671, 1673 (2011). The result was that two drug counselors who were fired after using the illegal drug peyote, during Native American Church religious services, could not obtain unemployment compensation, because they had violated state law. The Free Exercise Clause did not provide immunity from the state law governing peyote or unemployment compensation. *Emp't Div. v. Smith*, 494 U.S. at 890.

This Court explained:

> [G]overnment's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development. To make an individual's

> obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling—permitting him, by virtue of his beliefs, to become a law unto himself—contradicts both constitutional tradition and common sense.

494 U.S. at 885 (internal quotation marks and citations omitted). Accordingly, strict scrutiny in the *Smith* case "would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applicability." *Boerne v. Flores*, 521 U.S. 507, 513 (1997.

Lobbyists for religious organizations and some civil rights groups responded to *Smith* with hyperbole and exaggeration, claiming that the Supreme Court had "abandoned" religious liberty. They mischaracterized the Court's previous holdings. Their representations to Congress that the First Amendment mandates exemptions from neutral, generally applicable laws also incorrectly portray the Framers' intent and the history of free exercise in the states. *See Boerne*, 521 U.S. at 541 (Scalia, J., concurring); *see also* Marci A. Hamilton, *The "Licentiousness" in Religious Organizations and Why it is Not Protected Under Religious Liberty Constitutional Provisions*, 18 WM. & MARY BILL RTS. J. 953 (2010) [hereinafter Hamilton, *Licentiousness*]; Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992); Ellis West, *The Case Against a Right to*

Religion-Based Exemptions, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591 (1990).

This Court predicted in *Smith* that legislatures would be amenable to requests for accommodation. 494 U.S. at 890. The decision proved to be prescient: while the rhetoric on Capitol Hill furiously attacked this Court's interpretation of the First Amendment as the end of religious liberty, the federal government and the states where Native American Church members practice their religion enacted exemptions for the sacramental use of peyote.[4] This underscores how misguided the attack on *Smith* was.

The hearings before Congress were almost exclusively a litany of criticism against this Court and the *Smith* decision, accompanied by demands that Congress reverse this Court's reading of the First Amendment. As this Court stated, "Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990)." *Boerne*, 521 U.S. at 512.

RFRA was enacted three years after *Smith* was decided. It handed religious claimants the constitutional standard that drug counselor Smith had demanded but that the Court had thoughtfully rejected. The result was that religious entities obtained extreme rights to trump constitutional, neutral, generally applicable laws, in defiance of the Court's opinion.

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[4] *See, e.g.*, David Perry Babner, *The Religious Use of Peyote After* Smith II, 28 IDAHO L. REV. 65 (1991); Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 474-77 (2012).

In 1997, this Court, in a majority decision authored by Justice Kennedy, held that RFRA was unconstitutional in *Boerne v. Flores,* 521 U.S. 507 (1997), invoking several constitutional bedrock principles. First, RFRA is a violation of the separation of powers as a takeover of the Court's primary role as interpreter of the Constitution, *Boerne*, 521 U.S. at 519, 523–24. Second, it is beyond Congress's power. *Id.* at 536. Third, RFRA's enactment by simple majority vote circumvented the rigorous requirements under Article V to amend the Constitution. *Id.* at 529. These defects remain, even when RFRA is solely applicable to federal law, and this Court should invalidate RFRA once and for all.

To quote Gertrude Stein, "[a] rose is a rose is a rose." Gertrude Stein, *Sacred Emily*, Geography and Plays (1922). The plain language of RFRA makes the case that it is a shameless takeover of the Free Exercise Clause, constitutional doctrine, and "all . . . free exercise cases." 42 U.S.C. § 2000bb(b)(1) (2012). The very title of the law indicates that it is a "restoration" of something that previously existed. It invokes the "framers" for a standard they would not have adopted. *See* 42 U.S.C. § 2000bb(a)(1) (2012); *see also Boerne*, 521 U.S. at 541 (Scalia, J., concurring); Hamilton, *Licentiousness*, *supra*; Hamburger, *supra*; West, *supra*. It unabashedly states that the statute's purpose is to "restore the compelling interest test as set forth in [the Supreme Court's First Amendment free exercise cases] *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (2012).

In short, RFRA is "restoring" this Court's doctrine in cases where this Court had held it did not belong. *See also* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L. J. 65, 119–20 (1996) (arguing that based on its "proclaimed purpose, RFRA violates the separation of powers doctrine . . . .").

RFRA plagiarizes this Court's doctrinal terminology and approach by choosing the Court's trigger for free exercise cases and a level of scrutiny from prior cases. It even replicates the burdens on the parties in free exercise cases:

> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1 (2012). This plain language establishes that Congress was aggrandizing its power by taking over this Court's power to interpret the Constitution. On its face, therefore, RFRA is not an ordinary statute, and is in violation of the separation of powers and Art. V. Moreover, the only class of beneficiaries for these extreme rights against constitutional laws is religious, which violates the Establishment Clause. No matter how much one pretends that RFRA is "just a statute," it is in fact an unconstitutional enactment.

I. RFRA Violates the Separation of Powers

There is nothing subtle about RFRA's encroachment on this Court's power. With RFRA, Congress selected the constitutional standards it prefers and required them to be applied in every circumstance where the Court has ruled it should not be applied. *See* Joanne C. Brant, *Taking the Supreme Court at its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 6 (1995) (arguing that RFRA violates the separation of powers doctrine because "it undermines the most fundamental power held by any branch of government: the power to determine its own limitations.").

RFRA was and is a novel statute, which has not yet been replicated. For that reason alone, this Court should be wary. "Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes 'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent' for Congress's action." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2586 (2012) (Roberts, C.J.) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 130 S.Ct. 3138, 3159 (2010)) (internal quotation marks omitted).

RFRA is Congress's attempt to concoct its own free exercise clause out of the Court's constitutional doctrine. This Court's terminology is Congress's terminology. The title alone says Congress is restoring a doctrine, not introducing anything new. RFRA lifts this Court's doctrinal language including "substantial burden" and "compelling interest."[5] And Congress "restores" its two favorite free exercise decisions, *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). RFRA even replicates the burdens on the parties. 42 U.S.C. § 2000bb-1.

At the same time, Congress shopped among various other constitutional parameters. To these pre-existing free exercise doctrines, it added a new element for the benefit of religious believers. As this Court noted in *Boerne*, the "least restrictive means" test was not the test used in previous free exercise cases, *Boerne*, 521 U.S. at 535, even in *Sherbert* or *Yoder*, The concept of extremely narrow tailoring for strict scrutiny, however, is present in this Court's other constitutional cases invoking strict scrutiny, *e.g.*, under the Equal Protection Clause when a law includes a race-based distinction. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507-08 (1989).

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[5] Congress borrowed free exercise doctrine up to the point it could hand religious lobbyists the maximum benefit, but was not even satisfied with that. It also added narrowly tailoring not yet seen in the Court's free exercise cases. .

Then Congress ordered the federal courts to apply this new package of free exercise rights to the very laws this Court had held should not receive the benefit of strict scrutiny: neutral, generally applicable laws. *Boerne*, 521 U.S. at 515; *Smith*, 494 U.S. at 879.

RFRA's legislative history supports reading it as a takeover of this Court's power to interpret the Constitution, as it focuses nearly exclusively on members of Congress and testimony castigating the Supreme Court for its First Amendment interpretation in *Smith*. To say that RFRA is not in fact an attempt to overrule this Court's constitutional interpretation is to engage in high-level intellectual gymnastics divorced from its text, history, and fundamental common sense.

If it were constitutional, RFRA is a formula that would make it possible for Congress to meddle with any constitutional doctrine and decision, and move the Court to the sidelines as political winds shift constitutional standards by simple majority votes. *See* Christopher L. Eisgruber & Lawrence G.

Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 469-70 (1994) (arguing that RFRA is unconstitutional because it violates principles of religious freedom, it exceeds Congress' authority, and it is an "assault upon the judiciary's interpretive autonomy."). It ignores this Court's long experience in crafting and considering the proper balance of rights. Before RFRA, this Court's role was to engage in ongoing oversight and consideration of how each constitutional rule operates through the decades and centuries most effectively to achieve the Constitution's multiple ends. If Congress can unilaterally insert its preferred standards whenever politically pressured to do so, this Court's role has been preempted. *See* Aurora R. Bearse, Note, *RFRA: Is it Necessary? Is it Proper?*, 50 RUTGERS L. REV. 1045, 1066 (1998); *see also* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 3 (1998).

As this Court stated in *Boerne*, "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." *Id.* at 536.

II. RFRA Violates Article V

Article V imposes extraordinary limits on amendments to the Constitution, resulting in only 27 amendments over the course of 225 years:

> The Congress, whenever two thirds of both Houses shall deem it necessary,

> shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate. U.S. Const. art. V.

The Framers chose this complicated and difficult route to ensure stability and maintenance of the separation of powers. *See* Edward J.W. Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of* City of Boerne v. Flores, 98 COLUM. L. REV. 1410, 1447 (1998). *Cf.* William Van Alstyne, *The Failure of the Religious Freedom Restoration Act under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 292–303 (1996), cited in *Boerne*, 521 U.S. at 529.

This Court in *Boerne* explained the separation of powers defects under the umbrella of Congress's power under the Fourteenth Amendment, by reasoning first from this Court's role vis-à-vis the Bill of Rights regarding the "traditional separation of power between Congress and the Judiciary," stating that, "[t]he first eight Amendments to the Constitution set forth self-executing prohibitions on government action, and this Court has had primary authority to interpret those prohibitions." *Boerne*, 521 U.S. at 524. The Court considered the argument that Sec. 5 of the Fourteenth Amendment was intended to invest Congress with a new power to create constitutional rights against the states—with the understanding that they could *not* be created against the federal government. While the history of the Fourteenth Amendment supports that Congress may enforce constitutional rights against the states, even in a prophylactic manner, the Court concluded that under the Fourteenth Amendment, "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary." *Boerne*, 521 U.S. at 524. This Court's cases further confirmed that even Sec. 5 of the Fourteenth Amendment had not "endowed Congress with the power to establish the meaning of constitutional provisions." *Id.* at 527. With RFRA , Congress unilaterally usurped that authority: RFRA "appears . . . to attempt a substantive change in constitutional protections." *Id.* at 532. *See also*, *id*. at 534.

Accordingly, when the courts apply RFRA, the primary doctrine comes from the Court's constitutional free exercise cases, as the parties in this case have urged this Court to do. "Given this restorative purpose, Congress expected courts considering RFRA claims to 'look to free exercise cases decided prior to *Smith* for guidance.' S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993) (Senate Report); See H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same)." Br. of Petitioner Kathleen Sebelius, Secretary of Health and Human Services, et al., Jan. 10, 2014, at 16. Br. for Respondents at 23–28, *Sebelius v. Hobby Lobby Stores, Inc.*, 133 S.Ct. 641 (2012) (No. 13-354); Br. for Petitioners at 17–19, *Conestoga Wood Specialities Corp. v. Sebelius*, (No. 13-356), 2014 WL 173487. *See also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1131–32 (10th Cir. 2013) (en banc); *Conestoga Wood Specialities Corp. v. Sec'y of U.S. Dep't of Health and Human Servs.*, No. 13-1144, 2013 WL 1277419, at *2–3 (3d Cir. Feb. 8, 2013).

RFRA 's defenders say that RFRA is "just a statute" that is different from a constitutional amendment. Yet, everything passed by Congress is "just a statute." It is a meaningless truism to say that just because a law passes through Congress and is signed by the President, it is a statute. Some statutes are aggrandizements of Congress's power, or fail to follow required procedures, and, therefore, are unconstitutional statutes. *E.g., Clinton v. City of New York*, 524 U.S. 417 (1998) (holding Line Item Veto Act unconstitutional); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 21, 211 (1995) (holding § 27A(b) of the 1934 Act unconstitutional because it would require federal courts to reopen final judgments entered before the provision was enacted); *Metro. Washington Airports Auth. v.*

Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 253 (1991) (holding that congressional delegation of veto power to review board composed of congressmen unconstitutional); *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (holding unconstitutional a section of the Immigration and Nationality Act authorizing a one-house resolution to invalidate Executive Branch decision to allow deportable alien to remain in the country); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Comptroller General, as congressional agent, may not exercise executive functions). That describes RFRA.

III. RFRA Is Not a Valid Exercise of Congressional Power

Article I grants no federal enumerated power to Congress that justifies RFRA as applied to federal law. It is in fact, simply, an enactment by simple majority vote of constitutional doctrines that Congress prefers. There is no enumerated power over religious liberty. The only conceivable theory to support its application to federal law is the Commerce Clause, and it is an illegitimate law under this Court's Commerce Clause jurisprudence.

The Commerce Clause cannot be used to regulate that which is noneconomic. RFRA is nothing other than a constitutional standard of review, which means it is solely aimed at laws. That is what constitutional standards of review measure. Yet, the law is by its nature noneconomic.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that a legitimate exercise power under the Commerce Clause requires a direct and substantial effect on commerce, and that to uphold the Gun-Free School Zones Act in that case, "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.[6] *See also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2646 (2012) (Scalia, J., dissenting) ("At the outer edge of the commerce power, this Court has insisted on careful scrutiny of regulations that do not act directly on an interstate market or its participants."); *Sebelius*, 132 S.Ct. 2566, 2586-87 (2012). To conclude that RFRA is a direct regulation of commerce with a substantial effect on commerce, this Court would have to "pile inference upon inference."

RFRA does not directly regulate any activity in commerce itself, but rather the law, which is noneconomic in nature. To be sure, religious entities have tried to undergird Congress's power to enact RFRA by arguing that religious entities otherwise operate in commerce. "But if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end." 132 S.Ct. at 2648.

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[6] In *Lopez*, the Court also held that the Gun-Free School Zones Act was unconstitutional in part because Congress did not consider its authority under the Commerce Clause. 514 U.S. at 562-63. The same is true of RFRA.

Under similar reasoning, the private right of action in the Violence Against Women Act was held as beyond Congress's power under the Commerce Clause, because "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *United States v. Morrison*, 529 U.S. 598, 613 (2000). *See also Reno v. Condon*, 528 U.S. 141, 142 (2000); *cf. Gonzales v. Raich*, 545 U.S. 1, 25-26 (2005) (finding law valid under the Commerce Clause where it "directly regulates economic commercial activity"). *See also* Lara A. Berwanger, Note, *White Knight?: Can the Commerce Clause Save the Religious Land Use and Institutionalized Persons Act?*, 72 FORDHAM L. REV. 2355, 2382 (2004).

RFRA 's novel tack of usurping this Court's constitutional doctrine as the substance of an ordinary statute is unconstitutional as against the states because it is beyond Congress's power, see *Boerne*, and unconstitutional when applied to federal law, because the Commerce Clause does not justify regulation of the law *per se*, which is noneconomic in nature.[7]

IV. RFRA Violates the Establishment Clause

Defenders of RFRA say it cannot be unconstitutional on the theory that Congress can carve up its laws however it sees fit. After all, Congress's own efforts are scaled back by this self-imposed law. This is, in fact, an incomplete description of the necessary issues to be considered under the Religion Clauses.

The Establishment Clause prevents Congress from favoring religious individuals or entities. It is after all, "[t]he clearest command of the Establishment Clause. . . that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). This command is particularly strong when financial benefit is at stake. *See also Mitchell v. Helms,* 530 U.S. 793, 809 (Thomas, J., plurality) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, the Court has consistently turned to the neutrality principle, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."); *Lee v. Weisman*, 505 U.S. 577 (1992); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989). RFRA carves up every neutral, generally applicable federal law (i.e., those that are constitutional under the Free Exercise Clause) for the benefit solely of religious actors and it does so by granting extreme rights against otherwise constitutional statutes. This violates the Establishment Clause.[8]

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[7] Nor could RFRA be constitutional under Congress's spending or taxing powers. Such a preference for religious believers to overcome neutral, generally applicable fiscal or tax laws would be an extraordinary financial benefit designed solely for religious actors, and a patent violation of the Establishment Clause, as discussed in the next section. RLUIPA's prison provisions have been upheld under the Spending Clause, but RLUIPA regulates states and local governments, not individuals, and the relevant funding flows to prisons, not religious persons. *See Sossamon v. Texas*, 560 F.3d 316, 328 (5th Cir. 2009), *aff'd*, 131 S.Ct. 1651 (2011); *Madison v. Virginia*, 474 F.3d 118, 124 (4th Cir. 2006); *Benning v. Georgia*, 391 F.3d 1299, 1306–07 (11th Cir. 2004); *Charles v. Verhagen*, 348 F.3d 601, 606–09 (7th Cir. 2003); *Mayweathers v. Newland*, 314 F.3d 1062, 1066 (9th Cir. 2002).

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[8] Even if this Court did not invalidate RFRA under the Establishment Clause on its face, it is undoubtedly unconstitutional as a violation of the separation of church and state in many applications. *See, e.g.*, Br. for Church-State Scholars Frederick Mark Gedicks, et al. as Amicus Curiae Supporting Petitioner, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354. *See also* Sara Brucker, Navajo Nation v. United States Forest Service*: Defining the Scope of Native American Freedom,* 31 ENVIRONS ENVTL. L. & POL'Y J. 273, 292 (2008). The same can be said about RLUIPA. See, e.g., Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized*

This Court has explained how extreme RFRA 's "stringent test," *Boerne*, 521 U.S. at 533, is as applied to state law, and the principle is no different when applied to federal law:

> The stringent test RFRA demands of state law reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest. Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. If compelling interest really means what it says, many laws will not meet the test. The test would open the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind. Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the

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Persons Act of 2000: Unconstitutional and Unnecessary, 10 WM. & MARY BILL RTS. J. 189, 189 (2001).

> position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by RFRA.

Boerne, 521 U.S. at 533–34 (citations omitted) (internal quotation marks omitted).

Imposing this gauntlet on every federal law forces the needs of other believers and nonbelievers to be subservient to the believers invoking RFRA. For example, the women in Hobby Lobby's employ were hired under the protection of Title VII's prohibition against religious discrimination, 42 U.S.C. § 2000e-2(a)(1) (2012). Therefore, Hobby Lobby cannot mandate that its employees share its owners' religious beliefs, and, in this religiously diverse society, many female employees likely will have their own, different beliefs. These women cannot, under the Tenth Circuit's reasoning and Hobby Lobby's invocation of RFRA, get coverage of widely accepted medical care consistent with their own religious beliefs, because of their employer's beliefs. That is an undue preference for one religion over another, which this Court's cases have long forbidden. *See* Ruth Colker, *City of Boerne Revisited*, 70 U. CIN. L. REV. 455, 465, 473 (2002) (arguing that the Court could have decided *City of Boerne* by ruling that RFRA violated the Establishment Clause because the compelling interest standard "pose[d] the problem of possibly providing undue preferential treatment to religious entities without balancing other interests . . . .[,]" and thus, the RLUIPA is also "unconstitutional not because it violates City of Boerne's proportionality and congruence test, but because it violates the

Establishment Clause in its attempt to protect religious freedom."). *See generally* Sara C. Galvan, Note, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 230 (2006) (arguing that the RLUIPA, as applied to auxiliary use claims, may violate the Establishment Clause because it "favor[s] religion over irreligion.").

RFRA is being invoked in this case as a license for employers to influence their female employees' contraception choices, but, because of the way that RFRA operates, this case actually represents just the tip of the iceberg. As Justice Kennedy has noted, the test in RFRA creates the potential for required religious exemptions from civil obligations of almost every conceivable kind. *Boerne*, 521 U.S. at 533-34. For example, the contraception mandate at issue in this case is just one element of a list of preventive requirements for health plans, which also includes certain immunizations; "evidence-informed preventive care and screenings" for infants, children, and adolescents; and domestic violence screening and counseling, among others. 42 U.S.C. § 300gg-13 (2012). If Hobby Lobby can deploy RFRA to block coverage of women's reproductive health, the next believer will argue against vaccinations, and the next against screenings for children or domestic violence screening and counseling. There is no limit to the variety of religious believers in the United States, and good reason to know that the vulnerable will pay the price. It is no answer to say that protection of the vulnerable always serves a "compelling interest," as the "least restrictive means" analysis tilts the balance away from all those protected by the law and toward the religious claimant determined to overcome the law.

The RFRA preference is not only a matter of believers obtaining a political advantage over public policy issues. RFRA also rewards believers with financial benefits. For example, it permits for-profit businesses like Hobby Lobby and Conestoga Wood to carve up neutral, generally applicable laws to their financial benefit, and to the financial detriment of other arts and crafts and cabinet stores of other faiths or no faith, favoring some believers in a way that this Court's precedents have never allowed. This Court has never allowed the government to pick and choose who receives financial benefits according to belief (or lack thereof). *Zelman v. Simmons-Harris,* 536 U.S. 639, 662-63 (2002) (upholding voucher system only because it covered all schools, religious and non-religious); *Texas Monthly, Inc.*, 489 U.S. at 2 (holding unconstitutional tax exemption only applicable to religious publications); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding statute authorizing one-minute period of silence in all public schools for "meditation or voluntary prayer" violates the First Amendment because it was entirely motivated by a purpose of advancing religion); *Estate of Thornton v. Caldor, Inv.*, 472 U.S. 703 (1985) (holding statute unconstitutional because it imposed an absolute duty on employers and employees to conform their business practices to the practices of one particular religion); *Larkin*, 459 U.S. at 116 (state statute granting churches and schools the power to reject liquor license applications for locations within 500-foot radius of the church or school violates the Establishment Clause); *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 18 (1947) (upholding bus service to religious schools, in addition to public schools, because it was available to all students). *See also Mitchell,* 530 U.S. at 840 (2000) (O'Connor J., concurring), quoting *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 847, (1995) (O'Connor, J. concurring) ("Although '[o]ur cases have permitted some government funding of secular functions performed by sectarian organizations,' our decisions 'provide no precedent for the use of public funds to finance religious activities.'"); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 690 (1994) (holding that a statute creating separate school district for religious enclave violated the Establishment Clause).[9]

Moreover, federal law then rewards believers who prevail under RFRA with attorneys' fees, which means that taxpayers pay for believers to demand a personal accommodation that is not constitutionally required. 42 U.S.C. § 1988 (2012). Therefore, taxpayers are paying for believers' litigation in circumstances where the Constitution does not require the accommodation. That is a novel, and truly stunning benefit to be accorded to believers alone. If taxpayer standing ever were justified, this is the law that would justify it. *Flast v. Cohen*, 392 U.S. 83 (1968). The Establishment Clause violation is straightforward: "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

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[9] RFRA also creates perverse profit incentives for for-profit businesses to claim religious rights. Were Hobby Lobby to prevail in this case, it would be able to drive its overhead costs down, which would permit it to push prices down, and therefore trump other arts and crafts stores in the marketplace.

The financial imbalance between religious believers and other citizens is even more extreme than it might seem at first blush, because RFRA lets religious citizens rewrite any federal law they don't like, to their benefit. RFRA forces other citizens to enter a second round, this time in federal court, to pursue their policy convictions. Believers, like all citizens, can ask Congress for exemptions, *see Smith*, 494 U.S. at 879-80, but if an exemption is denied through duly enacted legislation, RFRA invites the believer into the judicial system to trump the duly enacted public policy. After having fought in the political process, the objecting taxpayers must then expend their own funds in federal litigation to protect the law that was passed, assuming they can intervene or obtain taxpayer standing, and they must do so under a standard that places a heavy thumb on the side of the balance of the religious believer. In short, religious believers are getting two bites at the public policy apple.

In sum, RFRA 's invalidation of constitutional laws to the benefit solely of religious actors, is a patent preference for believers, which violates long-settled and critically important principles under the First Amendment's Establishment Clause.

CONCLUSION

The Religious Freedom Restoration Act was held unconstitutional in *Boerne v. Flores*, 507 U.S. 521 (1997), as a violation of separation of powers, federalism, and Art. V procedures. Under pressure from religious lobbyists and intent on trumping this Court's constitutional free exercise doctrine, Congress ignored much of the *Boerne* reasoning, and re-enacted RFRA following *Boerne* as a law that only applies to every federal law. Its constitutionality has not been widely considered, because the religious claimants do not raise it, the Attorney General has chosen not to, and courts have not raised it *sua sponte*. The result is that this novel federal statute, which is one of the most aggressive attacks on this Court's role in constitutional interpretation in history, has fomented culture wars in the courts like the one ignited by for-profit employers in this case.

RFRA violates the separation of powers and Article V, exceeds Congress's enumerated powers, and violates the Establishment Clause. Accordingly, *Amici Curiae* respectfully request this Court address its constitutionality and hold RFRA unconstitutional.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

Nos. 13-354; 13-356

IN THE

Supreme Court of the United States

JAN 28 2014
OFFICE OF THE CLERK

SEBELIUS, SECRETARY OF HEALTH
& HUMAN SERVICES, *et al.*,

Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,

Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,

Petitioners,

v.

SEBELIUS, SECRETARY OF HEALTH
& HUMAN SERVICES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

BRIEF OF *AMICI CURIAE* FREEDOM X, STEVEN J. WILLIS, KRISTIN BALDING GUTTING AND DANIEL D. BARNHIZER IN SUPPORT OF RESPONDENTS IN NO. 13-354 AND PETITIONERS IN NO. 13-356

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ISSUES PRESENTED

1. Whether the Court should make a distinction between C Corporations and S Corporations when it determines the religious rights of corporations.

2. Whether the Third and Tenth Circuits' imprecise or improper use of the terms "for profit" and "non profit" led to flawed legal analyses that unconstitutionally create two unequal tiers of First Amendment religious rights based solely upon financial considerations.

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INTEREST OF AMICI CURIAE[1]

Freedom X is a public interest law firm dedicated to protecting the freedom of religious, political and intellectual expression. Freedom X and its donors and supporters are gravely concerned that this case may result in subjecting businesses to the imposition of compulsory rules that violate the consciences and religious values of their shareholders and principals, thus depriving business owners of their fundamental right to religious liberty by virtue of the taxable corporate form they elect.

Steven J. Willis is Professor of Law at the University of Florida College of Law. For thirty-three years, he has taught courses in charitable law, tax law, family law, accounting, and finance. He has written and lectured extensively on the law of charities, as well as on the inter-relationship of tax law, business entities, and family law. Professor Willis believes courts are erroneously treating S corporations as "distinct and separate" from their shareholders in a way that denies both the corporations' and shareholders' religious rights. Professor Willis is also concerned that courts have confusingly used the terms "for profit" and "non profit." *Amici Curiae* gratefully acknowledge the work of Steven J. Willis, the principal author of this brief.

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[1] All the parties other than Hobby Lobby Stores, Inc., have filed blanket waivers with the clerk of the court. The consent of Hobby Lobby is attached hereto. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Kristin Balding Gutting is an Associate Professor of Law at the Charleston School of Law. For eight years, she has taught courses in the area of tax law, including tax procedure, partnership taxation, and federal income taxation. She has written and lectured in the areas of partnership taxation, tax procedure, tax ethics, and income taxation. Professor Gutting believes courts are erroneously treating S corporations as "distinct and separate" from their shareholders in a way that denies both the corporations' and shareholders' religious rights. Professor Gutting is also concerned that courts have confusingly used the terms "for profit" and "non profit."

Daniel D. Barnhizer is a Professor of Law and the Bradford Stone Faculty Scholar at Michigan State University College of Law, where he also serves as the faculty advisor to the Christian Legal Society. Since 2001, he has taught in the areas of commercial and contract law, corporate and business organization law, as well as courses on jurisprudence and the Rule of Law. He researches and writes on topics relating to contract theory and the Rule of Law. Professor Barnhizer believes courts are erroneously treating S corporations as "distinct and separate" from their shareholders in a way that denies both the corporations' and shareholders' religious rights. Professor Barnhizer is also concerned that courts have confusingly used the terms "for profit" and "non profit."

SUMMARY OF ARGUMENT

The Third Circuit in *Conestoga* over-broadly described a corporation as "distinct and separate"[2] from its shareholders. It also broadly described corporations as "artificial beings."[3] The court used that separateness and artificiality to deny corporate religious rights, to deny corporate standing to assert shareholder rights, and to deny shareholder standing to assert their own rights.

The Third Circuit additionally failed to distinguish S corporations from C corporations. S corporations—which include Hobby Lobby, Mardel, and Conestoga—are mostly one and the same with their owners, not "distinct and separate." This close identity supports corporate standing to assert shareholder rights as well as shareholder standing. Tax law treats S corporation shareholders as the true actors in the commercial activities they collectively conduct.

The Third Circuit was wrong to deny religious rights to Conestoga. The court relied on Conestoga being an "artificial being" but ignored how law so often ignores that artificiality. It thus denied religious rights to an entity that the law generally treats as one and the same with its shareholders.

Additionally, both the Third Circuit and the Tenth Circuit confusingly used the term "for profit."

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[2] *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013) *cert. granted*, 134 S. Ct. 678 (U.S. 2013) (quoting *Barium Steel Corp. v. Wiley*, 108 A.2d 336, 341 (Pa. 1954)).

[3] *Conestoga*, 724 F.3d at 383, 385.

First, both courts used the term "for profit"[4] to describe the litigants without clearly defining how a "for profit" entity is distinguishable from a "non profit" entity. Second, the Third Circuit then used the term "for profit" as a factor in denying religious rights to Conestoga. This use suggests the court would apply a different rule if Conestoga were "non profit" or "not for profit"; however, the Court provided no clear insight into how those categories differ. Because those terms are not terms of art in the fields of corporate and charitable law, any rules or distinctions using them will be unclear. This Court should define such terms or should use terminology more suited to the legal areas involved.

Third, the Third Circuit's use of the term "for profit" assumes the ultimate fact at issue: whether Conestoga is organized "for" general purposes that include religious purposes, or whether it exists merely "for" the purpose of making profits.

ARGUMENT

This matter arises under I.R.C. §4980D and involves corporate and shareholder religious rights. At least forty cases, including the two before the Court, have struggled with corporate religious rights;[5]

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[4] *Id.* at 381 (three times), 382, 383 (twice), 384, 385 (six times). The court, including the dissent, uses "for profit" or "for-profit" 91 times.

[5] *See* Steven J. Willis, *Corporations, Taxes, and Religion: The Hobby Lobby and Conestoga Contraceptive Cases*, 65 S.C. L. REV. 1, 3 & n.2 & n. 5 (2013) (listing and generally discussing the 40 cases) but only briefly discussing *Gilardi v. United States HHS*, 733 F.3d 1208, 1224-25 (D.C. Cir. 2013), which arose just before the article went to press). *See Gilardi* at 1224-25, Randolph, J., concurring in part and concurring in the judgment. Judge

yet all have misused the vocabulary of tax and corporate law.[6] In addition, some—including the Third Circuit—have failed to apply critical distinctions between and among types of corporations.

This brief addresses two areas in prior case decisions where misuse of terms and misunderstanding of corporate status have produced inaccurate and ultimately unjust results. Here those results impinge upon and restrict the fundamental right of religious expression. First, the Third Circuit mistakenly stressed that corporations are always "distinct and separate" from their owners. The Court failed to distinguish S corporations, which closely identify with shareholders, from C corporations, which *are* "distinct and separate" from their shareholders.

Second, both the Third and Tenth Circuits adopted the terms "not for profit" and "non profit" as if they are interchangeable and share a particular meaning, but without adequately defining either term. However this Court decides these cases, it should clarify the terms so that readers, including those who practice or teach corporate and tax exempt law, properly understand the holding.

Randolph argued: "It would be incongruous to emphasize the corporate veil in rigid form for RFRA purposes while disregarding it for tax purposes under subchapter S. This inference is particularly compelling because both subchapter S and the 'tax' that enforces the contraceptive mandate are part of the Internal Revenue Code. *I.R.C. §4980D.*"

[6] *See id.* at 61-70 and the authorities cited therein.

I. The Third Circuit Mistakenly Focused On The Corporate Entity As "Distinct And Separate" From Its Owners.

The Third Circuit *Conestoga* opinion stressed how corporations and shareholders are "distinct and separate"[7] under general corporate principles.[8] It used that separateness to deny Conestoga religious rights under the First Amendment, under the Religious Freedom Restoration Act (42 U.S.C. § 2000bb), or through the shareholders via prudential/associational standing.[9]

Although many corporations are indeed distinct and separate from their owners, an important category is not: S corporations.[10] Hobby Lobby,[11] Mardel,[12] and Conestoga[13] each have elected S status. As explained below, because they are S corporations, each is effectively one and the same with their shareholders, a point ignored by the Third Circuit.

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[7] *Conestoga*, 724 F.3d at 388.

[8] *Id.* at 387.

[9] *Id.* at 385, 388, and 409.

[10] I.R.C. §1361. Congress created the S corporation status with closely held corporations in mind. I.R.C. §1361 refers to them as "small business corporations" and requires they have no more than 100 shareholders. It is an alternative to partnership status, which is another type of "pass thru" entity. Owners who decide to elect S status do not typically choose between C status and S; instead, they choose between partnership status and S corporation status.

[11] *Hobby Lobby v. Sebelius*, Appellant's Br. at 50, n. 23 (Doc. No. 01018999833 02/11/2013).

[12] *Id.*

[13] Conestoga Cert. Br. at 28.

For tax purposes, corporations fit into two main categories: C and S. C corporations are taxpayers.[14] They report income, deductions, and credits on their own tax returns [15] and pay tax on the net. Shareholders receive dividends, on which they *also* pay tax. [16] Dividends are treated as "ordinary income."[17] The Third Circuit's focus on corporations being "distinct and separate" logically applies to C corporations, which tend to be large and which tend to have many shareholders. Such large and diverse entities, such as Apple or Microsoft, plausibly have no religious rights: they truly are "artificial beings" with no personality and no close connection to their owners.

In stark contrast, S corporations—such as Hobby Lobby, Mardel and Conestoga—are not taxpayers.[18] For tax purposes, they merely file an information return on which they separately allocate all items of income, deduction, gain, loss, or credit to their various shareholders.[19] The shareholders then report their share of each item on their personal returns and the shareholders pay any resulting tax. The corporation pays no tax. Tax law refers to S corporations as "pass thru"[20] entities because all the various economic activities (income, deduction, gain, loss, and credit) flow or pass through to the shareholders.

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[14] I.R.C. §11.

[15] C Corporations must file Form1120: U.S. Corporate Income Tax Return.

[16] I.R.C. §61(a)(7).

[17] The Internal Revenue Code does not explicitly define "ordinary income." However, sections 1221-22 and 64 define capital gains in a manner that excludes "dividends." Because dividends are not gains from the sale or exchange of capital assets, they must be ordinary.

[18] I.R.C. §1363(a).

[19] I.R.C. §1366. S Corporations file Forms1120S and Schedule K-1: Shareholder's Share of Income, Deductions, Credits, etc. and Information About the Shareholder (Part II).

Each item of income or deduction even retains its character as it flows through. Character of a tax item involves issues such as whether it is capital, ordinary, passive, active, at-risk, or investment. Items of different character produce substantially different tax results. For example, long-term capital gain income is subject to a lower tax rate than ordinary income; also, "passive" losses are deductible only to the extent of "passive" income.

Tax law *expressly* treats the items as if the shareholders participated directly in the transactions themselves.[21] Thus, for tax purposes, the law does not treat Mardel as if it sold a Bible to a customer; instead, it treats each shareholder as if he or she individually sold a portion of the Bible to the customer.

If Hobby Lobby must pay $10 for a Plan-B pill, tax law treats it as if David Green paid $2.00 of that in the same manner as the entity did (as would each of the other 4 shareholders). Thus, for tax purposes, David Green paid for the abortion. David Green reaps whatever tax benefits flow from the deduction. This has other real tax consequences: the character flows through to Mr. Green as a section 162 trade or business expense for a non-taxable employee fringe benefit. Section 3121 excludes it from employee wages for FICA and thus Mr. Green is not responsible for that. Section 3402 excludes it for withholding; thus Mr. Green has no responsible person liability for that either. This treatment contrasts with other expenses for interest, rent, inventory costs, capital costs, passive activities, capital losses, foreign expenses, and many more, each of which also flows through to Mr. Green as if he incurred them himself, but each of which affects Mr. Green in different ways. That is the essence of an S corporation: for tax purposes (federal and state), the owner is the actor.

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[20] I.R.C. §1(h)(10)(C).

[21] I.R.C. §1366(b) provides: "The character of any item included in a shareholder's pro rata share under paragraph (1) of subsection (a) shall be determined *as if such item were realized directly* from the source from which realized by the corporation, or incurred *in the same manner as incurred by the corporation*." (Emphasis added).

Thus when the government argues Mr. Green would not pay for an abortion, it is incorrect at least for tax purposes. At its core, this case is about section 4980D of the Internal Revenue Code; hence, tax purposes would seem paramount.

Because tax law treats the shareholders as the real actors, an S corporation and its shareholders are not "distinct and separate"; instead, they are *mostly*[22] one and the same. Thus the Third Circuit explained corporate law with far too wide a brush. *Nine times*[23] the court stressed the "distinct" nature of corporations, as if all corporations fit into the same mold. Indeed, most corporations are S corporations,[24] which are effectively partnerships under tax law and which are fundamentally different from widely held, publicly traded corporations. S corporations are not "distinct and separate" from their owners. Tax law mostly ignores their nature as "artificial beings."

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[22] Although S corporations remain separate from their shareholders for some purposes, *e.g.*, choice of taxable year or method of accounting, even those aspects do not support the Third Circuit's reasoning; instead, such joint decisions demonstrate the associational nature of S corporations.

[23] The Court uses "distinct" six times and "distinction" three times. *Conestoga*, 724 F.3d at 387 (twice), 388 (three times for distinct and once for distinction) 389 (one mention of each term).

The federal tax treatment of Hobby Lobby, Mardel, and Conestoga as essentially one and the same with their owners should be sufficient reason to reject the Third Circuit's overly broad analysis. But a second reason is also very important: state tax law.

Many states impose taxes on corporate income. While the state tax statutes vary, many "piggy-back" on the federal provisions.[25] "Piggy-back" means the state law adopts the federal law as its own. As a result, S corporations often[26] operate as one and the same with their shareholders for state tax purposes. Specifically, both Oklahoma [27] (the state of incorporation for Hobby Lobby and Mardel) and Pennsylvania [28] (the state of incorporation for Conestoga) have "piggy-back" statutes for S corporations. As a result, both effectively ignore the separate entity status for state tax purposes.

Together, federal and state tax law present a powerful reason to view Hobby Lobby, Mardel, and Conestoga as having very close identity with their shareholders. That close identity supports recognizing religious rights either for the entities themselves or through their owners. But, a third important reason exists: family law. In many states, S corporate income also passes through to an owner for purposes of determining alimony, child support and the division of assets.[29]

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[24] James S. Eustice & Joel D. Kuntz, *Federal Income Taxation of S Corporations* ¶ 1.01 (2014).

[25] *Id.* at ¶ 2.03(3)(e)

[26] This is particularly true for states with both corporate and individual income taxes.

[27] Okla. Stat. Ann. tit. 68 § 2365 (West 2014).

[28] 72 Pa. Stat. Ann. § 7307.8 (West 2014).

State family law schemes vary, with many states yet to consider the issue of whether to respect, for family law purposes, an S corporation as distinct from its owners. In those that have, courts may impute undistributed income remaining in the hands of the corporation as if the funds had been distributed.[30] Under such a ruling, an S corporation's income becomes a factor for determining child support and alimony, as well as for determining marital or community income in cases involving property division. Thus a shareholder in an S corporation may not always[31] assert his own corporation is distinct and separate from him and thus shield income from child support or alimony obligations. In contrast, a shareholder in a C corporation generally can successfully shield income by retaining it in the corporate name.

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[29] *E.g.*, *Tuckman v. Tuckman*, 308 Conn. 194, 61 A.3d 449 (2013); *J.S. v. C.C.*, 454 Mass. 652, 912 N.E.2d 933, 940-42 (Mass. 2009); *Zold v. Zold*, 911 So. 2d 1222 (Fla. 2005) (holding that Florida courts must look at the equities involved to determine whether to respect the corporate form of closely-held businesses for purposes of determining income for alimony and child support purposes); *Roberts v. Roberts*, 666 N.W.2d 477 (S.D. 2003); *In re Marriage of Brand*, 44 P.3d 321 (Kan. 2002); *In re Marriage of Perlenfein and Perlenfein*, 848 P.2d 604, 605 (Or. 1993); *In re Farideh & Nasirpour*, 2011 Cal. App. Unpub. LEXIS 9349 at *27; *Tebbe v. Tebbe*, 815 N.E.2d 180 (Ind. App. 2004); *Dagley v. Dagley*, 695 So. 2d 521, 523 (La. App. 1977). *See also Bleth v. Bleth*, 607 N.W.2d 577, 579 (N.D. 2000) (Court may impute income when a shareholder controls his own salary).

[30] *E.g.*, *J.S. v. C.C.*, 912 N.E.2d 933, 940-43 (Mass. 2009) (adopting a case by case method giving trial judges discretion to determine the availability of S corporation funds to shareholders). The Massachusetts court placed the burden of proving the lack of availability on the shareholder. *See also Zold v. Zold*, 911 So. 2d 1222, 1232-33 (Fla. 2005) (refusing to draw a bright-line and permitting trial judges to determine whether undistributed income may be ignored because of a sufficient business purpose or whether to impute it to the shareholder). *Zold* faced a peculiar accounting provision in Florida family law

This family law analogy is both instructive and critical in the cases before the Court. A central issue, as repeatedly stated by the Third Circuit, is whether corporations are "distinct and separate" from owners. As shown above, the Third Circuit majority concluded they are distinct. Many family law cases have already recognized the important difference between S corporations and C corporations for analyzing that precise issue.[32] Those cases permit trial courts to ignore the "artificiality" of the S corporation and thus to treat corporation actions as shareholder actions. Not only is this an instructive analogy, but it also critically affects the merits before this Court. Shareholders in Conestoga, Hobby Lobby, and Mardel may someday face claims for child support, alimony, or property division. If so, they risk being treated as one and the same with the entities. The Third Circuit's broad brush description of all corporations as

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that generally imputes "paid" items. See the discussion of this peculiar accounting rule in the authorities cited in note 31, *infra.*

[31] *J.S. v. C.C.*, 912 N.E.2d 933, 940-43 (Mass. 2009). As explained by the Massachusetts court, the burden of proof falls on the shareholder to show that S corporation earnings are not available for child support and other family law matters.

[32] *See* the cases cited in note 28, *supra.*

"distinct and separate" from owners is thus seriously flawed: Conestoga shareholders are one and the same with the entity for federal and state tax law and risk being treated as one and the same for family law.

Interestingly, recognition of an S corporation as one and the same with its owners in family law matters has begun to spread quickly across the country.[33] For example, Connecticut first considered the issue in 2013, Massachusetts in 2009, and Florida in 2005, with each deciding to allow judges to ignore the S corporation as a separate entity when the equities support such a decision. The Florida decision, *Zold v. Zold*, 911 So. 2d 1222 (Fla. 2005) specifically addressed the important distinction between S corporations and C corporations. The Court carefully explained the need to draw a line between entities it viewed as separate from owners and those it viewed as essentially the same as owners. As did the later Massachusetts [34] and Connecticut [35] courts, the Florida Supreme Court declined to draw a bright line, recognizing that minority shareholders without power might justifiably consider themselves separate because they could not force income distribution.[36] That line drawing exercise should be instructive in this matter.

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[33] *See* Steven Willis, *Family Law Economics, Child Support and Alimony Ruminations on Income: Part One*, 78 FL. BAR. J. 34 (No. 5, May 2004) and Steven Willis, *Family Law Economics, Child Support and Alimony Ruminations on Income: Part Two*, 78 FL. BAR. J. 34 (No. 6, June 2004) (discussing the flow through of income from various types of entities in relation to family law matters, arguing for distinctions between S corporations and C corporations).

[34] *J.S. v. C.C.*, 912 N.E.2d at 662-63.

[35] *Tuckman v. Tuckman*, 308 Conn. at 212.

This Court faces the same issue: whether a corporation is distinct and separate from its owners. It should follow the leading family law cases[37] that wisely distinguish S corporations from C corporations.[38]

II. Both the Tenth and Third Circuits Confusingly Used The Terms "For Profit" And "Non Profit" Without Adequately Defining Them.

The Third Circuit repeatedly labeled Conestoga as a "for profit" corporation, which suggests the court would apply a different rule were Conestoga a "non profit" corporation. Similarly, the Tenth Circuit described Hobby Lobby and Mardel as "for profit" corporations. Neither court clearly explained what it meant by "for profit."

However this Court decides these cases, it should use tax and corporate terminology carefully. Many people, including all the litigants, use the terms

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[36] *Zold v. Zold*, 911 So. 2d at 1231-33. The court also permitted shareholders the opportunity to prove a sufficient business purpose for maintaining some funds in the S corporation.

[37] *E.g., Zold v. Zold*, 911 So.2d 1222 (Fla. 2005), *Tuckman v. Tuckman*, 308 Conn. 194 (2013).

[38] Because each of the litigants, Hobby Lobby, Mardel, and Conestoga, has unanimous agreement among its shareholders, this Court need not address the additional issue faced by state family courts: whether to treat S corporations with dissenting minorities differently from those with unanimity.

"for profit" and "non profit" or "not for profit." Unfortunately none define the terms.

Presumably, the courts used "for profit" as a description of a general business entity operating for the benefit of owners.[39] That would distinguish it from a charitable organization, which operates for the benefit of itself and its charitable purpose.[40] The "for profit" terminology, however, is inappropriate. General business corporations certainly may earn profits as defined for tax law or generally accepted accounting principles. But charities may also earn profits as long as they do not "inure to the benefit of private shareholders."[41] The words "non-profit" and "not for profit" do not appear in I.R.C. §501(c)(3) or the corresponding treasury regulations.[42] Indeed, the relevant treasury regulations addressing charities *expressly* permit substantial trades or business activities.[43]

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[39] Black's law dictionary does not define "for profit"; however, it equates a "non-profit" entity with a charity. *Black's Law Dictionary* 147-48 (2d Pocket Ed. 2001).

[40] Per I.R.C. §501(c)(3) charities operate exclusively for one or more listed charitable purposes. Because they have no shareholders, they exist perpetually for their own purposes.

[41] I.R.C. §501(c)(3); Treas. Reg. §1.501(c)(3)-1(c)(2).

[42] The term "for-profit" appears once in an example. Treas. Reg. §1.501(c)(3)-1(d)(1)(ii) Example 3. The term "non profit" appears in I.R.C. §501(c)(4) in relation to social welfare organizations; however, it has no practical significance.

[43] Treas. Reg. §1.501(c)(3)-1(e)(1) provides: "An organization may meet the requirements of section 501(c)(3) although it operates a trade or business as a substantial part of its activities, if the operation of such trade or business is in furtherance of the organization's exempt purpose or purposes and if the organization is not organized or operated for the primary purpose

If this Court were to draw a distinction between for profit and non-profit businesses, those who practice and teach in the area of charitable law would be hard pressed to explain how the line would be drawn between the two categories. Would a tax-exempt hospital or school that earned profits be "for profit" or would it be "non profit"? Substantively, such an entity would intentionally have profits and thus would be "for profit"; however, one suspects the Third Circuit would classify it as "non-profit" in a more colloquial sense. If the Court draws such a distinction, it should avoid colloquial usage and would be wise to use a more specific term, such as a "charity described in section 501(c)(3)."[44]

The terms *non-profit* and *not-for-profit* are actually state law terms.[45] All states have general business corporation acts. Most have a non-profit or not-for-profit corporation act. Such non-profit corporation acts do not exist to preclude profits;[46]

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of carrying on an unrelated trade or business, as defined in section 513."

[44] The Court, however, should carefully weigh even that distinction, as many charities—such as hospitals and schools—can have substantial profits and thus may have few real differences from a taxable school or hospital other than the inurement of earnings to shareholders.

[45] *See* Darryl Jones, Steven Willis, David Brennen, and Beverly Moran, *The Tax Law of Charities* 2 (West 2007).

[46] *E.g.*, Model Non-Profit Corp Act §3.01 (providing "non-profit" corporations the power to engage in any lawful activity); §3.02 (permitting "non-profit" corporations to operate businesses and other commercial activities); §6.40 (prohibiting the distribution of a "non-profit" corporation's income or profits to members). The model act never defines the term "non-profit," but it permits non-profit corporations to earn profits as long as they do not inure to the benefit of members.

instead, they exist to provide standard provisions desired by most charities.[47]

Importantly, nothing in Oklahoma or Pennsylvania[48] non-profit law actually[49] requires entities organized as such to *be* non-profit. Indeed, Oklahoma does not even have a separate statute for non-profit corporations,[50] although it has a separate form used by the Oklahoma Secretary of State. That form does not require the entity to avoid profits. Indeed, the concept would seem absurd: surely Oklahoma would permit a private school or hospital exempt under I.R.C. §501(c)(3) to make profits. Instead, the form provides:

> This corporation is not for profit, and as such the corporation does not afford pecuniary gain, incidentally or otherwise, to its members.[51]

Effectively, that language precludes what tax law would consider private inurement:[52] the passing of profits or earnings to members. But that language does not distinguish "for profit" from "non-profit."

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[47] *E.g.*, Model Non-Profit Corp Act §6.01 (providing either for members or merely directors, which contrasts sharply with shareholder provisions for general business corporations); §6.40 (prohibiting distribution of earnings or assets to members). *See* IRS Publication 557 at 24 (2013) (permitting reliance on state law provisions permanently dedicating a charity's assets for exempt purposes).

[48] 15 Pa. Cons. Stat. Ann. §5101.

[49] The Pennsylvania Department of State's web site has two interesting provisions. One precludes private inurement. The other "suggests" that non-profit entities state their goal is to avoid "gain or profit, incident or otherwise." Nothing provides an enforcement mechanism for the suggestion. http://www.portal.state.pa.us/portal/server.pt/community/corporation_bureau/12457/pennsylvania_nonprofit_corporations/571889 (last visited 1/15/14).

[50] Okla. Stat. Ann. tit. 18 § 1002 (West 2014).

[51] Oklahoma Secretary of State Form 0009-07/12, available at https://www.sos.ok.gov/forms/FM0008.PDF.

Assuming the Third Circuit intended to distinguish between general business corporations and charities, that distinction illustrates an important surprising point: general business S corporations maintain a closer identity with owners than charities do with members. The close identity between the shareholders and the S corporation, like members' identity with a charitable organization, should be a crucial element on two levels: (1) deciding whether the S corporation, as a proxy for its shareholders, has standing to assert shareholders' religious rights; and (2) deciding whether the S corporation is truly an "artificial being" that is "distinct and separate" from its owners. Federal and state tax law, as well as state family law, explicitly or implicitly recognizes the identity of shareholders and their S corporation. That same recognition should be applied uniformly to decide standing to assert religious rights as well.

In sharp contrast with S corporations, charities are forbidden from having a close identity with founders and members.[53] The Third Circuit's use of the "for profit" versus "non profit" distinction was backwards. The court suggested "for profit" entities would have less identity with their founders and shareholders than would a "non-profit" entity like a charity. Under the law, a "non-profit" would not have the close identity. The S corporation would have the closer identity.

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[52] I.R.C. §501(c)(3).

[53] *E.g.*, I.R.C. §§501(c)(3) (prohibiting private inurement), 4958 (heavily taxing "excess benefit transactions" with "insiders"), and 4941 (heavily taxing "self-dealing").

Shareholder-owned corporations exist to serve the purposes of the owners.[54] In contrast, charities exist to serve the purposes *as stated by* their creators.[55] They do not, however, *operate*[56] to serve the purposes of their members, officers, directors or even their founders. To do so would trigger problems with private inurement,[57] private benefit,[58] self-dealing,[59] and excess benefit transactions.[60] From that perspective, what the Third Circuit called "for profit" corporations have a substantially greater identity with their owners than do what the Circuit apparently classified as "not-for-profit" entities, which, in most cases,[61] legally cannot have such an identity. That point directly relates to the important associational or representative standing issue here. The government appears to have no problem with "non-profit" entities using associational or relational standing on behalf of members; however, it objects to such standing by even closely held business corporations.[62] The analysis, however, should result in the opposite conclusion: S corporations such as

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[54] *E.g.*, Model Bus. Corp. Act §3.01(stating the purpose of a corporation is for any lawful activity); §7.21 (2010) (providing for shareholder voting rights and thus control of corporate activities); §§7.40-7.47 (providing for shareholder derivative rights to assert, on their own, that which the corporation fails to assert); §14.01 (providing for distribution of assets to shareholders upon dissolution).

[55] Per I.R.C. §501(c)(3) charities must be "organized" exclusively to serve the charitable purposes stated in their creating documents.

[56] Per I.R.C. §501(c)(3) charities must "operate" exclusively for charitable purposes stated in their creating documents. Under the operational test, the charity's income and assets cannot inure to the benefit of its founders.

[57] I.R.C. §501(c)(3) requires "no part of the net earnings" inure "to the benefit of any private shareholder, or individual ." As applied, this means neither the earnings nor the assets may benefit founders or members in their capacity as founders and members. Such persons may be employees and may receive a reasonable salary, subject to strict rules in I.R.C. §4958.

[58] The private benefit doctrine is related to but distinct from the private inurement restriction. *See The Tax Law of Charities, supra note 44,* at 345-400.

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[59] I.R.C. §4941 places a heavy excise tax on "self dealing" between a private foundation and a disqualified person, which generally includes substantial contributors, insiders, and members of their families, as well as any entities such persons own. The tax effectively forces private foundations to operate fully "distinct and separate" from their creators.

[60] I.R.C. §4958 imposes an excise on "excess benefit transactions" between a public charity and a disqualified person. The section 4958 definition of "disqualified person" differs dramatically from the section 4941 definition of "disqualified person." A disqualified person is an insider, a manager, or a person with "substantial influence."

[61] Unions, business leagues, social clubs, and veterans groups are exceptions.

[62] See Brief for Petitioners in No. 13-354 at 28, which recognizes that a partnership would have standing to assert associational standing on behalf of partners, while a corporation would not have standing on behalf of shareholders. The Brief does not acknowledge, however, that S corporations are far more like partnerships than they are like C corporations, and that the two types of corporation have radically different degrees of identity between entity and shareholders; *see also* Petition for Cert. in No. 13-354 at 23.

Hobby Lobby, Mardel, and Conestoga have much greater identity with their owners than do charities with their members.

The "for profit" terminology is unfortunate for another reason. The preposition "for" goes to the ultimate issue in this case: why these corporations exist. The government and the Third Circuit maintain they exist to make profits. Yet that conclusion presumes away the fundamental religious principles of the owners who claim they organize and operate their business "for" the glory of God.

Judge Garth, concurring in *Conestoga*, specifically rejected representative standing by emphasizing the separateness of the corporate entity:

> Conestoga further claims that it should be construed as holding the religious beliefs of its owners. This claim is belied by the fact that, as the District Court correctly noted, "[i]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs' . . . . It would be entirely inconsistent to allow the Hahns to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose of challenging these regulations."[63]

Judge Garth also rejected the petitioners' stated beliefs [64] that petitioners must operate their corporation consistent with Mennonite teachings. The Judge stated: "[T]he purpose—and only purpose—of the plaintiff Conestoga is to make money!"[65] Judge Jordan, dissenting, took issue with the comment:

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[63] Conestoga *Wood Specialties Corp. v. Sebelius*, 2013 U.S. App. LEXIS 2706, *13 (3d Cir. Feb. 7, 2013) Opinion/Order Re Expedited Motion for Injunction (Garth, J. concurring).

[64] Complaint at par. 27, *Conestoga v. Sebelius*, 917 F. Supp. 2d 394 (E.D. Pa. 2012)(No. 5:12-cv-06744-MSG) (stating petitioners'

> That assumes the answer to the question the Hahns have posed. As a factual matter, it is unrebutted that Conestoga does not exist solely to make money. This is a closely held corporation which is operated to accomplish the specific vision of its deeply religious owners, and, while making money is part of that, it has been effectively conceded that they have a great deal more than profit on their minds. To say that religiously inclined people will have to forego their rights of conscience and focus solely on profit, if they choose to adopt a corporate form to conduct their business, is a controversial position and certainly not one already established in law.[66]

One must struggle to interpret what Judge Garth fully meant to say. On its face, the statement appears to flatly reject the owners' undisputed religious views that they operate the entity to fulfill their religious commandments. The reference to "money" along with the exclamation suggest a dichotomy reminiscent of the Biblical constraint that one cannot serve both God and money:

> No servant can serve two masters. Either he will hate the one and love the other, or he will be

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belief they must operate the corporation in line with their religious beliefs).

[65] *Conestoga*, 2013 U.S. App. LEXIS 2706, at *15 (Garth, J. concurring).

[66] *Id.* at *42-43 & n. 8 (Jordan, J. dissenting).

> devoted to the one and despise the other. You cannot serve both God and Money. *Luke* 16:13 (NIV).

The dichotomy raises serious theological issues. The stated views of the *Conestoga* petitioners, as well as those in *Hobby Lobby*, are more nuanced than how Judge Garth characterized them: to petitioners, one may – and indeed *must* – live one's whole life, including his commercial endeavors, for the glory of God. Making money does not equate to worshipping money and is not inconsistent with Christianity.[67]

Consider some traditional teachings:

- As obedient children, do not conform to the evil desires you had when you lived in ignorance. But just as He who called you is holy, so be holy in *all you do*. 1 *Peter* 1:14-15 (NIV) (emphasis added).
- Give your *whole life* and body to God. *Romans* 12:1,2 (NIV) (emphasis added).
- Love the Lord your God with all your heart and with all your soul and with all your mind. *Matthew* 22:37 (NIV).
- *Whatever you do*, work at it with all your heart, as working for the Lord, not for human masters. *Colossians* 3:23 (NIV) (emphasis added).
- So whether you eat or drink or *whatever you do, do it all* for the glory of God. 1 *Corinthians* 10:31 (NIV) (emphasis added).
- Then the LORD said to Moses, "See, I have chosen Bezalel son of Uri, the son of Hur, of the

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[67] *See* Jay W. Richards, *Money, Greed and God: Why Capitalism is the Solution and not the Problem* 3-5, 7-8, 119-133 (2009) (analyzing the Christian Biblical basis for economic prosperity).

> tribe of Judah, and I have filled him with the Spirit of God, with skill, ability and knowledge in all kinds of crafts--to make artistic designs for work in gold, silver and bronze, to cut and set stones, to work in wood, and to engage in all kinds of craftsmanship. *Exodus* 31:1-6 (NIV).

God did not call people to be holy merely in Church, Synagogue, Temple, Mosque or while on a mission. He made a commandment for one's whole life: while at work, at play, walking the dog, buying groceries, or investing talents. God did not mention a commercial, let alone a corporate exception, as in "Act according to my law, unless you create a corporation or enter business."

Judge Garth's statement goes to the heart of the religious issues. It creates the appearance that he believes earning money is not itself consistent with the practice of Christianity. If this Court ultimately limits religious freedom to non-commercial activities, it will force many people to choose between practicing their faith and entering commerce, particularly as business operators. If it permits religious freedom only for "religious" commercial activities, it inevitably must define "religious," potentially, as did Judge Garth, in a manner inconsistent with fundamental theology of one's whole life being for the glory of God.

This Court may, in the alternative, limit religious rights based on the entity rather than the activity. In so doing, it may, as did the Third Circuit, deny religious rights to corporations, or to some class of corporation. If it does so with a broad brush, it will tell many religious people "You cannot incorporate your family business and still practice your religion."

Perhaps the Court will permit religious rights in the commercial operation of sole proprietorships, general partnerships, or simple trusts.[68] Wherever this Court draws the line, however, it will inevitably affect "choice of entity" planning for tax and corporate lawyers.[69] Advisors will have to counsel clients they may give up religious rights if they choose some business entities but not if they choose another. Thus the Court should be very careful to consider exactly where to draw that line.

Drawing the line with S corporations on one side having religious rights and C corporations on the other, with no religious rights, is an option worth serious consideration. C corporations are truly separate entities from shareholders. Whether C corporations have their own religious rights is not before the Court. Prudential and associational standing, however, *is* before the Court. C corporations lack a close relationship with shareholders. A holder of shares in a C corporation is sufficiently removed from the corporation's operations that no serious theological issues arise to tar shareholders with corporate actions. But, the religious rights of C corporations is not before the Court.

S corporate shareholders, in contrast, are so intimately involved with and related to their corporation, the theology is clear for many: what the corporation does, they do as well. Using the preposition "for" as used by the Third Circuit, the S corporation exists and acts "for" the shareholders. Because the law—federal and state tax law, as well as much family law—treats S corporate shareholders as the real actors in whatever business the S corporation conducts, the religious rights of the shareholders are very relevant. Thus S status should be an important factor in the Court's drawing of lines concerning which type of entity may assert religious rights on its own or on behalf of its owners.

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[68] I.R.C. §641(b). A simple trust is a pass through entity under I.R.C. §1(h)(10)(E); in contrast, "complex trusts" are taxpayers under I.R.C. §651. *See Willis, supra* note 4 at 70-77 (discussing how the *Hobby Lobby* and *Conestoga* litigation might view various commercial entities).

[69] *Id.*

CONCLUSION

This brief demonstrates two fundamental errors in the Third Circuit opinion:

1. The Third Circuit erroneously lumped all corporations together by describing them as "distinct and separate" from their owners and as "artificial beings." The court ignored the S corporation status of the litigants. Federal and state tax law, as well as much of family law, treats Conestoga, as well as Hobby Lobby and Mardel, all of them S corporations, as one and the same with their owners. Tax and family law typically ignore an S corporation's separate entity status and treat the shareholders as the true actors. This Court should distinguish S corporations from C corporations. It should recognize the actions of Hobby Lobby, Mardel, and Conestoga as the actions of the shareholders and should thus respect the religious rights of the entities as well as the right of the entities to assert the rights of the shareholders.
2. The Third Circuit confusingly used the term "for profit" in attempting to distinguish "for profit"

entities from "non profit" entities. If this Court draws such a distinction, it should either clearly define those colloquial terms or, better, it should carefully use tax and corporate terms of art to draw distinctions. Also, by describing Conestoga as a "for profit" entity, the Third Circuit presumed the ultimate fact regarding why the entity exists. This Court should be careful not to make the same mistake.

DATED: January 28, 2014

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(Additional Caption on the Reverse)

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are law professors who teach and write about church-state issues.[1] They submit this brief to offer a more thorough analysis of the Establishment Clause implications of the religious accommodation at issue in this case than was undertaken in the decisions below.

Amici include: **Frederick Mark Gedicks**, Guy Anderson Chair & Professor of Law, Brigham Young University Law School; **Vincent Blasi,** Corliss Lamont Professor of Civil Liberties, Columbia Law School; **Caitlin Borgmann**, Professor of Law, CUNY School of Law; **Caroline Mala Corbin**, Professor of Law, University of Miami School of Law; **Sarah Barringer Gordon**, Arlin M. Adams Professor of Constitutional Law and Professor of History, University of Pennsylvania Law School; **Steven K. Green**, Fred H. Paulus Professor of Law, Director of the Center for Religion, Law & Democracy, Willamette University College of Law; **Leslie C. Griffin,** William S. Boyd Professor of Law, William S. Boyd School of Law, University of Nevada, Las

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[1] Letters from the government and the *Conestoga Wood* petitioners consenting generally to the filing of briefs by amici curiae are on file with the Court. The *Hobby Lobby* respondents consented to the filing of this brief by letter to counsel dated January 17, 2014. Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than Amici, their members, and their counsel made any monetary contribution to the preparation or submission of the brief.

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The institutional affiliations of Amici are supplied for the purpose of identification only and the positions set forth below are solely those of Amici.

SUMMARY OF ARGUMENT

The Establishment Clause prohibits the government from shifting the costs of accommodating a religion from those who practice it to those who do not. As this Court has held, "The First Amendment . . . gives no one the right to insist that in pursuit of their own interest others must conform their conduct to his own religious necessities." *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (citation omitted).

The *Hobby Lobby* respondents and the *Conestoga Wood* petitioners (collectively "Hobby Lobby") ask this Court to construe the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), to allow them a religious exemption from covering certain forms of contraception under the contraception mandate (the "Mandate") of the Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, *amended by* Pub. L. No. 111-152, 124 Stat. 1029 ("ACA"). The Mandate would otherwise require Hobby Lobby to cover contraception at no additional cost to its employees. Granting the exemption would shift the cost of accommodating Hobby Lobby's religious exercise to employees who do not share its beliefs. Such cost-shifting violates the Establishment Clause.

Throughout this and other litigation involving the Mandate, the lower courts have failed to examine the Establishment Clause implications of the RFRA exemption sought here. The prohibition against cost-shifting religious accommodations does not affect the facial validity of RFRA because most accommodations do not impose significant costs on others. But the Establishment Clause prohibits

RFRA's application where – as here – a particular exemption would shift the costs of the accommodated religious practice to identifiable and discrete third parties in the for-profit workplace. This prohibition controls the outcome of this case regardless of how this Court might rule on the *prima facie* elements of Hobby Lobby's RFRA claim. Thus, if a RFRA exemption from the Mandate violates the Establishment Clause, such an exemption cannot be granted regardless of whether this Court ultimately finds that Hobby Lobby is a "person" exercising religion and that the Mandate substantially burdens Hobby Lobby's religious beliefs. *See* 42 U.S.C. § 2000bb-1(a), (b). "The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

The Establishment Clause prohibition on cost-shifting religious accommodations was recently reaffirmed and applied in *Cutter v. Wilkinson*, 544 U.S. 709 (2005). *Cutter* addresses the facial constitutionality of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), a federal statute that closely tracks its antecedent, RFRA. *Id.* at 714–15. While upholding the "institutionalized persons" provision of the statute, the Court held that in "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries . . . ." *Id.* at 720. Statutes creating permissive accommodations of religion – like RFRA and RLUIPA – are thus subject to the Establishment Clause prohibition on such accommodations when they burden third parties.

Cutter's rejection of cost-shifting under RLUIPA rests on *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703. In *Caldor*, this Court held that a statute requiring employers to accommodate their employees' Sabbath observance violated the Establishment Clause because of the "substantial economic burdens" it imposed on employers and the "significant burdens" it imposed on other employees. *Id.* at 710. The unanimous opinion in *Cutter* cited and quoted *Caldor* with approval in holding that RLUIPA accommodations that burden third parties violate the Establishment Clause. *See* 544 U.S. at 720 (citing *Caldor*, 472 U.S. at 703); *id.* at 722 (quoting *Caldor*, 472 U.S. at 709–10).

The Court has similarly rejected religious accommodations that impose costs on a class of discrete and identifiable third parties when interpreting the Free Exercise Clause and Title VII of the Civil Rights Act of 1964. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 261 (1982) (refusing to grant employer an exemption from payroll taxes under Free Exercise Clause because of, *inter alia*, the burden the exemption would have imposed on its employees); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (interpreting Title VII to require employer accommodation of employee religious practices only when costs to employers and other employees are *de minimis*). Indeed, this Court has upheld a cost-shifting permissive accommodation of religion in only a single decision, allowing the nonprofit arm of a church to require its employees to adhere to its religious standards. *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

The Mandate requires that Hobby Lobby provide insurance coverage of contraceptive drugs and services to employees and their dependents free of all co-payments, co-insurance, and other out-of-pocket payments beyond the employees' contribution to their health plan premiums. This coverage is a legally mandated and economically valuable employee entitlement, just like benefits provided by the Social Security Act, the Fair Labor Standards Act, the Family and Medical Leave Act, and other federal statutes that mandate specific employee compensation and benefits. If this Court were to uphold Hobby Lobby's claim for a RFRA exemption from the Mandate, it would deprive Hobby Lobby's thousands of female employees and the covered female dependents of all employees of this entitlement. This, in turn, would saddle them with significant burdens ranging from the substantial out-of-pocket expense of purchasing certain contraceptives to the personal and financial costs of unintended pregnancies. The Establishment Clause does not permit this.

Moreover, these burdens would not be imposed only on Hobby Lobby employees, or only with respect to the contraceptives to which it religiously objects. If Hobby Lobby were granted the RFRA exemption it seeks, there would be no principled way to distinguish accommodation of its objections to a few forms of contraception from accommodations sought by an employer who religiously opposes all forms of contraception. *See, e.g.*, *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (granting for-profit corporation and its owners a preliminary injunction under RFRA, applicable to all FDA-approved contraceptive methods). Every for-profit employer and business owner in the United States will be empowered to reject insurance coverage for contraception or any other medical prescription, procedure, treatment, or health service it finds religiously objectionable.

The Establishment Clause requires that RFRA be interpreted not to authorize the sort of cost-shifting religious accommodation that Hobby Lobby seeks. Thus, even if Hobby Lobby may assert a corporate RFRA claim, and even if it can establish that the Mandate substantially burdens its religious exercise, it cannot prevail because the Constitution prevents the application of RFRA sought here. Indeed, RFRA itself provides that the statutory right gives way to a "compelling state interest," 42 U.S.C. § 2000bb-1(b), and conformity with the Constitution is always such an interest. Accordingly, and as more fully set forth below, RFRA may not be applied in a manner that causes the government to violate the Establishment Clause by allowing a for-profit employer to claim a religious accommodation that imposes a significant burden upon thousands of discrete and identifiable third parties who will derive no benefit from the accommodation.

ARGUMENT

I. GRANTING HOBBY LOBBY A RFRA EXEMPTION WOULD VIOLATE THE ESTABLISHMENT CLAUSE BY SHIFTING THE COSTS OF ACCOMMODATING ITS RELIGIOUS BELIEFS TO ITS EMPLOYEES AND THEIR DEPENDENTS.

Under the Establishment Clause, no significant burden associated with a permissive religious accommodation like RFRA may be displaced onto a discrete and identifiable group of third parties that does not benefit from the accommodation. *See Cutter*, 544 U.S. at 720; *Caldor*, 472 U.S. at 710; *see also* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev. (forthcoming Apr. 2014), *available at* http://ssrn.com/abstract=2328516. This Court's accommodation jurisprudence under the Free Exercise Clause and Title VII also recognizes the constitutional prohibition on cost-shifting. *E.g.*, *United States v. Lee*, 455 U.S. at 261; *Hardison*, 432 U.S. at 84.

RFRA is a permissive accommodation. Its stated purpose is to provide *more* protection for religious exercise than the Free Exercise Clause requires after *Employment Division v. Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(a)(4), (b)(1). RFRA exemptions, therefore, must satisfy Establishment Clause limitations on the permissive accommodation of religion.

The Tenth Circuit ignored these long-established constitutional and statutory doctrines when it summarily dismissed concerns that a RFRA exemption would impose the costs of Hobby Lobby's religious beliefs on employees who do not share them. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1144–45 (10th Cir. 2013) ("Accommodations of religion frequently operate by lifting a burden from the accommodated party and placing it elsewhere").[2]

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[2] Because the Third Circuit determined that a "person" under RFRA did not encompass the

But cost-shifting permissive accommodations are not "frequent" at all. This Court has allowed only one, in a circumstance involving the nonprofit religious operations of a church and its member-employees. *See Amos*, 483 U.S. 327. Nothing in that case supports a grant of the RFRA exemption Hobby Lobby seeks.

A. The Establishment Clause Prohibits Religious Exemptions That Impose Significant Burdens on Third Parties.

This Court has consistently found an Establishment Clause violation when the government accommodates religion in the for-profit workplace or other secular environment by imposing significant burdens on a discrete class of identifiable persons who do not benefit from the accommodation.

Government accommodations of religion can be either "mandatory" or "permissive." Accommodation is mandatory when a law targets a religion with special burdens not imposed on comparable secular or other religious conduct, such that the Free Exercise Clause requires an accommodation. *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993).

Accommodation is permissive when Congress or the state legislatures enact accommodations not mandated by the Free Exercise Clause, but which otherwise comply with the constitutional limits

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Conestoga Wood Specialties petitioners, the panel did not reach the constitutional implications of the exemption sought. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013).

prescribed by the Establishment Clause. *See, e.g.*, *Lee v. Weisman*, 505 U.S. at 587; *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 18–19 (1989) (plurality opinion).

The Establishment Clause has long been understood to prohibit government from requiring one person to support the religion of another. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005). Prominent members of the Founding generation condemned laws that compelled people to give financial support to or to observe the tenets of a government-established religion to which they did not belong.[3] *See Cutter*, 544 U.S. at 729 (Thomas, J., concurring) ("[E]stablishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers.").

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[3] *See, e.g.*, Thomas Jefferson, *The Virginia Act for Establishing Religious Freedom*, enacted by the Gen. Assem. of Va., Jan. 19, 1786 ("[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief."), *quoted in Everson v. Bd. of Educ.*, 330 U.S. 1, 28 (1947) (Rutledge, J., dissenting); Thomas Jefferson, *Draft of Bill Exempting Dissenters from Contributing to the Support of the Church* (Nov. 30, 1776) ("[A]ll Dissenters of whatever Denomination from the said Church [of England] shall . . . be totally free and exempt from all Levies Taxes and Impositions whatever towards supporting and maintaining the said Church as it now is or may hereafter be established and its Ministers."), *in* 5 The Founders' Constitution 74, 74 (Philip B. Kurland & Ralph Lerner eds., 1987); James Madison, *Memorial and Remonstrance against Religious Assessments* ¶ 4

These historical concerns are reflected in contemporary Establishment Clause decisions. In *Estate of Thornton v. Caldor, Inc.*, the Court struck down a Connecticut statute that granted every employee an absolute right to be free from work on his or her Sabbath regardless of the burden this imposed on the employer and other employees. 472 U.S. at 710–11. By giving employees an unqualified right not to work on their Sabbath, the statute shifted the costs of accommodating Sabbath observance to employers and nonobservant employees, forcing employers to offer premium pay to attract volunteers to cover weekend shifts, or to order non-Sabbath observers to cover such shifts irrespective of their seniority or personal preferences. *Id.* at 709–10. This, the Court held, violated the Establishment Clause:

> This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses . . . : The First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.

(asserting that proposed Virginia religious tax "violate[d] equality by subjecting some to peculiar burdens" and "granting to others peculiar exemptions"), *quoted in Everson*, 330 U.S. at 66 (Rutledge, J., dissenting).

Id. at 710 (quoting *Otten v. Balt. & O.R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953) (Hand, J.)) (internal quotation marks, internal block quoting, and ellipses deleted).

The Court unanimously affirmed the holding and rationale of *Caldor* in *Cutter*, 544 U.S. 709. *Cutter* rejected a facial challenge to RLUIPA, a permissive accommodation statute identical to RFRA in all material respects. *Id.* at 714–15. It did so, however, on the express understanding that the statute would violate the Establishment Clause if it threatened the safety or other interests of third parties:

> Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, as-applied challenges would be in order.

Id. at 726.

Explaining that its "decisions indicated that an accommodation must be measured so that it does not override other significant interests," *id.* at 722, the Court quoted *Caldor* with approval:

> In *Caldor*, the Court struck down a Connecticut law that "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath." We held the law invalid under the Establishment Clause because it "unyielding[ly] weigh[ted]" the interests of Sabbatarians "over all other interests."

Id. (quoting *Caldor*, 472 U.S. at 709, 710).

Thus, the Court relied on *Caldor* as authority for its holding that RLUIPA exemptions may not impose significant burdens on third parties: "Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720 (citing *Caldor*, 472 U.S. 703 (1985)); *see also Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring in the judgment) ("[A] religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or so discriminate against other religions as to become an establishment.").

B. The Free Exercise Clause and Title VII Also Preclude Religious Exemptions That Impose Significant Burdens on Third Parties.

1. *Free Exercise Clause*

The Court's mandatory accommodation decisions under the Free Exercise Clause reflect the same aversion to cost-shifting exemptions as its Establishment Clause decisions. In *United States v. Lee*, 455 U.S. at 254–55, 260–61, the Court refused a free-exercise exemption to an Amish employer who objected to the payment of Social Security taxes on his employees. Concluding that the federal government has a compelling interest in the uniform collection of such taxes, the Court observed:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which

> are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.

Id. at 261.[4]

Similarly, in *Tony & Susan Alamo Foundation v. Secretary of Labor*, the Court construed the Fair Labor Standards Act to require a nonprofit religious organization to pay the minimum wage to employees working in its *for-profit* commercial operations because of the burdens a free-exercise exemption would have imposed on third parties. 471 U.S. 290, 302 (1985) (an exception to FLSA coverage for the religious nonprofit "would be likely to exert downward pressure on wages in competing businesses" and thereby compromise the right of workers in such businesses to earn the minimum wage).

Indeed, the very decisions that RFRA sought to restore, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and *Sherbert v. Verner*, 374 U.S. 398 (1963), were careful to note that the free-exercise exemptions they granted did not impose significant costs on third parties. *See* 42 U.S.C. § 2000bb(b)(1) ("The purposes of this chapter are . . . to restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened.").

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[4] Congress understood *Lee* to have rejected a cost-shifting accommodation under the Free Exercise Clause. It later tailored a permissive accommodation to this holding by exempting religiously objecting employers (like the petitioner in *Lee*) from payment of employee Social Security taxes, but *only* with respect to employees who shared the same objection and would therefore also reject receipt of Social Security benefits. *See* I.R.C. § 3127(a).

In *Yoder*, two parents who were members of the Old Order Amish religion were convicted of violating a Wisconsin law making school attendance compulsory for children younger than sixteen. 406 U.S. at 207–08. The parents argued that the compulsory-attendance law violated the Free Exercise Clause as applied to them because their religion forbade attendance in high school. *Id.* at 208. The Court found in favor of the parents, but only after concluding that the case was "not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred." *Id.* at 230.

Similarly, in *Sherbert*, the petitioner was discharged for refusing to work on Saturday, the Sabbath Day of her faith, and South Carolina then disqualified her from receiving unemployment benefits because of her failure to accept suitable work when offered. 374 U.S. at 399, 401. The Court held that this disqualification burdened petitioner's free exercise rights, especially because South Carolina law expressly protected the employment rights of Sunday worshippers in other contexts. *See id.* at 404–06. Finding no compelling state interest in the policy, the Court held that the practice violated the Free Exercise Clause. *Id.* at 409. In arriving at its holding, the Court specifically noted that "the recognition of the appellant's right to unemployment benefits under the state statute [does not] serve to abridge any other person's religious liberties." *Id.*; *see also id.* at 410 ("This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society.").

2. *Title VII*

Finally, this Court has authoritatively interpreted Title VII to permit accommodations of employee religion only when the costs borne by employers are de minimis. *Hardison*, 432 U.S. at 84. Any other standard, the Court held, would impose an "undue hardship" on the employer, contrary to Title VII, by forcing the employer to impose on other employees the costs of accommodating a religion in which they did not believe or participate. *Id.* ("[T]o require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion.").

The *Hardison* de minimis test for Title VII accommodations was reaffirmed by the Court in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 67, 69 (1986), and is widely followed in the federal courts of appeals, *see, e.g.*, *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312–14 (4th Cir. 2008); *Morrissette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1322–23 (11th Cir. 2007); *Virts v. Consol. Freightways Corp. of Del.*, 285 F.3d 508, 517 (6th Cir. 2002); *see also* 3 Lex K. Larson, Employment Discrimination § 56.06[1] (2d ed. 2013) (explaining application of *Hardison* to subsequent Sabbath cases under Title VII).

C. Cost-Shifting Accommodations Are Permitted Only When Necessary to Protect a Religious Organization's Nonprofit Activities.

The Court has recognized only one narrow exception to the rule that religious accommodations may not impose significant costs on third parties: when accommodation is necessary to protect a church's ability to advance its religious purposes through its nonprofit activities.

In *Amos*, the Mormon Church fired the building engineer of a nonprofit gymnasium it operated, for failing to observe the highest standards of Mormon belief and practice. 483 U.S. at 330 & nn.3–4. The Church acted under section 702 of Title VII, which exempts "all activities of religious organizations" from the statute's general prohibition on religious discrimination in employment. *Id.* at 332 n.9. The Court rejected an Establishment Clause challenge to section 702 despite the obvious burden it imposes on third parties. *Id.* at 337 n.15, 340.

The Court observed that a religious organization would be put at risk if section 702 exempted only "religious activities" (as it did originally), thereby forcing a church to predict which of its activities a secular court might consider "religious" and thus exempt from Title VII. *Id.* at 336 & n.14 (noting the Church's argument that "the District Court failed to appreciate that the Gymnasium . . . is expressive of the Church's religious values").

Accordingly, the Court held that section 702 permissibly alleviated "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Id.* at 335. This holding was expressly limited, however, to a religious organization's *nonprofit* activities. Addressing the District Court's fear that wealthy churches might "extend their influence and propagate their faith by entering the commercial, profit-making world," the Court emphasized that the Church's operation of the Gymnasium was both a religious and a nonprofit activity that had endured for more than 75 years. *Id.* at 337 (quoting dedicatory prayer).

Amos thus stands for the proposition that the government may choose to relieve a nonprofit run by a church of the risk of liability when it insists that employees adhere to its religious mission. *Id.* at 336–37. In this sense, *Amos* follows other decisions that shield churches from government regulation or oversight so that they may retain control in defining and pursuing their religious ends. *E.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (reaffirming "ministerial exception" that requires dismissal of lawsuits by those designated as ministers against their churches for adverse employment actions); *Serbian Eastern Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696 (1976) (holding that church had final authority to decide whether and by what means to remove bishop); *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952) (invalidating state law that would have superseded church authority to determine what ecclesiastical body controlled use of cathedral).

This line of authority has no application to a commercial enterprise operating for profit. Unlike churches and their nonprofit arms, for-profit corporations enjoy no right to exercise their religion – if indeed they can claim such a right at all – at the expense of others who do not share their beliefs. In the commercial sphere, when the government provides a religious exemption that burdens third parties, it effectively compels them to bear the costs of practicing someone else's religion in violation of the Establishment Clause. Like the salespeople in the retail store in *Caldor*, 472 U.S. at 705, or the farmhands and carpenters employed by Mr. Lee, *U.S. v. Lee*, 455 U.S. at 254, the employees of the Hobby Lobby stores may not be required to underwrite their employer's religion.

Caldor and *Cutter* prohibit religious accommodations that impose a significant burden on identifiable third parties who derive no benefit from the accommodation.[5] But this principle does not apply to exemptions that allow churches and their nonprofit arms to follow their religious beliefs by selecting as employees those who share and abide by those beliefs. The considerations that may permit special accommodations for churches and religious nonprofits have no bearing, therefore, on the availability of a RFRA exemption to for-profit businesses like Hobby Lobby.

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[5] The *Amos* majority sought to distinguish *Caldor* by observing that it was the Church, not the government, that forced the employee to choose between his religion and his job. *Amos*, 483 U.S. at 337 n.15. This is not persuasive; religious employers may threaten employees with their jobs *only when empowered to do so* by a permissive accommodation like section 702. *See id.* at 347 (O'Connor, J., concurring). *Cutter* effectively abandoned this approach when it relied on *Caldor* to foreclose cost-shifting RLUIPA exemptions rather than employing *Amos* to uphold them. *Cutter*, 544 U.S. at 720.

D. The Exemption Hobby Lobby Seeks Would Impose a Significant Burden on Identifiable and Discrete Third Parties.

1. *Unconstitutional burden-shifting*

Many permissive religious accommodations entail no burden on third parties. In *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435–37 (2006), for example, a 130-member sect that used a controlled substance in its sacraments was excused from compliance with federal drug laws. The Court noted that the government did not identify any burdens imposed on persons not belonging to the sect, *see id.* at 435–36, and that the sect's small size prevented the government from showing that a RFRA exemption would compromise its administrative or drug enforcement interests, *see id.* at 437.

Other permissive religious accommodations create third-party burdens that are insignificant because they are widely distributed among a large and indeterminate class. The prototypical example is a property tax exemption for churches, along with all other nonprofit entities, which the Court has held does not violate the Establishment Clause by requiring taxpayers to make an unwilling "contribution to religious bodies." *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 667 (1970). There, the incremental increase in the pre-existing tax burden was spread among all owners of taxable property and did not fall on a discrete class.[6]

The cases excusing religious objectors from compulsory military service pursuant to federal law provide another example of burden-shifting that crosses no constitutional line. The exemption for religious pacifists upheld in *Welsh v. United States*, 398 U.S. 333 (1970), and *United States v. Seeger*, 380 U.S. 163 (1965), resulted in a mathematical increase in the probability that nonexempt persons would be drafted in their place. This increase in probability, however, was both infinitesimal and distributed among millions of nonexempt potential draftees. Like the incremental tax increase in *Walz*, the religious pacifist exemption barely increased an already existing burden, and thus did not impose significant *additional* costs on others in violation of the Establishment Clause, even though whoever was drafted in place of the objectors faced the consequence of going to war.

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[6] Where a tax exemption ran only to religious publications, in contrast, a plurality of the Court evinced intolerance for the burden imposed on other taxpayers, even though it was widely dispersed. *Bullock*, 489 U.S. at 14 (plurality opinion) (recognizing that "[e]very tax exemption . . . affects non-qualifying taxpayers, forcing them to become indirect and vicarious donors," but finding no Establishment Clause problem so long as "that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end" (internal quotation marks and citations omitted)).

By contrast, affording Hobby Lobby an exemption to the Mandate would, for the reasons set forth below, impose significant burdens on an identifiable group of persons. Unlike the exemption from the drug laws in *O Centro*, an exemption from the Mandate would significantly impact the thousands of female employees and female dependents of Hobby Lobby employees who do not share the same religious beliefs as their for-profit employer, by requiring them to pay for or forgo contraceptives that Hobby Lobby's health plan would otherwise cover. Moreover, whereas the tax and draft exemption cases involved an infinitesimal, marginal increase in an already-existing burden, the religious accommodation sought by Hobby Lobby would impose significant costs on employees that would not exist but for the exemption from the Mandate that Hobby Lobby seeks.

2. *The costs imposed on employees*

The Mandate is a valuable legal entitlement for Hobby Lobby's employees. It requires that employer health plans cover FDA-approved contraception and related services without "patient cost-sharing" – that is, without co-payments, co-insurance, deductibles, or other out-of-pocket expense beyond the employee's share of the basic health-insurance premium. 42 U.S.C. § 300gg-13(a)(4).

Although Hobby Lobby is seeking an exemption for only four contraceptives, *Hobby Lobby*, 723 F.3d at 1125, there is no principled way to distinguish its RFRA claim from that of an employer who religiously objects to all forms of contraception covered by the Mandate or, indeed, to any covered medical benefit. If Hobby Lobby prevails, every for-profit employer and business owner in the United States will have a basis for rejecting insurance coverage for contraception and any other medical prescription, procedure, service, or device to which the employer religiously objects.

Congress enacted the Mandate in part in response to studies showing that that "[i]ndividuals are more likely to use preventive services if they do not have to satisfy cost-sharing requirements" and that "[u]se of preventive services results in a healthier population and reduces health care costs by helping individuals avoid preventable conditions and receive treatment earlier." Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,872 (July 2, 2013). In particular, Congress recognized that "women have unique health care needs . . . [that] include contraceptive services" and sought to "ensure that recommended preventive services for women would be covered adequately . . . ." *Id.*; *see also* Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 16–18 (2011) ("IOM Rep.") (noting that women's health needs differ from those of men, and these differences have a serious impact on the cost of healthcare coverage).

Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men, largely because of the costs of reproductive and gender-specific conditions, including the costs of contraception. IOM Rep. at 19–20; *see also* Rachel Benson Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, Guttmacher Rep. on Pub. Pol'y, Aug. 1998, at 5. Oral contraception costs women an average of $2,630 over a five-year period. James Trussell et al., *Erratum to "Cost Effectiveness of Contraceptives in the United States,"* 80 Contraception 229, 229 (2009). IUDs (to which Hobby Lobby objects) can cost nearly one thousand dollars in addition to the costs of placement and follow-up visits.[7] Some contraceptive methods are not medically suitable for women with particular medical conditions or risk factors, and certain methods are more effective at preventing pregnancy than others. *See* 78 Fed. Reg. at 39,872; IOM Rep. at 105.

Women take account of costs when deciding whether to use contraceptives. *See* Melissa S. Kearney & Phillip B. Levine, *Subsidized Contraception, Fertility, and Sexual Behavior*, 91 Rev. of Econ. & Stat. 137 (2009) (decreasing the cost of contraceptives leads to a higher usage rate which, in turn, decreases the rate of unintended pregnancies). If Hobby Lobby is granted an exemption, thousands of women will incur significant out-of-pocket costs or have to forgo these particular FDA-recommended preventive services if they cannot afford to pay for them.[8] For women who need a particular contraception option at a particular time, this loss of coverage is a discrete, focused, and significant harm – especially in emergencies entailing the risk of pregnancy from coerced sex.

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[7] *See, e.g.*, *If Mirena Isn't Covered*, Mirena, http://www.mirena-us.com/how-to-get-mirena/if-mirena-isnt-covered.php (last visited Jan. 24, 2014) (noting product cost of $927.18); *Cost Comparison Chart*, ParaGard, http://www.paragard.com/ how-do-i-get-it/Payment.aspx (last visited Jan. 24, 2014) (product cost of $754).

[8] A 2007 study found that 52 percent of women (compared with only 39 percent of men) failed to fill a prescription, missed a recommended test or treatment, or did not schedule a necessary specialist

In addition, there are numerous health-related repercussions and collateral economic costs associated with the failure to make available a full range of contraception. For example, pregnancy may be dangerous for women with serious medical conditions, such as pulmonary hypertension, cyanotic heart disease, and Marfan Syndrome. IOM Rep. at 103–104; *see also* 78 Fed. Reg. at 39,872. Likewise, "there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy[,]" which include the prevention of certain cancers, menstrual disorders, and acne. 78 Fed. Reg. at 39,872; IOM Rep. at 107.

The use of contraceptives also reduces the risk of unintended pregnancies, which comprise nearly half of all pregnancies in the United States. IOM Rep. at 102–03. "Because women experiencing an unintended pregnancy may not immediately be aware that they are pregnant[,] their entry into prenatal care may be delayed, they may not be motivated to discontinue behaviors that present risks for the developing fetus[,] and they may experience depression, anxiety, or other conditions." *Id.* at 103. The result is that women with unintended pregnancies are less likely to receive

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appointment because of cost. Sheila D. Rustgi et al., *Women at Risk: Why Many Women Are Forgoing Needed Health Care,* The Commonwealth Fund, May 2009, at 3.

timely prenatal care, and are more likely to smoke, consume alcohol, become depressed, and experience domestic violence during pregnancy. *Id.* This, in turn, increases deleterious health outcomes for infants, including low birth weight and prematurity. *Id.*; *see also* 78 Fed. Reg. at 39,872.

Unintended pregnancies also prevent women from participating in labor and employment markets on an equal basis with men. *See* Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of U.S. Women Seeking Care at Specialized Family Planning Clinics*, 87 Contraception 465, 465 (2012) ("Economic analyses have found clear associations between the availability and diffusion of oral contraceptives particularly among young women, and increases in U.S. women's education, labor force participation, and average earnings, coupled with a narrowing in the wage gap between women and men.").

The Tenth Circuit's exemption of Hobby Lobby from the Mandate under RFRA thus constitutes the exercise of congressional power (in the enactment of RFRA) and federal judicial power (in ordering an exemption under RFRA's authority) to force Hobby Lobby employees to pay money for benefits that they otherwise would receive without additional expense, for the sole purpose of enabling Hobby Lobby's practice of its religion. This is precisely the kind of cost-shifting to accommodate religion prohibited by the Establishment Clause.

II. RFRA SHOULD BE INTERPRETED TO AVOID VIOLATING THE ESTABLISHMENT CLAUSE.

The Establishment Clause marks a structural constitutional limit that government cannot exceed. *See, e.g., Lee v. Weisman*, 505 U.S. at 589–90, 596. It is axiomatic that federal legislation like RFRA may not be applied in a manner that conflicts with the overriding constraints imposed on federal government action by the Establishment Clause.

Accordingly, this Court should follow traditional canons of statutory construction by interpreting RFRA to preclude cost-shifting religious accommodations like the one sought by Hobby Lobby, so as to avoid a violation of the Establishment Clause.

A. Observing Establishment Clause Limits Is a Compelling Government Interest.

RFRA itself signals that the statutory rights it creates are subject to overriding constitutional constraints. The statute permits the federal government to place substantial burdens on a person's exercise of religion so long as "it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The standard for determining a compelling governmental interest under RFRA is the same as "the compelling interest test . . . set forth in prior Federal court rulings." 42 U.S.C. § 2000bb(a)(5).

This compelling-interest test provides a means of conforming RFRA to the constitutional requirements of the Establishment Clause. The government has a compelling interest in acting within the limits imposed by the Establishment Clause. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 271 (1981) ("We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling."); *Gentala v. City of Tucson*, 213 F.3d 1055, 1066 n.9 (9th Cir. 2000) ("Obeying the mandate of the Establishment Clause is undeniably a compelling state interest."); *see also Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1564 (6th Cir. 1992) (Lively, J., dissenting) ("Every unit of government in the United States . . . has a compelling interest in observing the Establishment Clause and preserving the values that Clause guarantees.").

Thus, even assuming that Hobby Lobby may bring a RFRA claim as a for-profit corporation and that the Mandate imposes a substantial burden on its exercise of religion, that burden cannot justify a RFRA exemption from the Mandate because the government has a compelling interest in remaining within the constitutional boundaries set by the Establishment Clause. The least restrictive means of avoiding an Establishment Clause violation – indeed, the only means – is to interpret RFRA not to authorize courts to grant exemptions where, as here, doing so would shift significant costs to third parties.

B. Other Exemptions from the Mandate Do Not Diminish the Compelling Governmental Interest Because They Do Not Shift the Costs of a Religious Accommodation to Third Parties.

Referring to the exemptions from the Mandate found in the ACA and its implementing regulations, the Tenth Circuit determined that "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *accord Conestoga Wood Specialties*, 724 F.3d at 413 (Jordan, J., dissenting) ("The government's arguments against accommodating the Hahns and Conestoga are 'undermined by the existence of numerous exemptions [it has already made] to the . . . mandate.'" (quoting *Newland*, 881 F. Supp. 2d at 1297)).

That the Mandate allows other permissible exemptions has no bearing, however, on whether a cost-shifting religious exemption violates the Establishment Clause. The existence of other exemptions cannot cure an unconstitutional exemption because the government's interest in complying with the Constitution is paramount and unwaivable. The ACA exemptions are facially permissible precisely because they do not violate the Establishment Clause or any other constitutional provision.

The Mandate provides two primary religious accommodations.[9] First, it fully exempts "churches, their integrated auxiliaries, and conventions or associations of churches," as well as "the exclusively religious activities of any religious order," so long as these are operated as nonprofit entities under the Internal Revenue Code. 45 C.F.R. § 147.131(a) (citing I.R.C. § 6033(a)(3)(A)(i), (iii)). And second, it provides an accommodation to religious organizations that oppose the coverage of mandated contraceptives on religious grounds, are organized and operated as nonprofit entities, hold themselves out as religious organizations, and self-certify to these three criteria. 29 C.F.R. § 2590.715-2713A(a).

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[9] The Mandate includes other exemptions, but these are religiously neutral and thus do not implicate the Establishment Clause. *See, e.g.*, I.R.C.

In this second case, contraceptive coverage is provided instead by the religious nonprofit's health insurer or health plan administrator. *See* 29 C.F.R. §§ 2590.715-2713A(b)(2),(3), 2590.715-2713A(c)(2)(ii);

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§ 4980H(c)(2)(A) (employers with fewer than 50 employees are not required to provide employee health insurance; however, if they choose to do so, they must adhere to the Mandate, *see* 42 U.S.C. § 300gg-13(a)(4)); 45 C.F.R. § 147.140 (plans that do not significantly alter their coverage after March 23, 2010, are exempt from the Mandate and most other requirements of the ACA);.

The statute also creates a minor exemption for individuals who voluntarily join a "health care sharing ministry" through which members share medical expenses that conform to their collective ethical or religious beliefs. I.R.C. § 5000A(d)(2)(B). Given the voluntary nature of such a ministry, no third-party burdens are imposed.

45 C.F.R. §§ 147.131(b), 156.50(d).[10] Because payment for contraception within a health care plan is at least cost-neutral, the third-party insurer does not incur additional net costs.[11] *See* 78 Fed. Reg. at

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[10] *Little Sisters of the Poor Home for the Aged v. Sebelius*, No. 13-cv-2611-WJM-BNB, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *temporary injunction granted*, No. 13A691, 2013 WL 6869391 (U.S. Dec. 31, 2013), addresses a subsidiary problem that arises when a religious nonprofit's health plan administrator itself asserts religious objections to providing contraceptive coverage. The District Court concluded that when such an administrator is exempt from regulation under ERISA, the administrator need not provide contraceptive coverage, and the religious nonprofit satisfies its obligations under the ACA by self-certifying its religious objections without regard to the administrator's parallel objection. *Id.* at *11–12. This idiosyncratic issue is the subject of continuing litigation, but will affect only a very small number of employers and employees.

[11] Studies have concluded that coverage for contraception reduces net reimbursable costs by virtue of savings in prenatal care, childbirth, and medical treatment of newborns. *See, e.g.*, Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 Wash. L. Rev. 363, 366–67 & n.13, 394–95 (1998); Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 Guttmacher Pol. Rev. 7, 10 (2010); James Trussell et al., *Cost Effectiveness of Contraceptives in the United States*, 79 Contraception 5, 5 (2009) ("Contraceptive use

39,872–73, 39,877. To the extent insurers do, in fact, incur net costs for providing mandated contraceptive coverage, these costs may be allocated as an administrative expense to all insured healthcare plans (other than those plans entitled to the religious accommodation), or reimbursed by a credit against the health insurance exchange tax. 78 Fed. Reg. at 39,877–78.

Neither the church exemption nor the religious nonprofit accommodation violates the Establishment Clause. As the government has observed, it is likely that employees of churches that religiously object to contraception will share that objection and thus will not suffer a significant burden if the church's health plan does not cover contraception. As for the religious nonprofit accommodation, employees of the accommodated religious employers continue to receive all contraceptives covered by the Mandate without cost-sharing; they simply receive them from

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saves nearly $19 billion in direct medical costs each year"); C. Keanin Loomis, Note, *A Battle over Birth "Control": Legal and Legislative Employer Prescription Contraception Benefit Mandates*, 11 Wm. & Mary Bill Rts. J. 463, 477–78 (2002). These savings in reimbursable costs are likely to be equal to or greater than the cost of mandated contraceptive coverage. Accordingly, premiums charged by a third-party insurer could, in fact, be lower when no-cost contraception coverage is included. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8727–28 (Feb. 15, 2012).

their employer's health insurer or plan administrator rather than the religious nonprofit employer.

Accordingly, the permissive religious accommodations afforded under the ACA pose no conflict with the Establishment Clause. It is Hobby Lobby's invocation of RFRA to avoid compliance with the Mandate that raises constitutional concerns. And those concerns cannot be overcome.

CONCLUSION

For these reasons, the Establishment Clause requires reversal of the judgment of the United States Court of Appeals for the Tenth Circuit and affirmance of the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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AMICUS
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BRIEF

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AND
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Nos. 13-354, 13-356

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In The
Supreme Court of the United States

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KATHLEEN SEBELIUS, SECRETARY OF HEALTH
AND HUMAN SERVICES, ET AL., PETITIONERS

v.

HOBBY LOBBY STORES, INC., ET AL.

◆

CONESTOGA WOOD SPECIALTIES
CORPORATION, ET AL., PETITIONERS

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH
AND HUMAN SERVICES, ET AL.

◆

*ON WRITS OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND TENTH CIRCUITS*

◆

BRIEF FOR FOREIGN AND COMPARATIVE LAW EXPERTS LAWRENCE O. GOSTIN, ET AL., AS AMICI CURIAE SUPPORTING PETITIONERS IN NO. 13-354 AND RESPONDENTS IN NO. 13-356

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BRIEF FOR FOREIGN AND COMPARATIVE LAW EXPERTS LAWRENCE O. GOSTIN, ET AL. AS AMICI CURIAE SUPPORTING PETITIONERS IN NO. 13-354 AND RESPONDENTS IN NO. 13-356

Professors Lawrence O. Gostin, Bernard Dickens, Erika R. George, Johanna E. Bond, and Jaya Ramji-Nogales respectfully submit this brief as amici curiae in support of petitioners in No. 13-354 and respondents in No. 13-356.[1]

INTEREST OF AMICI CURIAE

Amici curiae are leading experts in international and comparative law and global health law. Each has published and lectured widely in the field. Each has extensive knowledge of global judicial and legislative developments regarding women's access to reproductive health care.[2]

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[1] A letter from Hobby Lobby Stores, Inc. consenting to the filing of this brief is being filed with the Clerk of the Court, pursuant to Rule 37.3(a). Letters from the other parties granting blanket consent to the filing of amicus curiae briefs have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

These cases present the questions whether and to what extent for-profit corporations that claim a religious objection to providing health insurance plans that cover contraception can refuse to comply with a public health law as a so-called conscientious objector. Other nations have weighed the rights of conscientious objectors against the rights of patients who seek access to health care, including reproductive health services. Their approach is instructive. Although it is still a relatively new issue, most countries recognize some degree of protection for conscientious objectors who have religious objections to particular health care services. To amici's knowledge, however, none would recognize the claims asserted here.

Insofar as other constitutional democracies have addressed these issues, they have not recognized a non-religious organization's request for exemption from a law requiring it to provide health insurance that includes coverage for the full range of legal contraception. Foreign courts, international human-rights bodies, and medical organizations all recognize that access to affordable contraception is a fundamental component of a woman's liberty, dignity, and equality.

Many foreign states provide robust protections for conscientious objectors for whom providing a medical procedure would involve breaching a deeply held religious view. But those states couple the recognition of conscientious objection rights with the guarantee that women have access to the health care services to which they are entitled. Accordingly, the exercise of conscientious objection is regulated in order to give effect to both rights. As such, while a conscientious objector can refuse to provide a specific medical service, court decisions, laws, regulations, and medical codes of ethics require the objector to ensure that the patient is able to receive the service from a non-objector.

Moreover, when anyone other than a person who directly participates in the medical procedure asserts a right of conscientious objection, that assertion has been rejected. Amici are unaware of any decision by a foreign court or human-rights tribunal extending the right of conscientious objection to a for-profit corporation, much less where the issue in question is providing insurance coverage for basic health care services such as contraception. This Court should not make the United States an exception in a matter so paramount to women's health and liberty.

ARGUMENT

GLOBAL LEGAL DEVELOPMENTS CONFIRM THAT CONTRACEPTIVE ACCESS IS AN ESSENTIAL COMPONENT OF WOMEN'S HUMAN RIGHTS AND MAY NOT BE CIRCUMSCRIBED BY THE ASSERTION OF RELIGIOUS CONVICTIONS BY FOR-PROFIT CORPORATIONS

The right being asserted in these cases—a for-profit corporation's claim of a religious exemption from a public health law requiring insurance coverage for safe, lawful, affordable contraceptives—has not been recognized by foreign courts or other international tribunals. To the extent such courts and tribunals have addressed similar issues, they have rejected assertions of conscientious objector status by anyone other than individuals who directly participate in providing a medical service.

A. Foreign And International Law Serves As A Useful Touchstone For The Resolution Of These Cases

These cases require the Court to balance the conscience rights of objectors against the rights of the citizenry as a whole to access health care within a regulated system, a question that several foreign and international tribunals have confronted directly.

Respect for religious liberty, the separation of church and state, and equal protection of the law are all values the United States shares with other constitutional democracies.[3] Just as we have influenced the jurisprudence of other states, so too do we benefit from understanding how foreign nations that share many of our legal attributes, traditions, and history have confronted similar questions. "[T]he way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances" offers concrete evidence of solutions to common problems. *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting); *see also United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) ("These countries are our 'constitutional offspring' and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.").

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[3] *See* Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 Am. J. Int'l L. 593, 598-599 (1997) (tracing the traditional American constitutional safeguards for disestablishment and freedom of religion from the American founders to the French Revolution, the creation of an independent India, and Nelson Mandela's political leanings as reflected in the Constitution of the Republic of South Africa); *see also* Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone has the right to freedom of thought, conscience and religion * * * . Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.").

In particular, this Court can benefit from examining the way in which foreign courts have construed the principles of "liberty," "dignity," and "equality" in similar cases. *See Lawrence v. Texas*, 539 U.S. 558, 572-573, 576-577 (2003). As this Court has explained, "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

Indeed, this Court has a long history of looking to the practices of other democratic states to resolve previously unexamined questions. For example, when state mandatory vaccination laws were challenged as unconstitutional in the early twentieth century, the Court looked to the practices in several European countries to satisfy itself that the restraints on liberty entailed by the law were reasonable in light of current understandings of scientific knowledge and the practices of other governments. *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905); *see* Vicki C. Jackson, Constitutional Engagement in a Transnational Era 111 (2010).

The way foreign and international law has treated conscientious objections to the provision of reproductive services can aid this Court in striking the appropriate balance between ensuring access to basic health care and protecting conscientious objection based on religious convictions.

B. The Opinion Of The World Community Supports Access To Health Care And Family Planning, Including Contraception

This Court has long recognized the link between women's access to family-planning services and their autonomy: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (plurality opinion).

International human-rights and health institutions have also recognized this basic fact. For example, an analysis by the World Health Organization (the directing and coordinating authority for health within the United Nations) confirms that women's ability to control their fertility represents "a profound shift in the lives of women," and "an opportunity for enhanced participation in public life." World Health Organization, Family Planning: A

Health and Development Issue, a Key Intervention for the Survival of Women and Children 1-2 (2012).[4]

International instruments on population and development, which set priorities for global sustainable development, emphasize the equality and empowerment of women. For example, the 1994 International Conference on Population and Development (ICPD) Programme of Action (the Cairo consensus), adopted by the United States and 178 other countries, explicitly affirmed that reproductive rights are human rights. The ICPD found that reproductive rights are grounded in fundamental freedoms that are already recognized in national laws and international human rights instruments, such as rights to life, non-discrimination, privacy, and the right to be free from inhumane and degrading treatment.[5] The ICPD concluded that guaranteeing women's reproductive health rights is critical for achieving gender equality and ensuring women's full participation in all aspects of society, and it called on states to effectuate these commitments by investing in family planning. To emphasize the point, the ICPD urged states to "make available a full range of effective [contraceptive] methods."[6] The United States not only affirmed the Cairo consensus, but was also a leading voice at the conference[7] and has championed the ICPD framework ever since.[8]

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[4] *Available at* http://apps.who.int/iris/bitstream/10665/75165/1/WHO_RHR_HRP_12.23_eng.pdf. *See also* U.N. Development Programme, Human Development Report 2013: The Rise of the South: Human Progress in a Diverse World 128 n.90 (2013) (concluding, based on a study of 97 countries, that "higher fertility is associated with lower labour force participation of women during their fertile years" and that "on average, each additional child reduces female labour force participation 5-10 percentage points for women 20-44"); David Canning & T. Paul Schultz, The Economic Consequences of Reproductive Health and Family Planning 6, The Lancet (July 10, 2012), *available at* http://www.mamaye.org/sites/default/files/evidence/The%20economic%20consequences%20of%20reproductive%20health%20and%20family%20planning.pdf (concluding that evidence from Asia and Africa suggests that fertility declines from access to family planning "change the social and economic position of women, reducing gender inequality and allowing women more opportunity to enter formal employment").

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[5] International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Programme of Action of the International Conference on Population and Development*, ¶ 7.3, U.N. Doc. A/CONF.171/13/Rev.1 (1995). Subsequent international consensus documents are in accord. For example, the Beijing Platform for Action, which elaborated on the commitments made in the ICPD Programme of Action, specifically acknowledged the role that sexual and reproductive health plays in women's equality. Fourth World Conference on Women, Beijing, China, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, ¶ 92, U.N. Doc. A/CONF.177/20/Rev.1 (1996); *see also* Christina Zampas, *Legal and Ethical Standards for Protecting Women's Human Rights and the Practice of Conscientious Objection in Reproductive Healthcare Settings*, 123 Int'l J. Gynecology & Obstetrics S63, S64 (2013); Christina Zampas & Ximena Andión-Ibañez, *Conscientious Objection to Sexual and Reproductive Health Services: International Human Rights Standards and European Law and Practice*, 19 Eur. J. Health L. 231, 234 (2012).

[6] International Conference on Population and Development *supra*, ¶¶ 7.2, 7.5(a), 7.12, 7.14(c). The ICPD also condemned draconian population policies, including forced sterilization, thereby affirming that coercive laws, policies, and practices that fail to respect individuals' autonomy and decision-making must be eliminated. *Ibid.*

International human rights standards have increasingly articulated protection for reproductive rights, particularly in the area of contraception. For example, the Human Rights Committee, the monitoring body for the International Covenant on Civil and Political Rights (ICCPR), has recognized that a woman's ability to control her reproductive decision-making through the use of contraception is deeply rooted in fundamental rights such as the right to equality and nondiscrimination.[9] The Human Rights Committee has recommended the repeal of laws that ban contraceptive access[10] as well as laws requiring or coercing sterilization.[11] It has also recognized that cost is a key barrier to contraceptive access and has urged governments to make contraception widely available and affordable.[12]

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[7] *See, e.g.*, Albert Gore, U.S. Vice President, Statement at the International Conference on Population and Development (Sept. 5, 1994) ("[H]ere at Cairo, there is a new and very widely shared consensus * * * . The education and empowerment of women, high levels of literacy, the availability of contraception and quality health care—these factors are all crucial."), *quoted in* International Conference on Population and Development, *supra*, at 176.

[8] Hilary R. Clinton, U.S. Secretary of State, Remarks on the 15th Anniversary of the International Conference on Population and Development (Jan. 8, 2010) ("[W]e are rededicating ourselves to the global efforts to improve reproductive health for women and girls. Under the leadership of this Administration, we are committed to meeting the Cairo goals."), *available at* http://www.state.gov/secretary/20092013clinton/rm/2010/01/135001.htm.

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[9] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Albania*, ¶ 14, U.N. Doc. CCPR/CO/82/ALB (Dec. 2, 2004); Human Rights Committee, *Concluding Observations: Hungary*, ¶ 11, U.N. Doc. CCPR/CO/74/HUN (Apr. 19, 2002); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Mali*, ¶ 14, U.N. Doc. CCPR/CO/77/ML (Apr. 16, 2003); Human Rights Committee, *Concluding Observations of the Human Rights Committee: Viet Nam*, ¶ 15, U.N. Doc. CCPR/CO/75/VNM (July 26, 2002).

[10] Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the Philippines*, ¶ 13, U.N. Doc. CCPR/C/PHL/CO/4 (Nov. 13, 2012).

[11] Human Rights Committee, *General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, ¶ 20, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000); Human Rights Committee, *Concluding Observations by the Human Rights Committee: Peru*, ¶ 21, U.N. Doc. CCPR/CO/70/PER (Nov. 15, 2000); Human Rights Committee, *Concluding Observations on the Fifth Periodic Report of Peru*, ¶ 13, U.N. Doc. CCPR/C/PER/CO/5 (2013); Human Rights Committee, *Concluding Observations: Czech Republic*, ¶ 10, U.N. Doc. CCPR/C/CZE/CO/2 (2007); Human Rights Committee, *Concluding Observations: Slovakia*, ¶ 13, U.N. Doc. CCPR/C/SVK/CO/3 (2011); Human Rights Committee, *Concluding Observations: Slovakia*, ¶ 12, U.N. Doc. CCPR/CO/78/SVK (2003).

As a state party to the ICCPR, the United States has agreed to respect, protect, and fulfill the right of women's equality enshrined in the Covenant. In fulfilling its reporting obligations under the ICCPR, the United States has cited the Affordable Care Act as evidence of our nation's compliance with our treaty obligation to ensure equal access to health care to all

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[12] Human Rights Committee, *Concluding Observations: Republic of Moldova*, ¶ 17, U.N. Doc. CCPR/C/MDA/CO/2 (2009); Human Rights Committee, *Concluding Observations: Poland*, ¶ 9, U.N. Doc. CCPR/CO/82/POL (2004); Human Rights Committee, *Concluding Observations: Argentina*, ¶ 14, U.N. Doc. CCPR/CO/70/ARG (2000); Human Rights Committee, *Concluding Observations: Poland*, ¶ 12, U.N. Doc. CCPR/C/POL/CO/6 (Oct. 27, 2010). Consistent with the ICCPR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which the United States has signed but not ratified, directs States to "eliminate discrimination against women in the field of health care in order to ensure * * * access to health care services, including those related to family planning." CEDAW art. 12(1). Recommendation 24 of CEDAW's interpretive committee has elaborated on the content and meaning of art. 12 by noting that "if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers." *See* Report of the Committee on the Elimination of Discrimination Against Women, 20th & 21st Sess., Jan. 19-Feb. 5, June 7-25, 1999, ch. I, ¶ 11, U.N. Doc. A/54/38/Rev.1 (1999).

segments of society, including women and racial and ethnic minorities.[13]

The United States has also pointed to the Affordable Care Act as evidence of its compliance with other international human-rights commitments. In October 2013, the United States cited the Affordable Care Act in its report to the U.N. Committee on the Elimination of Racial Discrimination, as one way that the country is complying with the Committee's 2008 recommendation that it take steps to "facilitat[e] access to adequate contraceptive and family planning methods"[14] in order to reduce persistent health disparities in women and minorities.[15] Similarly, in the Universal Periodic Review of the United States by the Human Rights Council, the United States cited the Affordable

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[13] Human Rights Committee, *Reports Submitted by States Parties Under Article 40 of the Covenant: Fourth Periodic Report: United States of America*, ¶ 90, U.N. Doc. CCPR/C/USA/4 (May 22, 2012).

[14] Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination on the United States of America*, ¶ 33, U.N. Doc. CERD/C/USA/CO/6 (2008).

[15] Committee on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under Article 9 of the Convention: Seventh to Ninth Periodic Reports of States Parties Due in 2011: United States of America*, ¶ 139, U.N. Doc. CERD/C/USA/7-9 (Oct. 2, 2013); *see also id.* at ¶ 196 ("The United States is also increasing women's access to health care through the ACA which, inter alia, ensures that more women have access to health care services for healthy pregnancies * * * .").

Care Act as evidence of its compliance with international human rights duties to end discrimination against women in health care.[16]

Consistent with these international standards, U.S. foreign policy makes access to family planning a cornerstone of U.S. efforts to promote women's equality around the world. In remarks to the Third International Conference on Family Planning in November 2013, Secretary of State John Kerry reaffirmed the United States' investments in family planning programs as critical to furthering women's equality around the world: "And we'll need to find new ways to remind people that when women and girls are better able to stay healthy and pursue new opportunities, they are also better able to contribute to the success of their families, their communities, their countries and the world. The fact is, when women and girls thrive, so do the people around them."[17]

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[16] Human Rights Council, *Working Group on the Universal Periodic Review: National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1*, ¶ 37, U.N. Doc. A/HRC/WG.6/9/USA/1 (Aug. 23, 2010) ("[O]ur recent health care reform bill also lowers costs and offers greater choices for women, and ends insurance company discrimination against them.").

[17] John Kerry, U.S. Secretary of State, Video Remarks on Third International Conference on Family Planning, Washington, D.C. (Nov. 12, 2013), *available at* http://www.state.gov/secretary/remarks/2013/11/217523.htm.

C. The Foreign And International Authorities That Recognize A Limited Right To Conscientious Objection Give Priority To Women's Right To Access Reproductive Health Care

Where a right to conscientious objection has been recognized, foreign and international authorities have required that the exercise of an objection must not interfere with a woman's access to reproductive health services. Consistent with the clear consensus on the importance of birth control to the health of women and families, access to contraception is necessarily included in the health services that are given priority over the objection.

1. Where conscientious objection is recognized, its exercise is regulated to ensure that women can still access reproductive health care

Many nations' health care regimes offer robust protections to individuals for whom directly providing a particular health service would violate a deeply held religious belief. But, in general, systems that extend conscientious-objection protections pair the ability of an individual to invoke the right with a guarantee that patients may access health care services from a non-objecting party.[18]

Numerous authorities that have recognized conscientious objection in health care have done so in the context of pregnancy-termination services—a factual scenario not before the Court. Amici have identified only one decision addressing conscientious objection to the provision of contraception, and the result was an unequivocal endorsement of women's access to birth control.

In that case, the European Court of Human Rights ruled that pharmacists did not have a right to conscientiously object to providing contraceptive pills to customers with valid prescriptions. *Pichon and Sajous v. France,* App. No. 49853/99 (Eur. Ct. H.R. 2001) (English translation).[19] The pharmacists invoked Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), which provides "the right to freedom of thought, conscience and religion." *See id.* at 3. But the court reasoned that Article 9 "does not always guarantee the right to behave in public in a manner governed" by one's religious beliefs. *Id.* at 4. The court concluded that conscientious objection by pharmacists could not disrupt the regulated sale of contraceptives under French law. "[A]s long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy," the pharmacists "cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products * * * ." *Ibid.*

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[18] The notion of a right of conscientious objection in the context of health care is a relatively new phenomenon. "In contrast to conscientious objection to military service, until quite recently, conscientious objection by health care professionals does not appear to have been a familiar occurrence." Mark R. Wicclair, Conscientious Objection in Health Care: An Ethical Analysis 14 (2011).

[19] *Available at* http://www.strasbourgconsortium.org/document.php?DocumentID=4942.

Decisions addressing conscientious objection in the context of pregnancy-termination services likewise have prioritized women's access to health services. The European Court of Human Rights has held that, if a state permits conscientious objection by health professionals, it has a corresponding obligation to protect the rights of patients:

> For the Court, States are obliged to organise their health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.

R.R. v. Poland, App. No. 27617/04, at 47 (Eur. Ct. H.R. 2011).[20] In that decision, the court ruled a woman's right to respect for her private life—which encompasses "the right to personal autonomy and personal development"—was violated because Polish law did not provide an effective mechanism for her to obtain diagnostic tests to determine fetal abnormality following her doctors' refusal to conduct such tests on grounds of conscience. *Id.* at 39-40, 47-48; *see also P. & S. v. Poland*, App. No. 57375/08 (Eur. Ct. H.R. 2012) (reaffirming that states must ensure that conscientious objections do not interfere with patients' rights to obtain services).

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[20] *Available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104911.

Numerous other high-court decisions, many from predominantly Catholic countries, prioritize the protection of women's access to health services. In Colombia, for instance, the Constitutional Court held that "since the conscientious objection is not an absolute right, its exercise is limited by the Constitution itself; that is, it cannot violate the fundamental rights of women." Corte Constitucional [C.C.] [Constitutional Court], noviembre 27, 2009, Sentencia T-209/08, ¶ 4.6 (Colom.). In order to protect women's rights, the court required that "if a doctor alleges a conscientious objection, he must immediately send the woman * * * to another doctor" who can provide the treatment. *Id.* ¶ 4.3; *see id.* Conclusion ¶ 11. And the court reiterated that "although health professionals are entitled to express their conscientious objection, they cannot abuse this right * * * by not immediately referring the pregnant woman to another physician that is willing to perform the procedure." *Id.* ¶ 5.13.[21]

National bodies that regulate the medical profession impose similar requirements. For example, Portugal's Ministry of Health requires health care institutions to ensure women's access to abortion services where the procedure is otherwise unobtainable because of the conscientious objections of health care professionals. Interrupção Voluntária Da Gravidez/Serviços Obtertricía, Portaria No. 189/98 de 21 março 1998 (Port.). Likewise, the United Kingdom's General Medical Council guidance instructs objecting physicians that they must "[m]ake sure that the patient has enough information to arrange to see another doctor who does not hold the same objection," or if it is not practical for the patient to make arrangements, to "make sure that arrangements are made—without delay—for another suitably qualified colleague to advise, treat or refer the patient." General Medical Council, Personal Beliefs and Medical Practice ¶¶ 12(c), 13 (Mar. 25, 2013) (U.K.). Similarly, Norway conditions a doctor's "refus[al] to treat a patient" on the patient's "reasonable access to treatment by another doctor." Den Norske Legeforening [Code of Ethics for Doctors], § 6 (Nor.) (translation on file with counsel).

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[21] Citing the decisions from the European Court of Human Rights and the Colombian Constitutional Court discussed in the text, the Inter-American Commission on Human Rights (IACHR) has addressed conscientious objection in the context of health professionals who object to "family-planning methods, emergency oral contraception," and other reproductive health services. IACHR, Access to Information on Reproductive Health from a Human Rights Perspective ¶¶ 94-95, 99 (2011), *available at* http://www.oas.org/en/iachr/women/docs/pdf/womenaccess informationreproductivehealth.pdf. The Commission's report recommended that "States must guarantee that women are not prevented from accessing information and reproductive health services, and that in situations involving conscientious objectors in the health arena, the States should establish referral procedures, as well as appropriate sanctions for failure to comply with their obligation." *Id.* ¶ 99.

International medical associations impose similar requirements, based on the principle that a doctor's primary duty is to the patient. The World Medical Association (WMA), a global organization representing physician groups from more than 100 countries, including the American Medical Association, British Medical Association, and Canadian Medical Association, mandates that a "physician may not discontinue treatment of a patient * * * without giving the patient reasonable assistance and sufficient opportunity to make alternative arrangements for care." World Medical Association, Declaration on the Rights of the Patient (1981).[22]

The International Federation of Gynecology and Obstetrics (FIGO), which represents 125 national associations of gynecologists and obstetricians, recognizes that "physicians have an ethical obligation, at all times, to provide benefit and prevent harm for every patient for whom they care." FIGO, Resolution on "Conscientious Objection" (2006). FIGO's "Resolution on 'Conscientious Objection'" requires that objecting physicians refer their patients to another physician who will provide the service. *Ibid.* And when referral is not possible and delay would jeopardize patient health, such as in the case of emergency, the objecting physician must provide the service notwithstanding the objection. *Ibid.*

In the same vein, the World Health Organization has stated that while health care professionals may interpose a conscientious objection, "that right does not entitle them to impede or deny access to lawful * * * services," and it has emphasized the duty of objecting physicians to refer patients to another provider and provide care in an emergency situation. World Health Organization, Safe Abortion: Technical and Policy Guidance for Health Systems 69 (2012).

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[22] *See also* World Medical Association, About the WMA, http://www.wma.net/en/30publications/10policies/l4/. The WMA's pledge for newly admitted doctors requires doctors to aver that "the health of my patient will be my first consideration," and that "I will not permit considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or *any other factor* to intervene between my duty and my patient." World Medical Association, Declaration of Geneva (adopted 1948, revised 2006) (emphasis added), *available at* http://www.wma.net/en/30publications/10policies/g1/; *see also* WMA Members' List, http://www.wma.net/en/60about/10members/21memberlist/index.html.

Finally, the need to prevent harm to third parties is so strong that many health care regimes require even a conscientious objector to provide services in medical emergencies, when the patient's life or health is at imminent risk. *See*, *e.g.*, Gazzetta Ufficiale della Repubblica Italiana, Part I, 2 May 1978, No. 140, Art. 9 (It.) ("Conscientious objection may not be invoked by health personnel or allied health personnel if, under the particular circumstances, their personal intervention is essential in order to save the life of a woman in imminent danger.");[23] Abortion Act, 1967, c. 87, § 4.2 (U.K.) (health professionals also not permitted to invoke conscientious objection where providing care "is necessary to save the life or to prevent grave permanent injury to the physical or mental health of a pregnant woman"); Código Deontológico da Ordem dos Medicos, art. 37(3) (Port.) (similar) (translation on file with counsel).[24]

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[23] *Available at* http://www.columbia.edu/itc/history/degrazia/courseworks/legge_194.pdf.

[24] *Available at* https://www.ordemdosmedicos.pt/index.php?lop=conteudo&op=9c838d2e45b2ad1094d42f4ef36764f6&id=84c6494d30851c63a55cdb8cb047fadd.

2. *Foreign and international authorities restrict the right of conscientious objection to individuals directly involved in providing the health care service*

To the extent that other states and international organizations permit a health care provider to interpose an objection, such a right has generally been extended only to medical personnel directly involved in providing the service in question, and not to staff performing peripheral functions. "[O]nly professionals who otherwise would be required to perform services *directly* on patients can invoke grounds of conscience for the purpose of exemption." Rebecca J. Cook & Bernard M. Dickens, World Health Organization, Considerations for Formulating Reproductive Health Laws 33 (2d ed. 2000) (emphasis added). Support staff who are not directly involved in patient care may not interpose an objection. *Ibid.*

As the Constitutional Court of Colombia noted, the right of health care providers to refuse to perform medical services "exclusively applies to direct service providers." Sentencia T-209/08, *supra*, ¶ 4.2. Extending the right to a broader category of individuals would be improper, the court held, because the duties of ancillary personnel "can hardly be found to have a real connection with moral, philosophical, or religious motives" that form a legitimate basis for an objection. Corte Constitucional [C.C.] [Constitutional Court], mayo 28, 2009, Sentencia T-388/09 (Colom.).

In Norway, the conscientious objector provision status "applies only to health personnel who either perform or assist in the operation itself, and not to those who attend to, nurse or treat the woman before and after the operation." The Act dated 13 June, 1975 no. 50 concerning the Termination of Pregnancy, with Amendments in the Act dated 16 June 1978 no. 5, ch. 11, § 20 (Nor.).

Similarly, Spain's conscientious objector provision covers only those health care providers "directly involved" in the medical procedure because such limits are necessary to ensure the highest levels of access and quality of care. Ley Orgánica 2/2010, de 3 de marzo, de Salud Sexual y Reproductiva y de la Interrupción Voluntaria del Embarazo [Law of Sexual and Reproductive Health and Abortion] (2010) (Spain). Spanish courts have interpreted this provision to deny objector status to individuals with peripheral roles. S.T.S., Nov. 27, 2009 (209/08) (Spain). For example, a Spanish administrative court refused to recognize a family doctor as a legitimate objector where he provided information and referrals for abortion but did not perform the procedure himself. Auto del Juzgado Contencioso-Administrativo No. 3 de Málaga, Pieza separada medidas provisionales No. 12.1/2011, Pmto. especial protección derechos fundamentales No. 39/2011, Apr. 5, 2011 (Spain). The court found that the public interest in a health system that provides safe medical procedures takes precedence over a single doctor's objector status. *Ibid.*

A minority of jurisdictions allow a slightly broader category of non-medical personnel to refuse to perform their duties as long as their role is directly related to the procedure in which they would normally participate. For instance, Italian law permits auxiliary or non-medical personnel to conscientiously object to providing services that are specific to, and necessary for, the interruption of pregnancy and not merely incidental to it. Legge 22 maggio 1978, n. 194, art. 9, Gazzeta Ufficiale 22 maggio 1978, n. 140 (Norme per la Tutela Sociale della Maternità e sull'Interruzione Volontaria della Gravidanza) [Italian Rules for the Interruption of Pregnancy] (It.). Persons providing medical assistance before and after the procedure are considered too attenuated to invoke conscientious objector status under the provision. *Ibid.*

The United Kingdom's conscientious objection provision does not distinguish between medical and non-medical personnel for purposes of claiming the right, but rather affords the right to anyone with duties requiring him or her to "participate in any treatment" under the Act. Abortion Act, 1967, c. 87, § 4 (U.K.). U.K. courts have interpreted this clause to require the objector to have a role in the medical procedure itself. In 1988, the U.K. House of Lords upheld the Court of Appeals and lower court decisions to refuse to extend conscientious objector status to a doctor's secretary who was terminated for refusing to type a referral letter because her actions were too remote from participation in the procedure. *Janaway* *v. Salford*, HA [1988] 3 All ER 1079 (Eng.); *see also Doogan & Wood v. NHS Greater Glasgow & Clyde Health Board,* [2013] CSIH 36 (Scot.) (conscientious objection may only be claimed by those "'actually taking part in treatment administered in hospital or other approved place'" (quoting Lord Keith in *Janaway*, HA [1988] 3 All ER 1079), *appeal pending*.

The right being asserted by the employers in these cases runs contrary to the view that only parties directly involved in providing a medical service are entitled to conscientious objector status. The direct providers here are the physicians who counsel their patients and prescribe contraception methods; there is simply no legal precedent for objections from anyone else. A private corporation that does not provide contraceptives but instead must sponsor an employee health plan that covers contraception is far too attenuated to justify a claim of conscientious objection.[25]

3. *These limitations on conscientious objection comport with this Court's religious freedom jurisprudence*

These limits imposed by foreign and international law on conscientious objection in health care are consistent with how this Court has balanced the interests at stake in evaluating free exercise claims. As the Court has stressed, "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." *Gillette v. United States*, 401 U.S. 437, 461 (1971). Rather, "[t]o maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good." *United States v. Lee*, 455 U.S. 252, 259 (1982). Were it otherwise, "the professed doctrines of religious belief [would become] superior to the law of the land, and in effect [ ] permit every citizen to become a law unto himself." *Reynolds v. United States*, 98 U.S. 145, 166-167 (1978).

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[25] Indeed, the employer is many steps removed from the services objected to here. Premium dollars—both the employer's and the employee's—are aggregated into a large pool, from which the health plan administrator pays claims to reimburse employees or health care providers for covered services. A woman seeking contraception will typically visit a health care provider and receive a prescription, and then must fill that prescription and decide to use the contraception. There are thus numerous intervening decisions between the employer's sponsorship of the health plan and an individual employee's use of contraception.

Moreover, health care benefits are appropriately viewed as a form of employee compensation—like wages but in a different form. Justin Falk, Congressional Budget Office, Comparing Benefits and Total Compensation in the Federal Government and the Private Sector 2, 4 (2012), *available at* http://www.cbo.gov/sites/default/files/cbofiles/attachments/2012-04FedBenefitsWP_0.pdf; *see also* Buck Consultants, Total Remuneration, https://www.buckconsultants.com/Services/Compensation/Totalremuneration.aspx (last visited Jan. 24, 2014). It makes no more sense to allow an employer to selectively deny coverage for basic health care services based on a religious objection than it would to allow that employer to forbid an employee from using her wages to purchase contraception.

Thus, in evaluating a claim to a religious-based exemption to a general law, this Court has repeatedly considered whether the claimed exemption would burden others. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (plurality opinion). When the Court has upheld an exemption, it has usually done so after noting that the religious freedom asserted by plaintiffs did "not bring them into collision with rights asserted by any other individual." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 630, 633 (1943); *see also Braunfeld v. Brown*, 366 U.S. 599, 604 (1961) (rejecting Free Exercise challenge to state Sunday closing law); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (distinguishing petitioner's claims for unemployment benefits after being fired for refusing to work on her Sabbath day from cases rejecting free exercise challenges to government regulation of conduct that "posed some substantial threat to public safety, peace or order").

When such a collision of interests exists, the Court has generally refused to grant an exemption to the law. For instance, in *Lee*, the Court explained that "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." 455 U.S. at 261. The Court rejected the challenge to social security taxes in *Lee*, observing that "[g]ranting an exemption from social security taxes to an employer *operates to impose the employer's religious faith on the employees.*" *Ibid.* (emphasis added); *cf. Prince v. Massachusetts*, 321 U.S. 158, 177 (1944) (Jackson, J., concurring in the judgment) ("My own view may be shortly put: I think the limits [on religious freedom] begin to operate whenever activities begin to affect or collide with liberties of others or of the public.").

D. Foreign And International Authorities Have Thus Far Recognized Conscientious Objector Rights Only For Individuals, Not For-Profit Corporations

Although the question of whether a for-profit corporation can assert conscientious objection is relatively new, to the extent such an assertion has been addressed by foreign and international tribunals, it has been rejected. Conscientious objection in the health care context has only been recognized as extending to individuals. Foreign courts and tribunals have ruled that permitting institutions to conscientiously object to the provision of legal reproductive health services could interfere with the exercise of other fundamental rights, including the right to freedom of conscience of the employees working within such institutions and the right of women to access legal reproductive health services.

For example, the Colombia Constitutional Court has explicitly rejected an institutional right to conscientious objection. Colombian Constitutional Court cases: Corte Constitucional [C.C.] [Constitutional Court], mayo 10, 2006, Sentencia C-355/06 (Colom.); Sentencia T-209/08, *supra*; Sentencia T-388/09, *supra*; Corte Constitucional [C.C.] [Constitutional Court], agosto 10, 2012, Sentencia T-627/12 (Colom.). In a 2006 decision, the court ruled that the right to conscientious objection does not extend to institutions such as clinics, hospitals, and health centers; it is only applicable to natural persons. *See* Sentencia C-355/06, *supra*. The court found that institutional objection is not necessary because individuals who belong to or are employed by institutions can still exercise their right to freedom of conscience individually. *Ibid.* Additionally, in a 2009 decision, the Court reiterated that conscientious objection is an "individual decision and not institutional or collective [decision]." Sentencia T-209/08, *supra*.

Likewise, the French Constitutional Council has recognized that freedom of conscience extends to individuals and not to institutions. The decision upheld the repeal of provisions of the Code of Public

Health that permitted "heads of departments in public health establishments to refuse to allow terminations of pregnancy to be practised in their department." Conseil constitutionnel [C.C.] [Constitutional Court] decision No. 2001-446DC, June 27, 2001, Rec. 74, ¶ 11 (Fr.).[26] Because the head of the department "retains the right under the relevant provisions [of] the Code of Public Health to refrain from terminating [pregnancies] himself; this safeguards his freedom of personal conscience, which cannot be exerted at the expense of that of other doctors and medical staff working in his service." *Id.* ¶ 15. Moreover, permitting the conscientious objection of the department head to extend throughout the department would undermine the freedom of conscience of the other health care providers working within the institution. *Ibid.*

Laws in many other countries expressly limit conscientious objection rights to individuals and, by extension, refuse to extend the claimed right of conscientious objection to institutions. For example, the laws of Denmark provide that "doctors, nurses, midwifes and social and health assistants, or students in these professions, for whom it is contrary to their ethic or religious beliefs to perform or assist in induced abortion, can apply for and be granted exemption." Sundhedsloven, LBK nr. 913 [Health Act, Law Notification no. 913], at Chapter 28, Section 102, Copenhagen, Civilstyrelsen [Civil Affairs Agency] (Den.).[27] Similarly, New Zealand's conscientious objector provision extends protections only to a "medical practitioner, nurse, or other person." Contraception, Sterilisation, and Abortion Act 1977 § 46 (2013) (N.Z.).[28]

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[26] *Available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/a2001446dc.pdf. The French Constitutional Council is an interpretive body whose decisions are binding on all public and administrative agencies. *See* Conseil Constitutionnel, General Presentation, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/presentation/presentation.25739.html (last visited Jan. 24, 2014).

That conscientious objection rights adhere only to individuals is consistent with our nation's heritage. This Court has repeatedly upheld general laws governing commercial or public activity against free-exercise challenges by institutions involved in those activities. For example, the Court held that the Free Exercise Clause did not require an exception to an IRS policy that tax-exempt status is available only to educational institutions that do not discriminate on the basis of race. *See Bob Jones University v. United States*, 461 U.S. 574, 604 (1983).

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[27] *Available at* https://www.retsinformation.dk/forms/r0710.aspx?id=130455&exp=1.

[28] *Available at* http://www.legislation.govt.nz/act/public/1977/0112/latest/DLM17680.html. Amici are aware of only one country—Argentina—that offers a right of conscientious objection to an institution, and that right is limited. There, federal law allows denominational institutions that provide health services to conscientiously object to the provision of reversible contraception. Decreto No. 1282/2003, May 23, 2003, art. 10 (Arg.). However, only individual medical providers can conscientiously object to abortion services and surgical contraception. Ministerios de Salud [Health Ministry], Guía Técnica para la Atención Integral de los Abortos No Punibles, June 2010, § 6.3.3 (Arg.); Ley No. 26.130, Aug. 9, 2006, art. 1 (Arg.). In the Australian state of Western Australia, the provisions in the health act that relate to the performance of abortions indicate that "[n]o * * * hospital, health institution, other institution or service is under a duty, whether by contract or by statutory or other legal requirement, to participate in the performance of any abortion." *Health Act 1911* (WA) § 334(2) (Austl.).

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit in No. 13-354 should be reversed, and the judgment of the Third Circuit in No. 13-356 should be affirmed.

Respectfully submitted,

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IN THE

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v.

HOBBY LOBBY STORES, INC., ET AL.

CONESTOGA WOOD SPECIALTIES CORPORATION, ET AL., PETITIONERS

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

On Writ of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF THE GUTTMACHER INSTITUTE AND PROFESSOR SARA ROSENBAUM AS AMICI CURIAE IN SUPPORT OF THE GOVERNMENT

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BRIEF OF THE GUTTMACHER INSTITUTE AND PROFESSOR SARA ROSENBAUM AS AMICI CURIAE IN SUPPORT OF THE GOVERNMENT

This brief is submitted on behalf of the Guttmacher Institute and Professor Sara Rosenbaum as amici curiae in support of the government.[1]

INTEREST OF AMICI CURIAE

Amici are the Guttmacher Institute and Professor Sara Rosenbaum.

Now in its fifth decade, the Guttmacher Institute is a private, nonprofit, nonpartisan corporation that advances sexual and reproductive health and rights through an interrelated program of research, policy analysis, and public education designed to generate new ideas, encourage enlightened public debate, and promote sound policy and program development. The Institute's overarching goal is to ensure the highest standard of sexual and reproductive health for all people worldwide by promoting evidence-based policies and conducting research according to the highest standards of methodological rigor. Attention to accuracy is fundamental to the Institute's work. It produces a wide range of resources on topics pertaining to sexual and reproductive health and publishes two peer-reviewed journals. The information and analysis it generates on reproductive rights issues are widely cited by policymakers, the media and advocates across the ideological spectrum.

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amici, their members, or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Letters from Conestoga Wood Specialties Corporation and the government consenting to all amici briefs are on file with the Clerk's office, and a letter from Hobby Lobby Stores, Inc., consenting to the filing of this brief is submitted herewith.

Professor Rosenbaum is the Harold and Jane Hirsh Professor of Health Law and Policy at The George Washington University School of Public Health and Health Services, where she also holds appointments in the University's Schools of Law and Medicine. Professor Rosenbaum has focused her career on issues of health and health equity for all Americans. Her expertise lies in public and private health insurance and its role in ensuring access to affordable, high-quality preventive, primary, and specialized health care, especially in the case of women and children. A member of the Institute of Medicine and the Guttmacher Institute's board of directors, Professor Rosenbaum enjoys wide recognition in her field. She has authored nearly 100 peer-reviewed journal articles and is the leading author of *Law and the American Health Care System* (2d edition), which offers a panoramic legal overview of health care access, financing, and quality, as well as a comprehensive discussion of law and women's health. Professor Rosenbaum's work helped inform the design and implementation of the Affordable Care Act.

Amici have a strong interest in the resolution of this case. In particular, amici believe that, as shown below, effective family planning yields enormous societal benefits for American women, children, and families, and that the contraceptive-coverage provision at issue in this case is crucial to achieving those benefits.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal Centers for Disease Control and Prevention named improved family planning one of the ten great public health achievements of the 20th century. Removing barriers to the full range of contraceptive options improves the health of women and families, reduces the need for abortion, and promotes the advancement of women and society.

Under the federal laws challenged in this case, if an employer not eligible for exemption or accommodation chooses to offer its employees a health insurance plan as a benefit of employment, the plan must include all contraceptive methods for women, without cost sharing or other fees.[2] This provision allows an individual woman to choose the method of contraception most appropriate for her circumstances and health needs and most consistent with her own personal religious and moral values.

A number of owners of for-profit companies have challenged the contraceptive coverage provision, arguing that the Religious Freedom Restoration Act (RFRA) should allow them to exclude from coverage in their company insurance plans any contraceptive options that are inconsistent with the religious views of the corporate employer.

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[2] 42 U.S.C. § 300gg-13; U.S. Dep't Health & Human Servs., *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines (visited Jan. 25, 2014). Coverage includes "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." It does not include male sterilization or condoms.

Legal requirements that contraception be covered in health insurance plans are neither novel nor unprecedented: 28 states require certain health insurance plans to cover all or almost all prescription methods of contraception. What is critically important about the federal requirement is that it provides women access to the full range of contraceptive methods without imposing fees or cost sharing on the patient.

Amici the Guttmacher Institute and Professor Sara Rosenbaum, drawing on extensive data, argue that the guarantee of coverage serves compelling societal and individual interests. Those who challenge these requirements suggest that because most women are already using contraception, the guarantee cannot be all that important. That assertion is fundamentally wrong. It fails to recognize the vastly different effectiveness and cost of different forms of contraception, the substantial degree to which cost determines which contraceptive methods are actually used, the health and social factors that affect a woman's method choice, and the resulting consequences for women's health, family well-being, and risk of unintended pregnancy and abortion.

First, some methods of contraception are far more effective in practice than others. For example, the hormonal intrauterine device ("IUD") is *45 times* more effective than oral contraceptives and *90 times* more effective than male condoms in preventing pregnancy based on typical use.

Second, cost is a major factor in determining which contraceptives women choose. Almost *one-third* of American women report that they would change their contraceptive method if cost were not an issue. Initiating use of an implant or IUD can cost a month's salary for a woman working full time at minimum wage.

Third, access to the range of contraceptive methods without cost sharing can dramatically reduce the rate of unintended pregnancy, with profound consequences for women and society. Effective family planning facilitates women's educational and career goals and contributes to the economic stability of women and their families. Women with health conditions that increase the risk of pregnancy and childbirth particularly benefit from reliable methods of contraception, allowing them to plan pregnancy consistent with their medical needs. Enabling women to space their pregnancies better also enables them to have healthier babies. Finally, reducing the rate of unintended pregnancy is by far the most widely accepted and effective means of reducing the need for and incidence of abortion.

Accommodation of individual religious beliefs is a principle of great importance, but this Court has noted that the scope of any such accommodation "must be measured so that it does not override other significant interests," including those of third parties.[3] The burden imposed on third parties in this case is far more severe than the "convenience or interests . . . of other employees" cited by the Court in rejecting an accommodation in *Estate of Thornton v.*

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[3] *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

Caldor, Inc.[4] Giving legal force to a corporate employer's beliefs against contraception would deny to female employees and their insured family members vital access to the full range of contraceptive methods, inflicting financial harm and erecting obstacles to needed medical care.

In these cases, the shifting of a burden to third parties would involve even more than economics and personal health, as significant as they are. Denying coverage of the most effective methods (or, in some cases, all methods) of contraception leads predictably and directly to unintended pregnancies. Removing the contraceptive coverage guarantee would place some women with religious objections to abortion in what is for them a morally difficult position: they might desire but be unable to afford the most reliable methods of contraception and therefore be at increased risk for confronting an unintended pregnancy and the difficult decisions that ensue. For all women, denying practical access to the method of contraception that is right for their health and life circumstances and the well-being of their families can represent a most serious incursion into their individual moral autonomy and the course of their lives.

Affording women effective access to the full range of methods of contraception will advance their health and that of their newborns, enhance their ability to make decisions in accord with their own religious and moral beliefs, reduce the incidence of unintended pregnancy and abortion, and support the aspirations of women and society. For these reasons, the

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[4] 472 U.S. 703, 709 (1985).

Court should hold that the Religious Freedom Restoration Act does not require the exemptions sought by the plaintiffs.

ARGUMENT

I. ELIMINATING COST BARRIERS TO EFFECTIVE CONTRACEPTIVE USE REDUCES THE INCIDENCE OF UNINTENDED PREGNANCY TO THE BENEFIT OF WOMEN AND FAMILIES.

The ability to control whether and when to have children is fundamental to a woman's ability to control almost all other aspects of her life, thus affecting nearly all members of society. A typical American woman wishing to have only two children must, on average, spend three decades—more than three quarters of her reproductive life—avoiding unintended pregnancy.[5] Women commonly seek to control the timing of each child's birth to protect their families' well-being and economic stability while protecting their own health and increasing the chances for a healthy start for their children. For these reasons, virtually all women across a variety of religious affiliations have used at least one method of contraception.[6]

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[5] Rachel Benson Gold et al., Guttmacher Inst., *Next Steps for America's Family Planning Program: Leveraging the Potential of Medicaid and Title X in an Evolving Health Care System* 6 (2009).

[6] Kimberly Daniels et al., *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, National Health Statistics Report No. 62, 8 (Feb. 14, 2013) (among women age 15-44 who have ever had sex with a man, 98.6% of Catholic women, 99.4% of women who are Baptist or affiliated with oth-

Half a century ago, this Court recognized the importance of the right to use contraception in *Griswold v. Connecticut.*[7] In reaffirming that right in 1992, the Court noted the by-then familiar benefits that had accrued to women and society: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[8]

In practice, however, a woman is not always able to avoid unintended pregnancy throughout her long reproductive life. Approximately half of all pregnancies in the United States are unintended[9]—that is, over three million pregnancies each year.[10] More

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er fundamentalist Protestant sects, 99.5% of women affiliated with other Protestant denominations, and 99.4% of women with no religious affiliation have used contraception).

[7] 381 U.S. 479 (1965).

[8] *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

[9] Lawrence B. Finer & Mia R. Zolna, *Shifts in Intended and Unintended Pregnancies in the United States, 2001–2008*, 104 Am. J. Pub. Health S43, S44 (2014). For study purposes, "[w]hen calculating unintended pregnancy rates, we counted pregnancies about which women felt indifferent along with intended pregnancies; therefore, the unintended pregnancy rate only included pregnancies that were unambiguously unintended." *Id.* at S43.

[10] This problem is particularly acute among poor women, who experience an unplanned pregnancy rate five times that of higher-income women. Finer & Zolna, *supra* note 9, at S45-46 (defining (i) "poor women" as women with incomes at or below the federal poverty level, and (ii) "higher income women" as those at or above 200% of the federal poverty level). Indeed, over the last two decades, unintended pregnancy has become increasingly concentrated among poor women: while the unin-

than half of all American women will experience an unintended pregnancy.[11] Forty percent of unintended pregnancies end in abortion,[12] and three in ten American women will have an abortion at some point in their lives.[13]

Vital to effectively timing childbirth and making abortion less necessary is enabling more women to prevent unintended pregnancy in the first place. That depends almost entirely on correct and consistent use of effective contraception. And that, in turn, depends on a woman's ability to choose the method of contraception most appropriate to her needs, in consultation with her health care provider, unhampered by cost concerns that often drive women toward less effective methods.

A. Contrary to Conestoga Wood's Claim, Reducing the Cost of Contraception Reduces Rates of Unintended Pregnancy.

1. Petitioner Conestoga Wood seeks to deny the connection between economic barriers to effective

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tended pregnancy rate among women with incomes below the federal poverty line increased 56% between 1994 and 2008, the rate among higher-income women decreased 24% during the same period. Guttmacher Inst., *Unintended Pregnancy in the United States* (Dec. 2013), http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html (last visited Jan. 25, 2014).

[11] Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 Fam. Plan. Persp. 24, 24 (1998).

[12] Finer & Zolna, *supra* note 9, at S44.

[13] Rachel K. Jones & Megan L. Kavanaugh, *Changes in Abortion Rates Between 2000 and 2008 and Lifetime Incidence of Abortion*, 117 Obstetrics & Gynecology 1358, 1366 (2011).

contraception and the United States' high rate of unintended pregnancies. Twice petitioner cites the Guttmacher Institute for the proposition that "89% of women who are at risk of unintended pregnancy are already using contraception."[14] But Conestoga Wood fundamentally fails to appreciate that having access to *some* method is far different than a woman consistently having access to the *best* method for her at a given point in her life.

American women utilize a broad range of contraceptives—on average, three or four methods by age 40.[15] They choose among options based on their specific life circumstances, economic resources, health needs, personal beliefs, and other factors.[16] Some women choose long-acting, reversible contraceptives such as an implant or IUD.[17] Others obtain prescriptions for hormonal-based contraceptives, such as birth-control pills, or shots (known as "injectables") that are administered in the upper arm by a health care provider on a quarterly basis.[18] Still other couples use over-the-counter contraception, such as male condoms or spermicide.[19] Others choose a permanent method, either female or male sterilization.[20] And others attempt to avoid pregnancy by altering their sexual behavior, including through fertility-awareness-based contraception (where couples do not engage in sexual intercourse during certain periods of a woman's fertility cycle) or "withdrawal."[21]

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[14] *See* Conestoga Wood Br. 52, 55.

[15] Daniels et al., *supra* note 6, at 4-5.

[16] *See, e.g.*, Gold et al., *supra* note 5, at 7 ("Women and couples need a broad range of high-quality contraceptive options, enabling them to select one that—according to their specific life circumstances, sexual behavior and health needs—maximizes their potential for effective use and minimizes the medical side-effects and other drawbacks that can lead to inconsistent use or nonuse").

[17] Jo Jones et al., *Current Contraceptive Use in the United States, 2006–2010, and Changes in Patterns of Use Since 1995*, National Health Statistics Reports No. 60, 14 tbl.1 (2012).

[18] *Id.*

Many women change methods over time or use a combination of methods at the same time, for example, using condoms in addition to birth-control pills to also protect against sexually transmitted diseases.[22] A recent study that assessed the most common methods of contraception ever used by American women concluded that 93% had used male condoms, 82% had used oral contraceptives, and 60% had used withdrawal at some point in their lives.[23]

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[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Daniels et al, *supra* note 6, at 5 ("[W]omen may switch methods as their reasons for contraceptive use change, such as delaying a first pregnancy or spacing between one pregnancy and the next, helping prevent sexually transmitted infections, or discontinuing a method due to dissatisfaction"); *see also* David L. Eisenberg et al., *Correlates of Dual-Method Contraceptive Use: An Analysis of the National Survey of Family Growth (2006–2008)*, Infectious Diseases in Obstetrics & Gynecology 1, 4-5 (2012) (7.3% of women of reproductive age use multiple contraceptive methods, most often the condom combined with another method).

[23] *See, e.g.*, Daniels et al., *supra* note 6, at 4.

Some contraceptive methods, however, are far more effective in practice than others. IUDs and implants, for example, are effective for years after they are inserted by a health care provider, and the woman need not worry about contraception on a day-to-day basis.[24] In contrast, birth control pills must be taken each day, at approximately the same time, to maximize protection.[25] And methods of contraception designed to be used during intercourse, such as condoms or spermicide, must be available, accessible, and used properly each time intercourse occurs. In addition, methods such as male condoms and withdrawal require the active participation of male partners, while methods such as IUDs, implants, and oral contraceptives can be employed by the woman alone.[26]

Perhaps not surprisingly, these variations in contraceptive methods translate directly into variable effectiveness. As reflected in the below table, IUDs and implants boast remarkably low failure rates compared to male condoms, while contraceptive methods such as withdrawal and fertility awareness have high failure rates over one year of typical use.

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[24] Brooke Winner et al., *Effectiveness of Long-Acting Reversible Contraception*, 366 New Eng. J. Med. 1998, 1999 (2012) (noting that long-acting reversible contraceptives' failure rates "rival those with sterilization").

[25] Nearly half of users of birth-control pills who obtained abortions reported that they had forgotten to take their pills; another quarter reported that they did not have ready access to their pills (16% were away from their pills and 10% ran out). Rachel K. Jones et al., *Contraceptive Use Among U.S. Women Having Abortions in 2000-2001*, 34 Persp. on Sexual & Reprod. Health 294, 300 tbl.6 (2002).

[26] Martha J. Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply*, Q. J. Econ. 289, 295-96 (Feb. 2006) (recognizing the significance of oral contraceptives as compared to prior-available contraceptive methods because they "divorced the decision to use contraception from the time of intercourse").

Contraceptive Method	Failure Rate Based on One Year of Typical Use[27]
IUDs and implants	Less than 1%
Injectables	6%
Oral contraceptives	9%
Male condoms	18%
Withdrawal	22%
Fertility-awareness-based contraception	24%
Spermicide	28%

This chart vividly illustrates that use of different methods of contraception can have an enormous impact on the rate of unintended pregnancy. Compared with a couple relying on the hormonal IUD (with a failure rate of 0.2%), a couple relying on condoms is 90 times as likely to have an unintended pregnancy in one year, and a couple relying on oral contraceptives is 45 times as likely. Extrapolating to the 24 million U.S. women using reversible contraceptive methods, if they all used the hormonal IUD, 49,000 of them would become pregnant in a year, compared with more than two million if they all relied on oral contraception, and more than four million if they all relied on condoms.

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[27] *See* R.A. Hatcher et al., *Contraceptive Technology*, tbl.3-2 (20th ed. 2011); *see also* Winner, *supra* note 24, at 1999.

It is important to remember these data reflect the average effectiveness among women using each method. Some women are more successful at consistently and correctly using a method than others. And there are myriad reasons beyond ease of use why method choice matters, and why choice helps women use their method most effectively. For example, women's contraceptive method choices are influenced by concerns about side effects and drug interactions, how frequently they expect to have sex, their perceived risk of sexually transmitted infections, and the nature of their intimate relationship(s).

A woman's satisfaction with her choice of method matters to its effectiveness. Those who are not completely satisfied are more likely to put themselves at high risk for unintended pregnancy (e.g., 30% of neutral or dissatisfied users have had a gap in use while they were at risk, compared with 12% of completely satisfied users).[28] Moreover, dissatisfaction with one's method is associated with incorrect or inconsistent use.[29] This explains why women need complete information about and access to the full range of available contraceptive options.

2. As we have shown, women's ability to choose from among the full range of contraceptive methods has a huge impact on their risk of unintended pregnancy. The next question is whether cost to the patient constrains her choice of contraceptive methods.

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[28] Jennifer J. Frost et al., Guttmacher Inst., *Improving Contraceptive Use in the United States*, In Brief, 2008 Series, No. 1, at 4 (2008).

[29] *Id.*

The answer is yes. Contrary to Conestoga Wood's efforts to minimize the connection as "marginal,"[30] a woman's choice among the various available contraceptive methods, of widely varying effectiveness and appropriateness for her, is significantly constrained by cost.

Conestoga Wood again misunderstands the data when it cites a Guttmacher publication for a finding that "only" 12% of women in one study cited cost as a reason for not using contraceptives.[31] For those women, the impact can be enormous: In any given year, 85% of sexually active women not using a contraceptive method will become pregnant.[32] Moreover, the 12% figure does not include the many more women who use less effective methods or forgo their desired method, due to cost.

Extensive empirical evidence demonstrates what common sense would predict: eliminating the fees for contraception leads to more effective and continuous use of contraception. While some contraceptive methods—such as male condoms and spermicide—can be purchased over the counter at a neighborhood drugstore for a comparatively low cost,[33] all highly effective methods are available only with a prescription and often at a substantial cost.[34]

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[30] *See* Conestoga Wood Br. 52-53.

[31] *Id.* at 56.

[32] James Trussell, *Contraceptive Failure in the United States*, 83 Contraception 397, 399 (2011).

[33] James Trussell et al., *Cost Effectiveness of Contraceptives in the United States*, 79 Contraception 5, 10 (2009).

[34] Hatcher et al., *supra* note 27.

- *Long-acting reversible contraception, such as implants and IUDs.* The average wholesale cost of these devices ranges from $718 to $844, exclusive of costs relating to the insertion procedure,[35] and the total cost of initiating one of these long-acting methods generally exceeds $1,000.[36] To put that in perspective, beginning to use one of these devices costs nearly a month's salary for a woman working full time at minimum wage.[37] These costs are prohibitive for many women; one recent study concluded that only 25% of women who request an IUD have one placed after learning the associated costs.[38] And women who face out-of-pocket IUD costs in excess of $50 are one-tenth as likely to obtain an IUD as women with access to the device for less than $50.[39] Yet as explained above, these devices are dramatically more effective in preventing pregnancy than methods of contraception with lower up-front costs, and in fact, they are among the most cost-effective methods over time.[40] They are also associated with particularly high rates of user satisfaction and continuation.[41]

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[35] David Eisenberg et al., *Cost as a Barrier to Long-Acting Reversible Contraceptive (LARC) Use in Adolescents*, 52 J. Adolescent Health S59, S60 (2013).

[36] *Id.*

[37] The federal minimum wage is $7.25 an hour. 29 U.S.C. § 206(a)(1)(C). At 40 hours a week, that amounts to $290 a week, before any taxes or deductions.

[38] Aileen M. Gariepy et al., *The Impact of Out-of-Pocket Expense on IUD Utilization Among Women with Private Insurance*, 84 Contraception e39, e40 (2011).

[39] *Id.* at e41.

- *Oral contraceptives.* In 2006, the average annual cost of oral contraceptives for an uninsured woman was approximately $344.[42] While less than the out-of-pocket cost associated with IUDs and implants, the expense nonetheless represented two-thirds of an uninsured woman's annual total out-of-pocket healthcare expenditures.[43] Moreover, these costs are incurred year after year. And for a woman paid only the federal minimum wage, for example, the monthly cost could mean the difference between an empty gas tank and the ability to travel to work each day.

The large up-front costs of these highly effective methods present an obstacle to use. Almost one-third of women report that they would change their contraceptive method if cost were not an issue.[44]

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[40] James Trussell, *Update on and Correction to the Cost-Effectiveness of Contraceptives in the United States*, 85 Contraception 611, 611 (2012).

[41] Gariepy et al., *supra* note 38, at e39; Hatcher et al., *supra* note 27, tbl.3-2.

[42] Su-Ying Liang et al., *Women's Out-of-Pocket Expenditures and Dispensing Patterns for Oral Contraceptive Pills Between 1996 and 2006*, 83 Contraception 528, 531 (2011).

[43] *Id.*

[44] Jennifer J. Frost & Jacqueline E. Darroch, *Factors Associated with Contraceptive Choice and Inconsistent Method Use, United States, 2004*, 40 Persp. on Sexual & Reprod. Health 94, 98 (2008).

This figure is particularly high among women relying on male condoms and other less effective methods like withdrawal; significant numbers of these women report that they would prefer to switch methods if cost were not a concern.[45] And uninsured women are less likely to use the most expensive, but most effective, contraceptive methods, such as IUDs, implants, and oral contraceptives,[46] and more likely than insured women to report using no contraceptive method at all.[47]

Concerns relating to the cost of effective contraception are particularly acute for women experiencing financial hardship. In a survey of women with household incomes of less than $75,000, conducted at the height of the recession in summer 2009, nearly half of respondents noted that they wanted to reduce or delay their childbearing because of the economy, and 64% agreed with the statement: "With the economy the way it is, I can't afford to have a baby right now."[48] Unfortunately, many of the surveyed women also reported that financial constraints had caused them to cut corners with regard to contraception. Indeed, 23% reported a more difficult time affording contraception than in prior years.[49] For example, 25% of women who were struggling financially and used oral contraceptives had resorted to using contraception inconsistently as a means of saving money.[50]

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[45] *Id.* at 99. Although Conestoga Wood stresses that a large number of women who had health insurance prior to the Affordable Care Act had plans that covered contraceptives (Conestoga Wood Br. 52), it does not acknowledge or differentiate among the plans that did not cover certain methods such as implants or IUDs. For example, approximately 43% of privately insured women surveyed in a 2007-2008 study had coverage plans that did not include IUDs. *See* Gariepy, *supra* note 38, at e41. Moreover, it does not acknowledge that prior to the Affordable Care Act, few plans covered contraceptive methods without cost sharing. *See* Lawrence B. Finer et al., *Changes in Out-of-Pocket Payments for Contraception by Privately Insured Women During Implementation of the Federal Contraceptive Coverage Requirement*, 89 Contraception 97, 98 (2014).

[46] Kelly R. Culwell & Joe Feinglass, *The Association of Health Insurance with Use of Prescription Contraceptives*, 39 Persp. on Sexual & Reprod. Health 226, 228 (2007).

[47] *Id.*; *see also* Kelly R. Culwell & Joe Feinglass, *Changes in Prescription Contraceptive Use, 1995–2002: The Effect of Insurance Status*, 110 Obstetrics & Gynecology 1371, 1375-76 (2007).

Twenty-eight states require private insurers that cover prescription drugs to provide coverage of the full range or almost the full range of FDA-approved contraceptive drugs and devices.[51] Experience from these states demonstrates that removing financial barriers to health care access is key to realizing increased access to effective contraception. Privately insured women living in states that required private insurers to cover prescription contraceptives were 64% more likely to use some contraceptive method during each month a sexual encounter was reported than women living in states with no such requirement, even after accounting for differences including education and income.[52]

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[48] Guttmacher Inst., *A Real-Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions* 3 (2009).

[49] *Id.* at 6.

[50] *Id.* at 5.

[51] Guttmacher Inst., *State Policies in Brief: Insurance Coverage of Contraceptives* 2 (Jan. 1, 2014), *available at* http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf.

Although these state policies reduced women's up-front costs, eliminating out-of-pocket costs entirely, as the new federal policy does, has even greater potential to increase effective contraceptive use. For example, when Kaiser Permanente Northern California eliminated patient cost-sharing requirements for IUDs, implants, and injectables, the use of these devices increased substantially, with IUD use more than doubling.[53] Another example comes from a study of more than 9,000 St. Louis-region women who were offered the reversible contraceptive method of their choice (i.e., any method other than sterilization) at no cost for two to three years, and were "read a brief script informing them of the effectiveness and safety of" IUDs and implants.[54] Three-quarters of those women chose long-acting methods (i.e., IUDs or implants), a level far higher than in the general population.[55]

Publicly funded family planning services provide more evidence that reducing or eliminating cost barriers to women's contraceptive choices matters.

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[52] Brianna M. Magnusson et al., *Contraceptive Insurance Mandates and Consistent Contraceptive Use Among Privately Insured Women*, 50 Med. Care 562, 565 (2012).

[53] Debbie Postlethwaite et al., *A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change*, 76 Contraception 360, 363 (2007).

[54] Jeffrey F. Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 Obstetrics & Gynecology 1291, 1292 (2012).

[55] *See id.* at 1293.

Among women who obtain contraceptive services from publicly funded reproductive-health providers, 64% use hormone-based contraceptive methods, 11% use implants or IUDs, and 8% use sterilization.[56] In the absence of these publicly supported services, it is estimated that more than half of those women would substitute their current contraception with male condoms or other non-prescription methods, and 30% would use no contraception at all.[57] This lack of access would result in a fivefold increase in the rate of unintended pregnancies among this group of women.[58]

In sum, ensuring the availability of the full array of contraceptive methods—without regard to cost, so that a woman can choose and use the method that works best for her—is crucial to preventing unintended pregnancies. This is exactly what the contraceptive-coverage provision at issue in this case does.

B. Reducing Unintended Pregnancy Reduces the Need for Abortion and Promotes the Educational, Economic, and Social Advancement of Women.

The briefs submitted to this Court by the Solicitor General and various other amici curiae detail the enormous, varied benefits to women, their families, and society when women are afforded the means to avoid unintended pregnancies. By allowing women to plan the number and timing of pregnancies and births, the contraceptive-coverage provision will advance women's health; this is a direct benefit that alone provides compelling reason for the coverage. Indeed, because of its numerous benefits to the health of women and children, the Centers for Disease Control and Prevention included the development of and improved access to methods of family planning among the ten great public health achievements of the 20th century.[59] Effective family planning especially benefits women with health conditions that heighten the risk of pregnancy and childbirth, and allows women with preexisting or underlying health conditions to plan the timing of pregnancy consistent with their health needs and medical care.[60] Allowing women to better space and time their pregnancies also enables them to have healthier babies.[61]

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[56] Jennifer J. Frost et al., Guttmacher Inst., *Contraceptive Needs and Services, 2010,* 19 (July 2013).

[57] *Id.*

[58] *Id.* at 19-20.

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[59] Ctrs. for Disease Control & Prevention, *Achievements in Public Health, 1900–1999: Family Planning*, 48 Morbidity & Mortality Wkly. Rep. 1073 (1999).

[60] *See, e.g.*, Hal C. Lawrence, Testimony Before the Institute of Medicine Committee on Preventative Services for Women at 11 (Jan. 12, 2011), *available at* http://www.iom.edu/~/media/Files/Activity%2520Files/Women/PreventiveServicesWomen/Lawrence_ACOG.pdf ("An unintended pregnancy may have significant implications for a woman's health, sometimes worsening a preexisting health condition such as diabetes, hypertension, or coronary artery disease."); ACOG Br. at I.A (explaining that many chronic conditions, including "sickle-cell disease, cancer, epilepsy, lupus, rheumatoid arthritis, hypertension, asthma, pneumonia, and HIV," can be complicated by pregnancy).

[61] *See, e.g.*, Agustin Conde-Agudelo et al., *Birthspacing and Risk of Adverse Perinatal Outcomes: A Meta-Analysis*, 295 JAMA 1809, 1821 (2006) (inter-pregnancy intervals shorter

In addition to these important and most obvious individual and public health benefits, enabling women to avoid unintended pregnancies through access to effective and appropriate contraception serves at least two additional vital ends. First, reducing the rate of unintended pregnancy is the most effective and most widely acceptable way to reduce the need for and incidence of abortion. Second, being able to determine whether and when to have a child promotes the educational, economic, and social advancement of women and their families.

1. The relationship between affordable, accessible, and effective contraception, on the one hand, and abortion rates, on the other, is undeniable. The vast majority of abortions are preceded by an unintended pregnancy, and therefore obviously could be prevented by effective contraceptive use. In fact, the two-thirds of women at risk of unintended pregnancy who consistently and correctly practice contraception account for only five percent of unintended pregnancies.[62]

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than 18 months are significantly associated with increased risk of several adverse perinatal outcomes, including preterm birth and low birth weight); Jessica D. Gipson et al., *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature*, 39 Stud. Fam. Plan. 18, 23-25 (2008); Amanda Wendt et al., *Impact of Increasing Inter-Pregnancy Interval on Maternal and Infant Health*, 26 (Supp. 1) Paediatric & Perinatal Epidemiology 239, 248 (2012) (an inter-pregnancy interval of less than 12 months increases the risk of, among other things, stillbirth and early neonatal death).

[62] Gold et al., *supra* note 5, at 6.

Dramatic evidence of the impact of effective contraception on the need for abortion can be found in the recent study of more than 9,000 St. Louis-region women who were offered the reversible contraceptive method of their choice at no cost.[63] During the study period, the number of abortions performed at St. Louis Reproductive Health Services declined by 20%, and study participants' abortion rate was significantly lower than the rate in the surrounding St. Louis region, and less than half the national average.[64] The study concluded that similar nationwide changes in contraception access could prevent more than half of abortions performed annually.[65]

International evidence also shows that the increased use of modern contraceptives is associated with a decline in abortion rates. An analysis of trends in central Asia and eastern Europe, for example, found that as use of modern contraceptive methods increased rapidly in those regions during the 1990s, abortion rates declined significantly, even as fertility rates and the number of children desired also declined.[66] Meanwhile, the United States lags behind: while unintended pregnancy rates declined in every other region of the world between 1995 and 2008,[67] the rate in the United States actually increased.[68] U.S. rates of unintended pregnancy,[69] abortion,[70] and teen pregnancy[71] are far higher than those in western European countries—at least in part due to the higher cost barriers to effective contraception that American women face.

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[63] Peipert et al., supra note 54, at 1295.

[64] *See id.* at 1294-95.

[65] *Id.* at 1296.

[66] *See generally* Charles F. Westoff, *Recent Trends in Abortion and Contraception in 12 Countries*, DHS Analytical Studies No. 8 (Feb. 2005).

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[67] Susheela Singh et al., *Unintended Pregnancy: Worldwide Levels, Trends, and Outcomes*, 41 Stud. Fam. Plan. 241, 245 (2010).

[68] Guttmacher Inst., *Unintended Pregnancy*, *supra* note 10.

[69] The U.S. unintended pregnancy rate in 2008 was 54 per 1,000 women 15–44. *See* Finer & Zolna, *supra* note 9, at S43. By comparison, the rate in Western Europe in 2008 was 32. *See* Singh et al., *supra* note 67.

[70] The U.S. abortion rate in 2008 was 20 per 1,000. *See* Rachel K. Jones & Kathryn Kooistra, *Abortion Incidence and Access to Services in the United States, 2008*, 43 Persp. on Sexual & Reprod. Health 41, 43 (2011). By comparison, the rate in Western Europe in 2008 was 12. *See* Gilda Sedgh et al., *Induced Abortion: Incidence and Trends Worldwide from 1995 to 2008*, 379 Lancet 625, 628 (2012).

[71] The most recent available comparison is for 1995, when the U.S. teen pregnancy rate was 84 per 1,000 females 15-19; by comparison, "most western European countries ha[d] very low or low pregnancy rates (under 40 per 1,000)"; the rate in the Netherlands and Spain was 12. Susheela Singh & Jacqueline E. Darroch, *Adolescent Pregnancy and Childbearing: Levels and Trends in Developed Countries*, 32 Fam. Plan. Persp. 14, 14, 16 (2000). The most recent available U.S. teen pregnancy rate is for 2008, when it was 68. Kathryn Kost & Stanley Henshaw, Guttmacher Inst., *U.S. Teenage Pregnancies, Births and Abortions, 2008: National Trends by Age, Race and Ethnicity* 2 (2012), *available at* http://www.guttmacher.org/pubs/USTPtrends08.pdf.

2. Effective family planning also promotes women's continued educational and professional advancement, contributing to the enhanced economic stability of women and their families. The advent of widespread access to effective reversible contraception (starting with oral contraceptives) in the 1960s gave women the ability to confidently plan for and delay pregnancy, and thereby allowed them to invest in higher education at a significantly increasing rate. In fact, early access to oral contraceptives is estimated to account for one-third of the increase in women's college enrollment during the 1970s.[72] Similarly, another study estimated that the initial increase in access to the pill accounted for more than 30% of the historic increase in the proportion of women in skilled careers from 1970 to 1990.[73]

A narrowing of the gender-based compensation gap soon followed. Indeed, one-third of the total wage gains for women born between the mid-1940s and mid-1950s is attributed to women's ability to reliably delay pregnancy through oral contraception.[74]

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[72] Heinrich Hock, *The Pill and the College Attainment of American Women and Men* 19 (Oct. 9, 2007) (unpublished study, Florida State University); *see also* Elizabeth Oltmans Ananat & Daniel M. Hungerman, *The Power of the Pill for the Next Generation: Oral Contraception's Effects*, 94 Rev. Econ. & Stat. 37, 50 (2012) (observing that early access to the pill increased the likelihood that a child had a college-educated, married mother).

[73] Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. Pol. Econ. 730, 749 (2002).

[74] Martha J. Bailey et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages* 26 (Nat'l Bureau of Econ. Research, Working Paper No. 17922, Mar. 2012).

Nor was oral contraceptives' impact limited to the years immediately following their widespread availability. Thirty-one percent of the narrowing of the gender-based hourly wage gap during the 1990s is attributed to oral contraceptives.[75] And it is estimated that as of 2000, more than 250,000 women over the age of 30 obtained a bachelor's degree because they could obtain contraception as late adolescents.[76]

The ability to prevent or delay pregnancy until after attaining educational, economic, and career goals remains critically important to the advancement of today's American women. Among the reasons for using contraceptives that most women characterize as "very important" are (i) "financial constraints," (ii) the sentiment that "having a baby would make it hard to keep my job or get a better job" or "stay in school," and (iii) a desire to provide the "best future" possible for the children that they already have.[77]

Delaying the birth of a first child has been widely found to contribute to a family's economic stability. The pill and subsequent methods of contraception have been shown to enhance women's earning potential by enabling delayed childbearing, thereby allowing young women to invest in education and obtain crucial early work experience in order ultimately to achieve greater income stability than those who started their families at a younger age.[78] Indeed, the evidence overwhelmingly demonstrates that women who wait to have children until their late 20s or 30s generally fare better economically than women who have children in their earlier years, at least in part due to their increased likelihood of having more advanced schooling and early employment experience.[79]

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[75] *Id.* at 27.

[76] Hock, *supra* note 72, at 19.

[77] *See* Jennifer J. Frost & Laura Duberstein Lindberg, *Reasons for Using Contraception: Perspectives of US Women Seeking Care at Specialized Family Planning Clinics*, 87 Contraception 465, 468 (2013).

In sum, affording women the full range of contraceptive options facilitates the use of more effective and reliable methods of contraception, advances the health of women and families, reduces the need for abortion, and promotes women's educational and economic advancement. For these reasons and consistent with the best scientific evidence, federal law now entitles privately insured women, with rare exception, to preventive health care that includes the full range of FDA-approved contraceptive methods at no out-of-pocket cost to the woman.

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[78] Amalia R. Miller, *The Effects of Motherhood Timing on Career Path*, 24 J. Population Econ. 1071, 1097 (2011); *see also* McKinley L. Blackburn et al., *Fertility Timing, Wages, and Human Capital*, 6 J. Population Econ. 1, 23 (1993) ("Fertility timing is strongly associated with differences in wages, as well as differences in education, experience, and tenure."); David S. Loughran & Julie M. Zissimopoulos, *Why Wait?: The Effect of Marriage and Childbearing on the Wages of Men and Women*, 44 J. Hum. Res. 326, 346 (2009) (explaining that the first birth of a child lowers female wages two to three percent); Hiromi Taniguchi, *The Timing of Childbearing and Women's Wages*, 61 J. Marriage & Fam. 1008, 1014 (1999).

[79] *See* Elizabeth Ty Wilde et al., *The Mommy Track Divides: The Impact of Childbearing on Wages of Women of Differing Skill Levels* 26 (Nat'l Bureau of Econ. Research, Working Paper No. 16582, Dec. 2010); *see also* Catalina Amuedo-Dorantes & Jean Kimmel, *The Motherhood Wage Gap for Women in the United States: The Importance of College and Fertility Delay*, 3 Rev. Econ. Household 17, 40 (2005).

II. THE RELIGIOUS EXEMPTION SOUGHT BY PLAINTIFFS WOULD SUBSTANTIALLY BURDEN WOMEN'S ABILITY TO MAKE CHILDBEARING DECISIONS IN ACCORD WITH THEIR OWN RELIGIOUS AND MORAL BELIEFS, HEALTH NEEDS, AND FAMILY RESPONSIBILITIES.

The scope of permissive religious accommodations generally depends not only upon the nature of the burden on the religious claimant and the existence of a compelling governmental interest, but also upon whether granting an exemption would impose burdens on third parties. As this Court stated in *Cutter v. Wilkinson*, with respect to a federal religious accommodation statute materially identical to and patterned upon RFRA, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," and therefore a religious accommodation under the law "must be measured so that it does not override other significant interests."[80] This is especially so where, as here, accommodating the religious preferences of a corporate employer's owners would impose on specific third parties not only direct financial and health constraints, but in some instances difficult religious and moral burdens as well.

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[80] 544 U.S. 709, 720, 722 (2005) (citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985)). As the *Cutter* Court's citations to *Caldor* demonstrate, if the statute were, instead, construed to impose significant burdens on third parties, it would at a minimum raise serious Establishment Clause questions. Such questions are avoided if RFRA is properly construed to be sensitive to the government's compelling interest in not imposing such third-party burdens.

Allowing for-profit corporations a religious exemption from the virtually universal federal guarantee of contraceptive coverage would preclude many thousands—perhaps millions—of American women from having the access to preventive health care intended by federal law. Highly effective methods of contraception are frequently the subject of employers' religious objections, including by plaintiffs Hobby Lobby and Conestoga Wood.[81] To give those objections legal force would allow employers to deny their employees and their employees' covered family members unimpeded access to a full range of contraceptive methods. Every time a woman and her health care provider contemplate a method of contraception, they would have to consult the specific choices made by the employer of the primary insured party—typically, the woman herself, her spouse, or her parent—to learn which methods were available for reimbursement under the relevant insurance plan.[82] Depending on the employer's beliefs, a woman might be denied coverage for the method that best serves her health and family needs and is most consistent with her own beliefs.[83]

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[81] Hobby Lobby objects to at least four specific methods: Plan B, ella, and two types of IUDs. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1124-25 (10th Cir. 2013). Conestoga Wood objects to any drugs or devices that "prevent the implantation of a human embryo into its mother's uterus after its fertilization," which it suggests include, at a minimum, "Plan B, Ella, and certain intrauterine devices (IUDs)." Conestoga Wood Br. 4.

[82] *See generally* U.S. Br. 57-58. In a nation like ours that relies heavily on a system of private health insurance, the case for universal insurance coverage that reflects the best prevention science is especially strong.

Shifting the burden of religious accommodation to women and their families would be particularly problematic because it could create conflicts with women's religious and moral beliefs. Many women do not agree that the contraceptives at issue in these cases are objectionable. Some women seeking to use these highly reliable methods of contraception have religious objections to abortion. For all women and families that face these choices, whatever their views about abortion, denying access to affordable, effective contraception can work a profound interference with their ability to exercise individual moral autonomy.

In *United States v. Lee*, this Court rejected an employer's attempt to seek a Free Exercise exemption from the Social Security statute because such an exemption would "operate[] to impose the employer's religious faith on the employees."[84] There could hardly be a more striking example of a religious accommodation that "override[s] other significant interests"[85] than a case in which the grant to one party of a religious exemption from a neutral law of general applicability imposes both moral and health burdens upon others.

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[83] Depriving women of the protections afforded them under the law would create a disconnect between the terms of coverage and scientific evidence of effectiveness, even though health insurance financing seeks to eliminate financial barriers as a consideration in access to health care of proven effectiveness. *See* Michael E. Chernew et al., *Value-Based Insurance Design*. 26 Health Aff. w195 (2007).

[84] 455 U.S. 252, 261 (1982).

[85] *Cutter*, 544 U.S. at 722.

This exemption is particularly inappropriate given that the burden on the corporate owners is only an indirect one. They are not required to provide contraceptive coverage because they are not required to offer employee health insurance at all. They would, however, prefer to offer their employees compensation in the form of insurance rather than compensation in some other form, such as wages (which would also foreseeably be used by numerous employees to purchase "objectionable" contraception).[86] Accommodation to what is at best an indirect burden on religion does not justify the burden imposed upon women's own moral and medical choices.[87]

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[86] U.S. Br. 8, 26-31; Marty Lederman, Hobby Lobby *Part III—There Is No "Employer Mandate,"* Balkinization (Dec. 16, 2013), http://balkin.blogspot.com/2013/12/hobby-lobby-part-iiitheres-no-employer.html, *cited in Hotze v. Sebelius*, 2014 WL 109407, at *1 n.5 (S.D. Tex. Jan. 10, 2014). As explained by Lederman, "a central component of plaintiffs' own RFRA arguments is that a 'less restrictive' means for the government to further its interests *without substantially burdening plaintiffs' religious exercise* would be for the government to use its own revenues to subsidize contraceptive use by Hobby Lobby and Conestoga Wood employees. Well, that is exactly what would occur if those employers were to choose to make a [tax] payment rather than offering their employees access to an employer plan" as expressly allowed under the Affordable Care Act. *Id.*

[87] *See, e.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 602-07 (1961) (plurality opinion) (legislation that imposed an indirect burden on the exercise of religion—such as making the practice of religious beliefs more expensive—did not violate Free Exercise Clause). Under a proposed alternative here, in which the gov-

Allowing such restrictions on women's covered contraceptive methods would also substantially and directly burden women's health. Among the host of factors that inform a woman's decision about which contraceptive method is right for her, several involve protecting her physical health, such as health and medical conditions that counsel for or against particular methods, potential drug interactions, or the woman's stage of life.[88] In addition, health care providers often prescribe forms of contraception to treat medical conditions unrelated to pregnancy avoidance

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ernment would itself provide cost-free contraception to women who do not receive coverage under their employers' plans as a result of a RFRA accommodation, employers who decide to exclude contraceptive coverage could reap a financial windfall given the relationship between the use of effective contraceptives and subsequent health care costs.

If an employer covers contraception, this cost is balanced out by savings from averted pregnancy-related care. *See* 78 Fed. Reg. 39,870, 39,877 (July 2, 2013) (observing that "[s]everal studies have estimated that the costs of providing contraceptive coverage are balanced by cost savings from lower pregnancy-related costs and from improvements in women's health"); *see also, e.g.*, Nat'l Business Group on Health, *Investing in Maternal and Child Health: An Employer's Toolkit* (Kathryn Phillips Campbell ed. 2007), *available at* http://www.businessgrouphealth.org/healthtopics/maternalchild/investing/docs/mch_toolkit.pdf. But under the proposed plan, the government (that is, the taxpayers) would incur all of the direct costs of contraceptive coverage while the employer-sponsored health plan would reap all of the savings from the averted pregnancy-related care. This might actually be an incentive to employers to opt out of providing contraceptive coverage for their employees.

[88] *See* ACOG Br. Section I.C.

or for a combination of contraceptive and noncontraceptive indications.[89] Employers could refuse to cover any or all of these drugs if the Court recognizes the religious exemption that plaintiffs seek.

These particular plaintiffs argue that they are objecting to merely a few contraceptive options and that coverage of the remaining options in their plans would mean that their employees would not be materially burdened. But plaintiffs fail to acknowledge that contraceptive methods are not interchangeable—due not only to differences in effectiveness, as described in part I above, but also to differences relevant to each women's health needs. Indeed, the U.S. medical eligibility criteria for contraceptive use written by the Centers for Disease Control and Prevention require more than 80 pages to analyze the advantages and disadvantages of specific methods for women in specific circumstances.[90] For example, for those women unable to tolerate hormonal contraception, the copper IUD is the only highly effective reversible method available. Other employers, of course—including many of those with RFRA claims pending—object to covering any method of contraception.[91] The logic of plaintiffs' RFRA claims thus portends a much more substantial intrusion on the benefits to women nationwide.

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[89] *Id.*; *see also* Rachel K. Jones, Guttmacher Inst., *Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills* 3 (2011).

[90] *See generally* Ctrs. for Disease Control & Prevention, *U.S. Medical Eligibility Criteria for Contraceptive Use, 2010,* 59 Morbidity & Mortality Wkly. Rep. 1 (2010), *available at*, http://www.cdc.gov/mmwr/pdf/rr/rr5904.pdf.

[91] *E.g.*, *Korte v. Sebelius*, 735 F.3d 654, 663-64 (7th Cir. 2013) (objecting to all forms of contraception); *Autocam Corp. v. Sebelius*, 730 F.3d 618, 621 (6th Cir. 2013) (same).

Moreover, many employers—including the plaintiffs here—object not just to contraceptive methods but also to counseling and education about those methods.[92] If that argument were to prevail, a woman attempting to seek advice from her health care provider regarding contraception would have to choose between forfeiting insurance coverage for her visit and receiving only information about the methods of contraception (if any) approved by her employer. That limitation would fundamentally undermine the health care provider-patient relationship, deprive women of the ability to provide fully informed consent, and prevent a woman from selecting what she believes to be the best method for her.[93]

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[92] Hobby Lobby Compl. ¶ 8 (objecting to rule that "forc[es]" the employer "to provide health insurance coverage for abortion-inducing drugs and devices, as well as related education and counseling."); Conestoga Wood Compl. ¶ 4 (objecting to the provision that "force[s] Plaintiffs to pay for and otherwise facilitate the insurance coverage and use of contraception with an abortifacient effect and related education and counseling."); *id.* ¶ 30.

Many other plaintiffs object to counseling and education as well. *See also, e.g.*, *Korte*, 735 F.3d at 663 n.5 (company's "ethical guidelines" provide that it "cannot arrange for, pay for, provide, facilitate, or otherwise support employee health plan coverage for contraceptives . . . or related education and counseling."); *Autocam*, 730 F.3d at 621 (similar).

[93] Full and accurate information is critical to the effective selection and use of contraception. Ctrs. for Disease Control & Prevention, *supra* note 90.

The exemption plaintiffs seek would cause direct financial harm to women, skew medical decisions, lead to higher rates of unintended pregnancy, and interfere with women's moral and religious decisions about contraception and abortion. The Religious Freedom Restoration Act should not be interpreted to require religious exemptions that would impose these profound burdens on those who do not share the claimants' religious beliefs.

CONCLUSION

For the foregoing reasons, the Court should hold that the Religious Freedom Restoration Act does not require the exemptions plaintiffs seek.

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v.
HOBBY LOBBY STORES, INC., *et al.*, *Respondents.*

CONESTOGA WOOD SPECIALTIES CORP., *et al.*, *Petitioners*,
v.
KATHLEEN SEBELIUS, *et al.*, *Respondents.*

On writs of certiorari to the
United States Courts of Appeals
for the Third and Tenth Circuits

BRIEF OF AMICI CURIAE SENATORS ORRIN G. HATCH, DANIEL R. COATS, THAD COCHRAN, MIKE CRAPO, CHARLES GRASSLEY, JAMES M. INHOFE, JOHN MCCAIN, MITCH MCCONNELL, ROB PORTMAN, PAT ROBERTS, & RICHARD SHELBY, AND REPRESENTATIVES BOB GOODLATTE, CHRIS SMITH, LAMAR SMITH, & FRANK WOLF IN SUPPORT OF HOBBY LOBBY AND CONESTOGA WOOD, *ET AL.*

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STATEMENT OF INTEREST

Amici are federal legislators who were part of the broad, bipartisan coalition that enacted the Religious Freedom Restoration Act of 1993 ("RFRA").[1] Amici designed and passed RFRA to establish one blanket default rule that would insulate religious liberty from the shifting fortunes of interest-group politics. Amici have an interest in vindicating RFRA's blanket protections against the government's attempt to carve out a category of protected religious exercise from the statute's deliberately sweeping coverage.

SUMMARY OF ARGUMENT

Through the Religious Freedom Restoration Act, Congress sought to curb government-imposed infringements on religious liberty by providing that "government shall not substantially burden a person's exercise of religion" unless it is able to meet one of the most demanding tests known to law. 42 U.S.C. § 2000bb-1(a)-(b). Although the government acknowledges, as it must, that the term "person" ordinarily encompasses corporations, companies, associations, and individuals, and does not dispute that certain non-profit corporations qualify for free exercise protection, the government nevertheless asserts that "[g]ranting the relief [Hobby Lobby and Conestoga Wood] seek for profit-making corporate entities engaged in commercial activity would expand the scope of RFRA far beyond anything Congress contemplated." (H.L. Gov't Br. at 12.) The government is wrong. Congress could have carved out such a category of unprotected "persons" in RFRA itself or in a later statute, but it did not. RFRA protects those engaged in commercial activity, such as hospitals and universities. And RFRA makes no distinction between those who engage in commercial activity in a non-profit corporate form or otherwise. The judicially created carve-out that the government advocates here is directly contrary to one of the primary reasons Congress enacted RFRA in the first place: to prevent those charged with implementing the law from picking and choosing whose exercise of religion is protected and whose is not. RFRA is a "super-statute" that cuts across the entire U.S. Code and applies a single, religion-protective principle for evaluating all actions of the federal government that substantially burden the exercise of religion. Congress can displace RFRA's protection through ordinary legislation; but Congress did not do so in the Patient Protection and Affordable Care Act. Unless and until Congress instructs otherwise, RFRA requires strict scrutiny any time the government substantially burdens any person's exercise of religion.

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[1] Amici Curiae are current members of Congress who voted to enact RFRA in 1993, either as senators or as representatives. Pursuant to Rule 37.6, counsel for amici curiae state that this brief was not authored in whole or in part by counsel for a party, that no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than amici curiae or their counsel made such a monetary contribution. Counsel for all parties have consented to the filing of this brief, and their written consents have been filed with the Court.

Although bound to formulate the HHS mandate in accordance with RFRA, the government ignored RFRA throughout the administrative process and began to attend to its requirements only in response to litigation and the pressures of public opinion. In taking this course, the government has not only violated RFRA but has also undermined its central purpose of insulating the free exercise of religion from the forces of standard interest-group politics. RFRA is more than a liability rule. It is a statutory requirement that agencies must account for and affirmatively implement when regulating and not just when defensively litigating.

Rather than follow RFRA's requirement of a single standard for all "persons," the government has erected a three-tiered approach to religious objections rooted in a combination of state policies and political compromise. This approach offers protection to some corporations while leaving others with none. Notwithstanding the government's arguments to the contrary, the government's carve-out of a category of "persons" from protection under RFRA is entirely improper under that law.

ARGUMENT

I. RFRA Is a Super-Statute that Protects the Free Exercise of Religion from Standard Interest-Group Politics

The Religious Freedom Restoration Act "is the most important congressional action with respect to religion since the First Congress proposed the First Amendment." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 243 (1994). It was produced by an "extraordinary ecumenical coalition in the Congress of liberals and conservatives, Republicans and Democrats, Northerners and Southerners, and in the country as a whole, a very broad coalition of groups that have traditionally defended . . . the various religious faiths . . as well as those who champion the cause of civil liberties." *Religious Freedom Restoration Act of 1990: Hearing before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 13 (1991) (statement of Rep. Solarz, chief sponsor of H.R. 5377).

This bipartisan legislative coalition came together to provide heightened protection for the free exercise of religion in response to *Employment Division v. Smith*, 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(a)(4)-(5), § 2000bb(b)(1). *Smith* sent the question of religious exemptions generally back into the political process. But Congress reacted legislatively by restoring a general principle designed to take free exercise questions out of "the standard interest-group politics that affect our many decisions." *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 123 (1993) (statement of Rep. Solarz, chief sponsor of H.R. 2797).

Congress's intent in passing RFRA can be seen in four concrete ways: (1) the statute's "super-statute" design to cut across other federal laws; (2) the statute's textual declaration of purpose; (3) the statute's across-the-board protection for free exercise of religion; and (4) the statute's provision of a judicial backstop.

RFRA applies "to all Federal law, *and the implementation of that law*, whether statutory or otherwise, and whether adopted before or after November 16, 1993." *See* 42 U.S.C. § 2000bb-3(a) (emphasis added). By virtue of this application to all law formulation and implementation, "RFRA operates as a sweeping 'super-statute,' cutting across all other federal statutes (now and future, unless specifically exempted) and modifying their reach. . . . [It] is thus a powerful current running through the entire landscape of the U.S. Code." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 253-54 (1995). Congress can set aside RFRA's application by ordinary legislation, but must make plain its intention to do so. *See* 42 U.S.C. § 2000bb-3(b).

The text of RFRA declares two statutory purposes. One is to provide heightened, across-the-board protection for the free exercise of religion: "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). The other is to provide a judicial forum for the vindication of this legal protection by "provid[ing] a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(2).

These purposes are related but distinct. The "claim or defense" is one means of securing enforcement of the compelling interest test. But if the government implements RFRA properly, litigation is simply unnecessary.

The primary operative section of RFRA sets forth a general rule that provides the same level of protection to all religious groups and to all exercises of religion: "Government shall not substantially burden a person's exercise of religion . . . except as provided in subsection (b) of this section." 42 U.S.C. § 2000bb-1(a). This rule applies to all levels of the federal government. *See* 42 U.S.C. § 2000bb-2(1) (defining "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States").

The single provision defining the exception to RFRA's general rule sets forth a strict two-part test: "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). In describing what the government must prove to come within this exception, RFRA defines "demonstrates" to mean "meets the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3). In sum, RFRA sets forth a single default rule that the government may not substantially burden a person's exercise of religion, and the *sole* exception is when the government carries the burden of satisfying strict scrutiny.

The government cannot satisfy this exception by asserting "broadly formulated interests justifying the general applicability of government mandates." *Gonzales v. O Centro Espirita Beneficent União do Vegetal*, 546 U.S. 418, 431 (2006). Rather, the government must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)).

The next subsection of RFRA provides for judicial relief against government violations. *See* 42 U.S.C. § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."). As the statute's findings indicate, this judicial backstop was an essential part of the statutory design. *See* 42 U.S.C. § 2000bb(b)(2).

Congress recognized, as did various witnesses who testified in hearings on RFRA, that government bureaucrats and agencies tend to discount the need for religion-based exemptions because they identify their own programs with the public interest. *See Religious Freedom Restoration Act of 1990: Hearing before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 29 (1991) (statement of Rev. Dean M. Kelley, Counselor on Religious Liberty, National Council of Churches) ("[W]hen every branch of Government and every agency likes to think that it is, by definition, expressing the public interest, and the public interest in its most compelling level, there is need for a neutral referee to judge that claim against the private claims of religious liberty."); *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 340-341 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas) ("No government bureaucrat admits that he is against religious liberty, but almost every government bureaucrat thinks his own program is so important that no religious exception can be tolerated.").

II. The Government Has Ignored and Violated RFRA in Implementing the HHS Mandate

The government has known of religion-based objections to the HHS mandate from the beginning of the lengthy administrative process through which they have attempted to implement it. But the government ignored RFRA in formulating the narrow religious exemption at the outset and only attended to its requirements because of litigation and the reaction to public scrutiny. As a consequence, the government has erected a three-tiered approach to religious objectors that provides third-class treatment to those at the bottom of the government's invented hierarchy and violates RFRA's single religion-protective standard.

A. The Government Ignored RFRA by Modeling Its Narrow Exemption and Selective Accommodation on State Policies and Title VII Instead of RFRA

Nothing in the Patient Protection and Affordable Care Act excludes the implementation of the women's preventive health services coverage requirement from the Religious Freedom Restoration Act. RFRA therefore directly controls the government's exercise of its rulemaking authority to implement the women's preventive health services coverage requirement. *See* 42 U.S.C. § 2000bb-3(b) ("Federal statutory law adopted after November 16, 1993, is subject to [RFRA] unless such law explicitly excludes such application by reference to this chapter."). Yet the government ignored RFRA in designing the mandate and began to address its requirements only in response to litigation and public opinion.

In August 2011, the government implemented the statutory women's preventive services coverage requirement by imposing the mandate with a narrow "religious employer" exemption. Specifically, the HRSA released guidelines requiring certain group health plans and health insurance issuers to cover all FDA-approved contraceptives for women.[2] The government promulgated interim final regulations that authorized the HRSA "to exempt *certain* religious employers from the Guidelines where contraceptive services are concerned." Interim Final Rule, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011) (emphasis added). But neither the HRSA guidelines nor the Interim Final Rule mentioned or purported to apply the Religious Freedom Restoration Act.

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[2] *See* Health Resources and Services Administration, Department of Health and Human Services, *Women's Preventive Services: Required Health Plan Coverage Guidelines* (August 1, 2011), available at http://www.hrsa.gov/womensguidelines.

Instead of following RFRA's controlling statutory command that "[g]overnment shall not substantially burden a person's exercise of religion," 42 U.S.C. § 2000bb-1(a)—that is, *any* person's exercise of religion—the government's "religious employer" exemption addressed only "the unique relationship between a house of worship and its employees in ministerial positions." Interim Final Rule, 76 Fed. Reg. 46621, 46623 (Aug. 3, 2011). And rather than formulate this exemption from the federal contraceptives mandate in accordance with federal law (*i.e.*, RFRA), the government sought to "be consistent with the *policies of States* that require contraceptive services coverage." *Id.* (emphasis added). This focus was particularly inapt for determining the scope of a religious exemption given that RFRA is inapplicable against States and local governments under *City of Boerne v. Flores*, 521 U.S. 507 (1997).

During the comment period, the government received 200,000 comments on the scope of the religious employer exemption, including comments about the Religious Freedom Restoration Act. On January 20, 2012, however, Secretary Sebelius announced that the government would not expand the exemption. And in February 2012, the government issued regulations that "finalize, without change," the interim final regulations issued in August 2011. Final Rule, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012).

By February 2012, however, the 200,000 initial commenters were not the only ones riled by the HHS mandate. Even stalwart Democrats were "deeply divided over President Barack Obama's new rule that religious schools and hospitals must provide insurance for free birth control to their employees." Donna Cassata, *Obama birth control policy divides Democrats*, Associated Press, Feb. 9, 2012. On Friday, February 10, 2012, the President announced at a press conference that the government would attempt to accommodate other employers with religious objections. At the same time that the government finalized its narrow religious employer exemption, then, the government also stated its intention to develop an "accommodation" for some (but not all) "non-exempt" employers, and to provide a temporary enforcement safe harbor for these employers in the meantime. *Id.*

In describing the potential "accommodation," the government asserted that its "future rulemaking would be informed by the existing practices of some issuers and religious organizations in the 28 States where contraception coverage requirements already exist . . . ." 77 Fed. Reg. at 8728. The government also asserted—without explanation or analysis—that "this approach complies with the Religious Freedom Restoration Act, which generally requires a federal law to not substantially burden religious exercise, or, if it does substantially burden religious exercise, to be the least restrictive means to further a compelling government interest." 77 Fed. Reg. at 8729. But the government never explained the connection between its state-law models for the accommodation and the claim that the proposed accommodation would comply with RFRA. Such a connection is far from clear given that the states are not subject to RFRA. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

By failing to follow RFRA when considering the scope of religion-based exemptions from the contraceptives mandate, the government guaranteed that impassioned political considerations would take the place of reasoned legal consideration. That is exactly what RFRA proponents worried would happen in the absence of RFRA. *See Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 123 (1993) (statement of Rep. Solarz, chief sponsor of H.R. 2797) ("Religion will be subject to the standard interest-group politics that affect our many decisions. It will be the stuff of postcard campaigns, 30-second spots, scientific polling, and legislative horse trading."). Testifying before the Senate Judiciary Committee at the invitation of *then-Senator Biden*, Professor Douglas Laycock stated that "[i]n a society where regulation is driven by interest groups, *Smith* means that churches will be embroiled in endless political battles with secular interest groups." *Religious Freedom Restoration Act: Hearing before the S. Comm. on the Judiciary*, 102d Cong. 63 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas). And that is exactly what has happened, as *Vice President Biden* has since experienced firsthand. According to multiple press reports, the government's shifting policies stem from internal disputes—disputes that have pitted Vice President Biden against others in the Obama Administration. *See* Helene Cooper & Laurie Goodstein, *Obama Adjusts a Rule Covering Contraceptives*, N.Y. Times, Feb. 11, 2012, at A1. The President's promise that the government would propose an accommodation reportedly came about only after the Administration faced "rising anger from Catholic Democrats, liberal columnists and left-leaning religious leaders." *Id.*

These are precisely the "vicissitudes of political controversy" that Congress enacted RFRA to protect religious freedom from being subjected to. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). RFRA did this "by legislating all at once, across the board, a right to argue for religious exemptions and make the government prove the cases where it cannot afford to grant exemptions." *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 340 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas).

The President's promise of future consideration of an accommodation amounted to an admission that the government could not have satisfied RFRA's "least restrictive means" requirement as of that time. For RFRA states that "Government may substantially burden a person's exercise of religion only if it [*i.e.*, the Government] *demonstrates* that application of the burden" complies with the compelling governmental interest and least restrictive means requirements. 42 U.S.C. § 2000bb-1(b) (emphasis added); *see also* 42 U.S.C. § 2000bb-2(3) ("[T]he term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion."). The government could not have made this demonstration based on their actions as of February 2012.

The government *then* committed to consider an accommodation in the *future* because it had not adequately considered an accommodation in the *past*. Without having previously analyzed this potential accommodation, the government could not have "demonstrat[ed]" that the mandate that it had already chosen and finalized with a narrow religious employer exemption was "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2).

The government's refusal to address RFRA in any meaningful way (except when sued in federal court) is remarkable. But it is also consistent with the way the government has treated the law of religious freedom from the beginning of the HHS mandate. When questioned by RFRA sponsor Senator Hatch at a February 15, 2012, hearing, Secretary Sebelius testified that she never requested an analysis of religious freedom issues surrounding the HHS mandate from the Department of Justice. *The President's Budget for Fiscal Year 2013: Hearing before the S. Comm. on Finance*, 112th Cong. (Feb. 15, 2012) (statement of Kathleen Sebelius, Sec'y of Health & Human Servs.). And HHS ignored an October 2011 request from twenty-seven Senators for "any analysis requested or obtained by HHS regarding these religious-liberty issues." *Id.* (statement of Sen. Orrin G. Hatch, ranking member, S. Comm. on Finance).

In March 2012, the government issued an Advance Notice of Proposed Rulemaking to "establish alternative ways to fulfill" the contraceptives mandate "when health coverage is sponsored or arranged by a religious organization that objects to the coverage of contraceptive services for religious reasons and is not exempt under the final regulations published February 15, 2012." 77 Fed. Reg. 16501, 16501 (Mar. 21, 2012). Although it was obviously issued in the shadow of RFRA litigation, the Advance Notice does not even mention RFRA.

On February 6, 2013, the government promulgated a Notice of Proposed Rulemaking that changed the definition of "exempt" religious employers and proposed an accommodation for certain other religious employers. 78 Fed. Reg. 8456, 8462 (Feb. 6, 2013). This Notice also further subdivided employers with religious objections from two categories (exempt and non-exempt) into three categories (exempt, non-exempt but accommodated, and neither exempt nor accommodated). In distinguishing between those employers who are non-exempt but accommodated, on the one hand, and those employers who are neither exempt nor accommodated, on the other hand, the Notice makes no reference to RFRA. The Notice refers instead to "the exemption for religious organizations under Title VII of the Civil Rights Act of 1964." *Id.* at 8462.

Although this reference was at least to federal law (unlike the state-law models for the proposed "accommodation"), RFRA supplies the proper guide, not Title VII.

B. The Government's Refusal to Exempt Any "For Profit" Corporations Violates RFRA's Single Religion-Protective Standard

The government's refusal to apply RFRA throughout the administrative process has resulted in a mandate that violates RFRA and turns the law of religious freedom upside down. RFRA places a heavy burden on the government and protects religion by default. But the HHS mandate places a heavy burden on religion and protects the government by default. RFRA's statutory structure—a single rule with a single exception—reflects the principle that the government should apply the same protective standard to all exercises of religion, by all persons. This principle may seem uncontroversial in the abstract. But the government can have difficulty honoring this demand in specific circumstances. *See O Centro Espirita*, 546 U.S. at 436 ("The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration . . . of exceptions to rules of general applicability."). The government's categorical refusal to exempt or accommodate Hobby Lobby, Conestoga Wood, and other "for-profit corporations" provides a case in point.

Congress did not limit RFRA's protections to individuals. Rather, Congress provided that "[g]overnment shall not substantially burden a *person's* exercise of religion," 42 U.S.C. § 2000bb-1(a) (emphasis added), employing a term that ordinarily encompasses "*corporations*, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1 (emphasis added). This was no mistake. The statute's reach was purposefully broad because a primary goal of the statute was to provide a single standard for the protection of all religious exercise.

In formulating RFRA, Congress heard testimony about the need for greater protection for the free exercise of religion by organizations as well as individuals. For example, Congress heard about the legal plight of St. Agnes Hospital of the City of Baltimore, Inc., a Roman Catholic teaching hospital that objected to providing its residents with clinical training in sterilization, abortion, or artificial contraception. *See, e.g.*, *Religious Freedom Restoration Act of 1991: Hearings before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 340 (1993) (statement of Douglas Laycock, Professor of Law, University of Texas) ("[C]ases like *St. Agnes* depend on RFRA specifying that the compelling interest test is . . . not the watered down deference to every bureaucrat that some lower courts now apply.") (citing *St. Agnes Hospital of the City of Baltimore, Inc. v. Riddick*, 748 F. Supp. 319 (D. Md. 1990)). It was not at all controversial that St. Agnes Hospital, which, like both Hobby Lobby and Conestoga Wood, is a corporate entity engaged in commercial activity, would qualify for protection under RFRA.

Because it cannot argue that corporations are not "person[s]" under RFRA, the government seeks to carve out "profit-making corporate entities engaged in commercial activity" from RFRA's definition of "person[s]". (H.L. Gov't Br. at 12.) The government reasons that "[f]or-profit corporations 'are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate a religious values-based mission.'" (*Id.* at 19 (quoting *Gilardi v. United States Dep't of Health & Human Servs.*, 733 F.3d 1208, 1242 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part).) But this is a gross oversimplification of matters. Many non-profit corporations, including those that unquestionably qualify as "persons" under RFRA, such as hospitals and universities, earn substantial revenue through commercial activity. And, as this case plainly shows, profits are not necessarily the be-all-and-end-all for every "for-profit" corporation.

In attempting to justify its failure to respect religious objections to the HHS mandate asserted by for-profit corporations, the government notes that Congress has sometimes created "religion-based exemptions for employers," but has limited those exemptions to "churches and other religious non-profit institutions." (H.L. Gov't Br. at 20 (discussing Title VII of the Civil Rights Act of 1964).) This demonstrates that Congress can distinguish among various types of corporate "persons" when it wishes to do so. But contrary to the government's assertion, Title VII does not distinguish between for-profit and not-for-profit employers. The pursuit of profit is but one factor among many in a legal test implementing the statutory Title VII exemption. *See Korte v. Sebelius*, 735 F.3d 654, 675 (7th Cir. 2013) (citing cases). Moreover, Congress drew no such distinction in RFRA, which applies broadly and generally, subject only to displacement by later enactments that relax its reach in specific areas. Congress plainly wrote RFRA to include corporations, and neither RFRA nor the PPACA excludes for-profit corporations.

Even though Congress did not provide for different treatment of for-profit and non-profit employers in either RFRA or the PPACA, the government has created a three-tier categorization of religiously objecting employers and has subjected for-profit corporations and their owners to third-class treatment in the lowest tier. This contravenes the design of RFRA. Congress knew that a healthy respect for religious freedom as exercised by a variety of actors would call for various government responses appropriate to the circumstances. But rather than attempt to formulate different principles to govern different categories of religious liberty claimants, Congress formulated a single principle and left it to government officials and courts to apply that same principle with sensitivity to different factual circumstances.

One particular episode from Congress's consideration of RFRA clarifies the broad scope of what Congress intended to accomplish by supplying a single standard to protect religious freedom for all. Near the end of legislative debate over RFRA, a group of senators sought an amendment to provide a lower level of protection for prisoners. Both Democratic and Republican senators opposed what Senator Lieberman termed the "dramatic proposal" that there should be "two separate standards for the protection of religious freedoms: protections afforded citizens out of jail and protections afforded incarcerated citizens." 139 Cong. Rec. S14462 (daily ed. Oct. 27, 1993) (statement of Sen. Lieberman); *see also id.* at S14465 (statement of Sen. Hatch) ("[T]his amendment sets a dangerous precedent for religious liberty. The real danger lies not so much in the exemption of prisoners, but in the choice we are making about exempting anyone from the principle of the free exercise of religion. Today we are asked only to exempt prisoners. Tomorrow, however, we will be asked to exempt others. . . . How far we will venture is a legitimate unanswered question."); *id.* at S14466 (statement of Sen. Danforth) ("Congress should not codify group exceptions to fundamental freedoms."); *id.* at S14467 (statement of Sen. Kennedy) ("As we vote today to restore the broad protection for religious freedom envisioned by the Framers of the Constitution, let us not deny this fundamental right to persons in prison.").

The Senate's rejection of this double-standard-for-prisoners amendment vindicated the one-rule-for-everybody principle reflected in RFRA's text and structure. The same Congress that refused to make a separate rule for prisoners and non-prisoners would not have created, and did not create, a separate rule for profit-seeking and non-profit corporations. Yet that is precisely what the government asks this Court to do. The government's relegation of for-profit corporations to third-class status in its invented hierarchy of religious objectors is flat-out wrong.

CONCLUSION

Congress has commanded equal treatment of all under a religion-protective rule. The government may not pick and choose whose exercise of religion is protected under RFRA and whose is not. Amici respectfully ask the Court to guarantee to all the full protection that Congress provided in RFRA.

Respectfully submitted,

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Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,

v.

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ON WRITS OF CERTIORARI TO THE U.S. COURTS OF APPEALS
FOR THE THIRD AND TENTH CIRCUITS

BRIEF OF AMICI CURIAE HISTORIANS AND LEGAL SCHOLARS SUPPORTING NEITHER PARTY

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RULES:

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BRIEF OF AMICI CURIAE HISTORIANS AND LEGAL SCHOLARS SUPPORTING NEITHER PARTY

INTEREST OF AMICI

Amici are scholars of history and law with an important interest in the question presented and particularly in the traditional treatment of corporations under American law.[1] Amici include:

Margaret Blair is the Milton R. Underwood Chair in Free Enterprise at Vanderbilt Law School. An economist who focuses on management law and finance, her current research focuses on six areas: team production and the legal structure of business organizations, legal issues in the governance of supply chains, the role of private sector governance arrangements in contract enforcement, the legal concept of corporate "personhood," the historical treatment of corporations by the Supreme Court, and the problem of excessive leverage in financial markets.

Ruth H. Bloch, a specialist in early American intellectual, religious, and women's history, is professor emerita in the Department of History at UCLA. She is the author of VISIONARY REPUBLIC:

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[1] This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. The parties (with the exception of Respondents in No. 13-354) filed blanket consents, and Respondents in No. 13-354 have provided written consent to this brief. Pursuant to Rule 37.6, counsel for amici affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make a monetary contribution to the preparation or submission of this brief.

MILLENNIAL THEMES IN AMERICAN THOUGHT, 1756-1800 AND GENDER AND MORALITY IN ANGLO-AMERICAN CULTURE, 1650-1800. She is currently working with Naomi Lamoreaux on a book on the history of privacy rights in America and on articles entitled, "Corporations and the Fourteenth Amendment" and "Legal Constraints on the Development of American Non-Profit Groups, 1780-1900."

Eric Hilt is Associate Professor of Economics at Wellesley College. He has written extensively on the history of the business corporation in the United States. In 2009 he was the recipient of the Economic History Association's Arthur Cole Prize.

Naomi R. Lamoreaux, a specialist in U.S. business and economic history, is Stanley B. Resor Professor of Economics and History and Chair of the History Department at Yale University, and a Research Associate at the National Bureau of Economic Research. She has written THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904 AND INSIDER LENDING: BANKS, PERSONAL CONNECTIONS, AND ECONOMIC DEVELOPMENT IN INDUSTRIAL NEW ENGLAND. She is currently working with Ruth Bloch on a book on the history of privacy rights in America and on articles entitled, "Corporations and the Fourteenth Amendment" and "Legal Constraints on the Development of American Non-Profit Groups, 1780-1900."

Jonathan Levy is an assistant professor of history at Princeton University. He is the author of the prize-winning FREAKS OF FORTUNE: THE EMERGING WORLD OF CAPITALISM AND RISK IN AMERICA (Harvard University Press, 2012).

William J. Novak is the Charles F. and Edith J. Clyne Professor of Law at the University of Michigan Law School. He is the author of THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA, which won the American Historical Association's Littleton-Griswold Prize for Best Book in the History of Law and Society.

Ajay K. Mehrotra is Associate Dean for Research, Professor of Law, and the Louis F. Niezer Faculty Fellow at the Indiana University Maurer School of Law. He is also an Adjunct Professor of History at Indiana University, Bloomington and an Affiliated Faculty member of the Vincent and Elinor Ostrom Workshop on Political Theory and Policy Analysis.

Elizabeth Pollman is Associate Professor of Law at Loyola Law School, Los Angeles, and the author of works on the constitutional rights of corporations and issues concerning private corporations, including *Information Issues on Wall Street 2.0*, 161 PA. L. REV. 179 (2012); *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629; and *Citizens Not United: The Lack of Stockholder Voluntariness in Corporate Political Speech*, 119 YALE L.J. ONLINE 53 (2009).

John Joseph Wallis is Professor of Economics at the University of Maryland and Research Associate at the National Bureau of Economic Research. He is an American Economic Historian who specializes in the interaction of political and economic forces in American development, with particular attention to the role of organizations and corporations as a nexus of that interaction.

Much of the research in this brief is drawn from papers by amici, developed through several meetings of the ongoing "Corporations and American Democracy" research initiative undertaken by the Tobin Project, a non-profit research organization.

Because amici have not examined the factual questions relating to the particular corporations at issue in these consolidated cases, they file this brief in support of neither party.

SUMMARY OF ARGUMENT

Amici's historical research reveals that, in analyzing constitutional rights and liberty interests, this Court has not treated corporations and natural persons the same, nor has it treated all corporations equally. Rather, this Court has treated corporations as artificial entities distinct from natural persons and has recognized that corporations come in many types and are organized for different purposes. In general, this Court has extended rights to corporations when necessary to protect the interests of natural persons, and especially when those interests are directly related to the corporation's primary purpose. Corporate rights are thus derivative. It is important to examine the historical basis for the distinctions between corporations and natural persons, and between for-profit business corporations and nonprofit corporations (including churches, advocacy groups, and similar organizations).

This Court has been especially sparing in extending rights, especially liberty rights under the Fourteenth Amendment, to for-profit business corporations. In *First National Bank of Boston v.*

Bellotti,[2] then-Justice Rehnquist, writing in dissent, noted that this Court historically drew a distinction, for Fourteenth Amendment purposes, between the *property* and *liberty* interests of business corporations. In the decades following the adoption of the Fourteenth Amendment, the corporate "rights" recognized by this Court were largely limited to property and contract entitlements, in circumstances where the interests of the underlying shareholders or owners so required.

Justice Rehnquist acknowledged, citing *Santa Clara County v. Southern Pacific Railroad*,[3] that the Court had decided "at an early date," although "with neither argument nor discussion," that a "business corporation is a 'person' entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment" and that "[l]ikewise, it soon became accepted that the *property* of a corporation was protected under the Due Process Clause of that same Amendment."[4] But, he pointed out, the Court "soon thereafter" concluded that the *liberty* protected by the same Due Process Clause was "the liberty of natural, not artificial persons."[5]

Justice Rehnquist was correct. During the late nineteenth and early twentieth centuries, this Court parsed the various clauses of the Fourteenth Amendment in different ways, so that some of them applied to corporations but others, such as the due process protection for liberty, emphatically did not.

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[2] 435 U.S. 765 (1978).

[3] 118 U.S. 394 (1886).

[4] 435 U.S at 822 (emphasis added).

[5] *Id.* at 822.

In particular, beginning in 1886 with the case of *Santa Clara County v. Southern Pacific Railroad*,[6] the Court treated the Equal Protection Clause as applying to corporations. It also interpreted the Due Process Clause as protecting corporate property.[7] That, however, was the extent of it. In 1906, the Court held in *Northwestern National Life Insurance Company v. Riggs* that the liberty protected by the Fourteenth Amendment was "the liberty of natural, not artificial persons."[8] Nor did the Court ever hold that corporations were "persons whom a State may not deprive of 'life' within the meaning of the second clause of the second sentence"[9] or that the privileges and immunities of citizens extended to corporations.[10]

In adopting these limited protections for corporations, the Court repeatedly confirmed that business corporations remained fully subject to government regulation. In particular, the Court did not create exemptions for for-profit business corporations from generally applicable, nondiscriminatory rules. Nor did the Court base its corporate-rights jurisprudence on the notion that a corporation was a constitutionally-protected "person" in its own right. The Court always treated corporations as artificial entities.

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[6] *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886). See also *Missouri Pacific Railway Co. v. Mackey*, 127 U.S. 205 (1888); *Minneapolis and St. Louis Railway Co. v. Beckwith*, 129 U.S. 26 (1889); *Charlotte, Columbia and Augusta Railroad Co. v. Gibbes*, 142 U.S. 386 (1891).

[7] See, e.g., *Minneapolis and St. Louis Railway Co. v. Beckwith*, 129 U.S. 26 (1889); *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578 (1896); *Smyth v. Ames*, 169 U.S. 466 (1898).

[8] *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243, 255 (1906).

[9] See *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 579 (1949).

[10] See, e.g., *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888).

The twentieth century saw the selective incorporation of the Press Clause[11] and the recognition of First Amendment rights for publishers and broadcasters, as well as for advocacy organizations. In *Bellotti* and successor cases, this Court also protected corporate speech, though chiefly for instrumental purposes (the interests of the audience in new contributions to the marketplace of ideas), rather than for reasons of corporate self-expression or self-actualization.

However, this Court never overruled the decisions drawing a constitutional distinction between corporate liberty and property rights. Nor has this Court ever upheld a religious liberty or free exercise claim brought by a for-profit corporation (even a closely held one).

Because amici have not examined the factual issues regarding the specific corporations at issue, they take no position on the proper disposition of the instant cases. However, their research reveals that corporations have always been treated as artificial entities under U.S. law, and that it would be inconsistent with historical practice to extend the same liberty interests to for-profit business corporations as natural persons enjoy.

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[11] *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

ARGUMENT

I. History Reveals Limited Constitutional Protections For Corporations.

This Court's earliest decisions addressing the status of corporations reveal little protection for the rights of corporations *qua* corporations. On the whole, the case law reflected a view of the corporation as an artificial entity representing an association of individuals. Further, the rights recognized were largely limited in scope to property and contract entitlements.

For example, in *Bank of the United States v. Deveaux*,[12] the Court (per Marshall, C.J.) held that a corporate entity was not a "citizen" for purposes of diversity jurisdiction, in a case involving a bank's challenge to a state tax statute:

> That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name.[13]

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[12] 9 U.S. (5 Cranch) 61 (1809).

[13] *Id.* at 86. The Court subsequently overruled *Deveaux* and held that, for purposes of diversity jurisdiction, a corporation is a "citizen" of the state in which it is incorporated. *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 43 U.S. (2 How.) 497, 555 (1844). Just ten years later, the Court in *Marshall v. Baltimore & Ohio Railroad*, 57 U.S. (16 How.) 314, 325-29 (1854), changed position again, holding that a suit by or against a corporation should be regarded as a suit by or against its shareholders and adopting a conclusive presumption

Similarly, in *Bank of Augusta v. Earle,*[14] the Court held that a corporation is not a "citizen" for purposes of the Privileges and Immunities Clause of Article IV, § 2.[15]

After the adoption of the Fourteenth Amendment, this Court considered the application of the Equal Protection Clause to business corporations in *Santa Clara v. Southern Pacific Railroad*. The reported opinion begins with a statement attributed to Chief Justice Morrison R. Waite at the start of oral arguments:

> The court does not wish to hear argument on the question whether the provision in the *Fourteenth Amendment to the Constitution*, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.[16]

There is no comparable statement about corporations and the Fourteenth Amendment in the actual decision of the case because the Court deliberately avoided the constitutional questions that the railroads had hoped to raise and instead based its ruling solely on California law.

The decision to print the statement in the first place seems to have been the doing of the Court's

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that all shareholders of a corporation are citizens of the state of incorporation.

[14] 38 U.S. (13 Pet.) 519 (1839).

[15] *Id.* at 587.

[16] *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886).

reporter, J. C. Bancroft Davis. Davis had originally submitted it for the Chief Justice's approval in the form of a paraphrase, not a direct quotation. The Chief Justice responded that Davis expressed "with sufficient accuracy what was said before the argument began," but added, "I leave it with you to determine whether anything need be said about it in the report inasmuch as we avoid meeting the constitutional question in the decisions." Davis not only left the statement in the report but set the paraphrase in quotation marks.[17]

Needless to say, this provenance is odd for a statement that would be repeatedly cited as precedent by this Court and other courts, especially given that the Chief Justice's purpose in making it was precisely to avoid a ruling on the constitutional issue. The answer to the question of how the statement came to be treated as precedent is surprisingly simple: It was the doing of Justice Stephen J. Field.

Justice Field had articulated his own views on the larger constitutional issues in circuit court opinions involving a provision of California's 1879 constitution that assessed taxes on property held by railroads differently from other property.[18] Justice

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[17] For the exchange between Waite and Bancroft, see C. Peter Magrath, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 223-24 (1963); Malcolm J. Harkins, *On the Road to* Santa Clara *and Beyond: Travels with the Supreme Court, Stephen J. Field and the Corporate Person* (Feb. 2010), http://works.bepress.com/malcolm_harkins/1, accessed on January 7, 2014.

[18] One group was consolidated under the title of *The Railroad Tax Cases*, 13 F. 722 (C.C.D. Cal. 1882), and the other

Field, who heard the suits alongside a local federal judge, wrote opinions in both cases, holding that the taxes violated the railroads' rights under the Fourteenth Amendment. Justice Field explained that "private corporations consist of an association of individuals united for some lawful purpose, and permitted to use a common name in their business and have succession of membership without dissolution."[19] The individuals "do not, because of such association, lose their rights to protection, and equality of protection."[20] In Justice Field's view, the Fourteenth Amendment protects the property of persons — to whom he referred as "members" or "corporators" — who were "united" or "associated" together in a "corporation" or "union."[21] "[I]n declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws," Justice Field opined, the Fourteenth Amendment "imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property .... Unequal exactions in every form, or under any pretense, are absolutely forbidden .... It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible; where different persons may be taxed on their property of the same kind, similarly situated, at different rates."[22]

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under the title *Santa Clara v. Southern Pacific Railroad Co.*, 18 F. 385 (C.C.D. Cal. 1883).

[19] *Santa Clara*, 18 F. at 402.

[20] *Id.*

[21] *Id.* at 402-04.

[22] *The Railroad Tax Cases*, 13 F. 722, 733 (1882). The local judges wrote concurring opinions in both cases.

When Justice Field could not convince the other Justices to take a similarly broad position in the *Santa Clara* case, he turned Chief Justice Waite's statement into precedent by citing it in subsequent opinions for the Court.[23]

II. The *Santa Clara* Decision Did Not Withdraw Governmental Authority To Regulate Corporations Via Generally Applicable Laws.

However, the Court's precedents (even opinions authored by Justice Field himself) make clear that *Santa Clara* did not interfere with efforts to regulate corporations by subjecting them to generally applicable laws. Indeed, the Court most often cited *Santa Clara* in decisions upholding state regulatory statutes. Just two years after *Santa Clara*, for example, the Court upheld a Kansas statute making railroads liable for injuries to workers caused by the mismanagement or negligence of other employees.[24] Conceding the *Santa Clara* precedent "that corporations are persons within the meaning" of the Fourteenth Amendment, the Court (per Field, J.) observed that when legislation imposes "additional liabilities" on "particular bodies or associations," it does not deny them "the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions." The particularly "hazardous character of the business of operating a railroad would seem to call for special legislation ... having for its object the protection of their employees as well as the safety of the public." So long as the law made all railroad corporations "subject to the same liabilities," the law was constitutional.[25]

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[23] See, e.g., *Missouri Pacific Railway Co. v. Mackey*, 127 U.S. 205 (1888); and *Minneapolis & St. Louis Railway Co. v. Beckwith*, 129 U.S. 26, 28 (1889).

[24] *Missouri Pacific Railway Co. v. Mackey*, 127 U.S. 205 (1888).

The next year, the Court (per Field, J) similarly upheld an Iowa law mandating that railroads that failed to erect fences along their right of ways must reimburse farmers for livestock injured or killed by trains,[26] and two years after that a South Carolina law that imposed a special tax on railroads to pay the costs of the commission the state had created to regulate them (again per Field, J.).[27]

Accordingly, *Santa Clara* was never understood as barring even-handed regulation of corporations by the government. Indeed, Justice Field himself never viewed corporations in the same light as natural persons. To the contrary, he explained in his circuit court decision in *Santa Clara* that "corporations are creatures of the state" and "could not exist independently of the law." Precisely because they were its creatures, the state might prescribe the conditions "upon which they may be formed and continued."[28] That is, the state might regulate the activities of these "artificial" persons in the interests of the "natural" persons who were its real constituents.

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[25] *Id.* at 209-10.

[26] *Minneapolis and St. Louis Railway Co. v. Beckwith*, 129 U.S. 26 (1889).

[27] *Charlotte, Columbia and Augusta Railroad Co. v. Gibbes*, 142 U.S. 386 (1891).

[28] *Santa Clara v. Southern Pacific Railroad Co.*, 18 F. 385, 402 (1883).

III. The History Of Corporate Treatment Under the Privileges & Immunities Clause Reinforces the Government's Regulatory Authority.

The Privileges & Immunities Clause provides further evidence that *Santa Clara* does not interfere with governmental authority to regulate corporations. In the decades following the Civil War, large-scale corporations began to operate on a national scale, and disputes arose when corporations sought to do business in states that had not chartered them – in particular, when corporations formed in states with lenient laws tried to set up shop in states whose laws were more restrictive. If states were required to grant corporations formed in other jurisdictions the same privileges and immunities as citizens, then state regulatory powers would be undermined.

This Court (per Field, J.) first confronted this issue in *Paul v. Virginia*, just months after the Fourteenth Amendment was ratified.[29] Although the case involved the Privileges and Immunities Clause of Article IV rather than the corresponding Clause of the Fourteenth Amendment, it served as the precedent for a long stream of Fourteenth Amendment decisions denying corporations the privileges and immunities of citizens. The *Paul* Court held that the privileges and immunities guaranteed by Article IV did not extend to the "special privileges" that states granted in the form of corporate charters. A corporation, "being the mere creation of local law," could have "no legal existence beyond the limits of the sovereignty" that created it. Other states might admit such "foreign" corporations "upon such terms and conditions" as they thought "proper to impose," or could even, if they wished, exclude them altogether. "The whole matter rest[ed] in their discretion."[30]

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[29] *Paul v. Virginia*, 75 U.S. 168 (1869).

After *Paul v. Virginia*, this Court repeatedly upheld state laws imposing regulatory restrictions on corporations chartered by other jurisdictions, and *Santa Clara* did not hinder this stream of decisions. In the 1888 case of *Pembina Consolidated Silver Mining and Milling Company v. Pennsylvania,*[31] the Court (again per Field, J.) upheld a Pennsylvania licensing tax on corporations chartered elsewhere that opened offices in the state. The Court confirmed that the privileges and immunities protected by Article IV applied only to natural persons, not corporations, reiterating the reasoning in *Paul v. Virginia* that corporations "had no absolute right of recognition in other States" — that states not only had the authority to regulate corporations chartered elsewhere but also could "exclude [them] entirely."[32] The Court then addressed explicitly the question of the applicability of the Fourteenth Amendment to the case. Echoing, but not citing, Chief Justice Waite's statement in *Santa Clara*, the Court expressed "no doubt" that a private corporation was covered by the "inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws." But, the *Pembina Consolidated Silver Mining* Court explained, the equal protection that corporations "may claim is only such as is accorded to similar associations within the jurisdiction of the State." Nothing in the Constitution prohibited a state from "discriminating in the privileges it may grant to foreign corporations."[33]

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[30] *Id.* at 181.

[31] *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888).

[32] *Id.* at 185.

IV. History Shows That The Fourteenth Amendment's Due Process Clause Protects Corporate Property But Not Liberty.

The *Santa Clara* line of cases arose under the Fourteenth Amendment's Equal Protection Clause. With regard to due process, this Court drew a sharp distinction between the rights of natural and corporate persons under the Fourteenth Amendment and recognized corporate rights to *property* but not to *liberty*.

In the 1906 case of *Northwestern National Life Insurance Company v. Riggs,*[34] this Court upheld a Missouri law requiring insurance companies to pay out on policies in cases where the decedent had not been completely truthful on the application for insurance but where the deception was unconnected with the cause of death. The Court took as its starting point the principle that corporations "may invoke the protection of that clause of the Fourteenth Amendment which declares that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.'"[35] But the Court reasoned that a state had the power "to regulate the relative rights and duties of all persons and corporations within its jurisdiction ... to provide for ... the public good."[36] The Court opined that Missouri's law was a reasonable exercise of the state's police powers because insurance companies had engaged in abusive practices, using innocent inaccuracies in applications as a pretext for denying claims. Moreover, because the law applied "alike to all life insurance companies doing business in Missouri," it did not deny the company "the equal protection of the laws."[37] The Court then broke new ground by declaring that the Due Process Clause of the Fourteenth Amendment did not bar the state's regulation:

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[33] *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181, 188-89 (1888); see also *Ducat v. Chicago*, 77 U.S. 410 (1871); *Liverpool Insurance Co. v. Massachusetts*, 77 U.S. 566 (1871).

[34] *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243 (1906).

> Equally without foundation is the contention that the statute, if enforced, will be inconsistent with the liberty guaranteed by the Fourteenth Amendment. The liberty referred to in that Amendment is the liberty of natural, not artificial persons.[38]

The principle that corporations were protected persons in the sense that their property could not be taken without due process had already been treated by the Court as a logical extension of the *Santa Clara* precedent.[39] However, *Northwestern National Life Insurance v. Riggs* was the first time this Court addressed the question of whether corporations were persons whose *liberty* was constitutionally protected as well. In asserting that they were not, the Court did not feel compelled to cite precedent. The Court evidently found the point so obvious that it needed no justification.

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[35] *Id.* at 253.

[36] *Id.*

[37] *Id.* at 255.

[38] *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243, 255 (1906).

Indeed, the idea that the Fourteenth Amendment protected the liberty of natural persons but not corporations had long been implied by the case law. Justice Field had laid out the distinction as early as his circuit court opinion in the *Railroad Tax Cases*: the amendment protected the property of corporations because corporate property "in fact" belonged to "the corporators," but it did not protect the life and liberty of corporations because "the lives and liberties of the individual corporators are not the life and liberty of the corporation."[40]

Although *Northwestern National Life Insurance Company v. Riggs* was the first Supreme Court decision explicitly to state that corporations did not have Fourteenth-Amendment protections for liberty, the understanding of liberty on which the holding rested pervaded the late-nineteenth-century jurisprudence. The opinion in *Northwestern National Life Insurance Co. v. Riggs* defined "the liberty guaranteed by the Fourteenth Amendment against deprivation" as embracing "the right to pursue a lawful calling and enter into all contracts proper, necessary and essential to the carrying out of the purposes of such calling."[41]

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[39] See, e.g., *Covington & Lexington Turnpike R. Co. v. Sandford*, 164 U.S. 578 (1896); *Smyth v. Ames*, 169 U.S. 466 (1898).

[40] *The Railroad Tax Cases*, 13 F. 722, 747 (1882).

This conception of liberty can be traced back through numerous opinions to Justice Field's famous dissent in the *Slaughterhouse Cases* in 1873, which in turn drew on the broader natural rights tradition of the American Revolution.[42] The "distinguishing privilege of citizens of the United States," Justice Field insisted, was an "equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life."[43] This conception of liberty referred to natural persons rather than artificial ones and addressed the importance of life and work for ordinary people, as well as the notion of an avocation or calling. The reasoning was part of a natural rights tradition that harkened back to the American Revolution.[44]

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[41] *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243, 253 (1906).

[42] *Slaughterhouse Cases*, 83 U.S. 36 (1873).

[43] *Id.* at 109-10.

[44] For historical work on this tradition, see especially Michael P. Zuckert, NATURAL RIGHTS AND THE NEW REPUBLICANISM (1994); Knud Haakonssen, "From Natural Law to the Rights of Man," in A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW, 1791 AND 1991 19-61 (Michael J. Lacey and Knud Haakonssen, eds. 1991), and James H. Hutson, "The Bill of Rights and the American Revolutionary Experience," in the same volume, pp. 62-97.

The Court drew the same line using the same language in *Western Turf Association v. Greenberg*.[45] The Court upheld a California statute regulating places of public amusement against a challenge by an incorporated racetrack. After opining that the statute did not violate the Fourteenth Amendment's Equal Protection Clause because it applied "alike to all persons, corporations or associations" operating in this business, the Court proceeded to hold that the company could not claim the protection of the Due Process Clause, either. Citing *Northwestern National Life Insurance Co.*, the Court declared that "the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons."[46] The same statement appeared in such twentieth century decisions as *Pierce v. Society of Sisters* (1925) and *Hague v. CIO* (1939).[47]

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[45] *Western Turf Association v. Greenberg*, 204 U.S. 359 (1907).

[46] *Id.* at 363.

[47] *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Hague v. CIO*, 307 U.S. 496, 528 (1939). The statement is also cited in *Applegate v. Travelers' Insurance Co.*, 132 S.W. 2 (1910); *Title Guaranty & Surety Co. v. Slinker*, 42 Okla. 811 (1914); *Andrus v. Business Men's Acc. Ass'n of America*, 283 Mo. 442 (1920); *American League v. Eastmead*, 15 Backes 487 (N.J. Ch. Ct. 1934); *Oney v. Oklahoma City*, 120 F. 2d 861 (10th Cir. 1941); *Finnish Workers Federation v. Horrocks*, 42 F. Supp. 411 (W.D. Wash. 1941); *Mo Hock Ke Lok Po v. Stainback*, 74 F. Supp. 852 (D. Haw. 1947); *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79 (D.C. Cir. 1949).

V. The Twentieth Century Emergence of Corporate Rights Was In Harmony With The Historical Understanding.

During the twentieth century, the Court continued to treat artificial and natural persons differently. The Court recognized that corporations were creatures of governments and, as a general rule, extended them constitutional protections only when it was necessary to safeguard the rights of the natural persons who made them up.

A. Economic Regulation Of Corporations.

For example, during the *Lochner* era, the Court invoked substantive due process to invalidate state laws affecting wages, working conditions, and public health and safety. Although some of the plaintiffs in the *Lochner*-era cases were corporations, the decisions hinged on the individual employees' liberty of contract, rather than the rights of corporations.[48]

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[48] See, e.g., *Adkins v. Children's Hospital*, 261 U.S. 525 (1923). A federal district court later asserted this Court "implicitly [found] in several cases that corporations had a liberty of contract which was protected by the Due Process Clause," *B.G.M. Enterprises v. Harris*, 482 F. Supp. 1073, 1077 (D. Mont. 1980), but the only case it was able to cite was *Advance-Rumely Thresher Co. v. Jackson*, 287 U.S. 283 (1932). In fact, *Advance-Rumely Thresher* held no such thing. It involved a suit by a company (whose incorporation status was not noted) against an individual farmer, whose liberty of contract was at stake. The only mention of the word "corporation" in the decision was in a quotation from the state statute. Cf. *Insurance Corporation of Ireland v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702-03 n.10 (1982) (applying minimum contacts test to corporations).

In *Hale v. Henkel*, the Court rejected a corporation's claim to the Fifth Amendment right against self-incrimination,[49] in keeping with the train of decisions that followed from *Paul v. Virginia* and *Santa Clara*. Unlike human persons, the Court opined, corporations were creatures of the states that chartered them. When a state granted "certain special privileges and franchises" to a corporation, the latter held them only "so long as it obey[ed] the laws of its creation." Hence, states could legitimately require corporations "charged with an abuse of such privileges" to produce their books and papers. The Court did not cite any precedent for this ruling; the point apparently was too obvious: "It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises," could not verify whether these franchises "had been abused." Moreover, in this instance, the Court asserted, the states' authority carried over to the federal government. Because the powers of the states were subordinate to those of Congress in matters of interstate commerce, the federal government had a similar right to compel testimony in cases involving commerce that extended across state lines.[50]

The Court was more sympathetic to the claim that the Fourth Amendment protected the corporation against unreasonable searches and seizures. Using a logic similar to Justice Field's in his circuit-court opinions in *Santa Clara* and the *Railroad Tax Cases*, the Court reasoned that a corporation was, "after all, but an association of individuals." When these individuals organized themselves "as a collective body," they did not waive any "constitutional immunities appropriate to such body." Therefore, the corporation's "property [could not] be taken without compensation." The corporation could "only be proceeded against by due process of law, and [was] protected, under the Fourteenth Amendment, against unlawful discrimination." By the same token, it should not be subject to unreasonable search and seizure, and in the present case, the grand jury's subpoena was "far too sweeping in its terms to be regarded as reasonable."[51] Although this part of the opinion did not affect the disposition of the case — for other reasons the Court affirmed the order to produce the subpoenaed documents — it is noteworthy because it highlights the reluctance of the Court to base the constitutional protections afforded corporations on the entities' status as legal persons, grounding them instead in the rights of the individual human beings who made them up. The line drawn in *Hale v. Henkel* would prove to be of lasting importance.[52]

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[49] 201 U.S. 43 (1906).

[50] *Id.* at 74-75.

Another set of cases that distinguished the protections for liberty afforded corporations and natural persons centered on the income tax, and in particular on the right to privacy implicated by tax enforcement actions. In the 1911 case of *Flint v.*

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[51] *Id.* at 76-77.

[52] See *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977). For other examples of the ongoing vitality of the distinction, see *Wilson v. United States*, 221 U.S. 361 (1911); *Baltimore & Ohio Railroad Co. v. ICC*, 221 U.S. 612 (1911); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Bell v. Maryland*, 378 U.S. 226 (1964).

Stone Tracy Co.,[53] the Court rejected an invasion-of-privacy challenge to the provision of a tax statute that made corporate returns a matter of public record and thus open to inspection.[54] After the ratification of the Sixteenth Amendment, this pronouncement became the basis for a later appeals-court decision regarding personal income tax returns. In the Revenue Act of 1924, Congress mandated that the Commissioner of Internal Revenue "cause to be prepared and made available to public inspection" a list of the names and addresses of all tax payers "together with the amount of the income tax paid."[55] This list, which included both individual and corporate tax payers, was published in many newspapers and provoked widespread outrage until Congress repealed that part of the law in 1926.[56] Although protesters recognized that the law applied to human persons and corporations alike, they focused their ire on the harm this unwanted publicity would do to individuals, deploring the provision as "a scandalous march into the privacy of the citizen's rights in which he thought he was protected by his constitution."[57]

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[53] *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911).

[54] *Id.* at 175.

[55] Quoted in *Hubbard v. Mellon*, 5 F.2d 764 (D.C. Cir. 1925).

[56] The 1926 law still mandated the Commissioner of Internal Revenue to make a list of taxpayers available for public inspection, but the list no longer included the amount of tax paid. Compare §257 of the Revenue Act of 1926 (44 Stat. 9) with the same section of the Revenue Act of 1924 (43 Stat. 253).

Over time, this Court would become more solicitous of the privacy rights of individuals, but it would also increasingly differentiate such rights from those of corporations. As the Court declared in the 1950 case of *United States v. Morton Salt Co.*, corporations "may and should have protection from unlawful demands made in the name of public investigation," but they "can claim no equality with individuals in the enjoyment of a right to privacy." The Court went on to explain that corporations "are endowed with public attributes. They have a collective impact on society, from which they derive the privilege of acting as artificial entities.... Even if one were to regard the request for information in the case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."[58] In *California Bankers Ass'n v. Shultz*, upholding the anti-money laundering provisions of the Bank Secrecy Act of 1970, the Court reaffirmed the distinction between the privacy rights of individuals and corporations.[59]

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[57] "In the Gold Fish Bowl," *Chicago Daily Tribute* 8 (Jun. 4, 1924). See especially the roundup of commentary from newspapers around the country in "How Income Tax Publicity is Viewed by the Editors," *Washington Post* 2 (Oct. 26, 1924). Amici have not found any writing from this period attacking the publicity requirement as an infringement on the constitutional rights of corporations, as opposed to individuals. To the contrary, opponents of the law argued that "publication is not going to affect the banks and other financial institutions or other corporations, for their books are open to the inspection of all stockholders and are practically public. The man who is going to be hurt is the most useful man in the community and the one who can least afford it." William J. Casey, Vice President of Continental Trust Co., quoted in "Bankers Heir Assails Income Tax Publicity," *Baltimore Sun* 22 (May 24, 1924).

B. Corporate Speech Rights.

Beginning in the twentieth century and continuing through today, this Court has frequently upheld the constitutional claims of corporations in the context of First Amendment speech rights. But such decisions can be harmonized with the traditional distinctions this Court has drawn with respect to corporations.

For example, this Court's selective incorporation of the Press Clause in 1936[60] heralded the recognition of rights for publishers and broadcasters, which have often been zealously protected in subsequent decisions.[61] However, the First

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[58] *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

[59] *California Bankers Assn. v. Shultz*, 416 U.S. 21, 59-67 (1974).

[60] *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

[61] E.g., *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); but see *Leathers v. Medlock*, 499 U.S. 439 (1991) (upholding against

Amendment rights of the press, which are the focus of a specific textual guarantee, do not necessarily imply a broader grant of constitutionally protected liberty interests, particularly with respect to for-profit business corporations that are not part of the press. Then-Justice Rehnquist made the same point in his *Bellotti* dissent.[62]

Further, in the 1950s the Court began to recognize associational and speech rights of nonprofit advocacy organizations such as the NAACP.[63] Again, the rights of nonprofit membership corporations organized for advocacy purposes say little about the proper treatment of for-profit business corporations, as Justice Rehnquist also noted.[64]

To be sure, in *Bellotti* and successor cases, this Court has accorded First Amendment protection to speech by business corporations, but largely for instrumental purposes (the interests of the audience in new ideas and information), rather than for reasons of corporate self-expression or self-actualization.[65] This Court's statement in *Bellotti*

First Amendment challenge the application of a general state tax to cable television services).

[62] *See Bellotti*, 435 U.S. at 822 (dissenting opinion).

[63] *See NAACP v. Alabama*, 357 U.S. 449 (1958); *NAACP v. Alabama*, 377 U.S. 288 (1964); *NAACP v. Button*, 371 U.S. 415 (1963). For more recent cases involving advocacy groups, see, e.g., *Federal Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449 (2007).

[64] *See Bellotti*, 435 U.S. at 822 (Rehnquist, J., dissenting).

[65] *See Bellotti*, 435 U.S. at 804-05 (White, J., joined by Brennan and Marshall, JJ., dissenting) (speech of business corporation "is not fungible with communications emanating

that political speech does not lose First Amendment protection "simply because its source is a corporation"[66] is an affirmation of the consequentialist value of expression in the marketplace of ideas – not a reference to the right of a business corporation to autonomy or self-realization. Similarly, this Court has explained that commercial speech is protected because it "assists consumers and furthers the societal interest in the fullest possible dissemination of information."[67]

In short, this Court never overruled the decisions drawing a distinction between artificial and natural persons, or between corporate liberty and property rights. It has not used the Due Process Clause to grant exemptions to for-profit businesses from generally applicable, nondiscriminatory laws on the basis of liberty interests. Nor has this Court ever upheld religious liberty or free exercise claims brought by for-profit corporations and their

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from individuals and is subject to restrictions which individual expression is not. Indeed, what some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations are not 'an integral part of the development of ideas, of mental exploration and of the affirmation of self'").

[66] *Bellotti*, 435 U.S. at 784.

[67] *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561-62 (1980); *see also Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

controlling shareholders.[68] This Court has continued to rely on the nineteenth century maxim that a corporation is an "'artificial being,'"[69] and has drawn a distinction between corporations and their shareholders,[70] even when the corporation has a single shareholder.[71]

* * *

Justice Rehnquist's dissent in *Bellotti* observed that shortly after this Court decided that a corporation is a "person" entitled to protection under the Equal Protection Clause of the Fourteenth Amendment, the Court concluded "that the liberty protected by that Amendment 'is the liberty of natural, not artificial persons.'"[72] The parsing of the Fourteenth Amendment in which the Court engaged during the late nineteenth and early twentieth centuries — in cases such as *Santa Clara*, *Paul v. Virginia*, *Pembina Consolidated Silver Mining*, and *Northwestern National Life Insurance Co.* — still has much to recommend it today. At its heart was the idea that corporations do not have the same claims to constitutional protections as natural persons.

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[68] See, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers) (denying stay application); cf. *United States v. Lee*, 455 U.S. 252, 261 (1982) (stating in a ruling against a non-corporate Amish employer who argued that paying Social Security taxes for his employees interfered with his exercise of religion, "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes that are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress explicitly provides otherwise.").

[69] *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987).

[70] E.g., *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003).

[71] E.g., *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 160, 163 (2001).

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[72] *Bellotti*, 435 U.S. at 822 (Rehnquist, J., dissenting) (quoting *Nw. Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243 (1906)).

CONCLUSION

Because amici have not examined the factual issues regarding the specific corporations at issue, they take no position on the proper disposition of the instant cases. However, their research reveals that corporations have always been treated as artificial entities under U.S. law, and that it would be inconsistent with historical practice to extend the same liberty interests to for-profit business corporations as natural persons enjoy.

Respectfully submitted.

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v.
HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,
v.
KATHLEEN SEBELIUS, *et al.*,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals
for the Third and Tenth Circuit

BRIEF OF THE INDEPENDENT WOMEN'S FORUM AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, *ET AL.*

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INTEREST OF *AMICUS CURIAE*[1]

The Independent Women's Forum ("IWF") is a non-partisan, 501(c)(3) research and educational institution. IWF seeks the advancement of women in today's marketplace and the full flourishing of human dignity through freedom and choice. IWF believes that gender equality and access to health care, including preventative services like contraception, are compelling government interests. IWF is concerned, however, that the contraception mandate may disadvantage women by adversely affecting health and employment options and impinging on religious liberty.

IWF believes that women have ready access to affordable contraceptives. Nine in ten employer-based insurance plans cover the full range of contraceptives. Twenty-eight states require insurers that cover prescription drugs to cover the full range of FDA-approved contraceptive drugs and devices. And a plethora of federal and state programs currently provide free contraceptive services to women with low incomes. Public funding for these services totaled $2.37 billion in 2010. In addition to public sources, clinics and other entities like Planned Parenthood provide free access to contraception.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* Independent Women's Forum states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties received notice of amicus curiae's intent to file this brief. Petitioner and respondent have consented to the filing of this brief and letters reflecting their consent have been filed with the Clerk of Court.

For women who make too much to qualify for free preventative care services, contraceptives are an affordable healthcare option. Generic contraceptives can be purchased for as low as $9 per month. Non-prescription options with similar efficacy rates, like condoms and vaginal sponges, are easy to purchase and inexpensive. The American Pregnancy Association, for example, estimates that condoms cost as little as twenty cents each—less than a pack of chewing gum. There is, in short, no need for the contraception mandate.

Perhaps for this reason, the Government has exempted over 190 million health plan participants from the contraception mandate. The requirement does not apply to employers with fewer than fifty full-time employees, grandfathered health plans, and certain religious non-profits, like churches. Exempt from the mandate also are certain forms of contraception—including those that can be used by men. That the Government chose to exempt hundreds of millions of women (and all men) undermines any asserted compelling interest in public health or a one-size-fits-all insurance system.

IWF believes the Government can promote public health in other ways. It could, for example, expand eligibility for the federal programs already in existence, offer tax deductions, credits, or federal reimbursements for the purchase of contraceptive services, or provide incentives for pharmaceutical companies to provide products free of charge. Indeed, and ironically, the best way to broaden access to birth control might be to heed the American College of Obstetricians and Gynecologists recommendation and make birth control available without a prescription.

IWF believes that the contraception mandate will make contraception more expensive. Because insurers are required to provide *first-dollar* coverage, price will no longer be a consideration. This will result in higher health-care costs and make contraceptives less affordable, and thus less accessible, to millions of *uninsured* women. According to CBO, some 30 million people will remain uninsured after full implementation of the Affordable Care Act. Even if only half are women, the mandate will have a detrimental impact on millions. And of course there is no such thing as a free lunch, even to the insured. The (higher) costs of contraception coverage likely will be passed on to employees through lower salaries or decreased benefits.

IWF also is concerned that the contraception mandate may have other detrimental effects on women's health. Studies have shown, for example, that increased access to other contraceptives decreases condom usage—a means of preventing sexually transmitted diseases in addition to pregnancy.

The contraception mandate also overlooks that women and their families benefit from a flexible work environment that allows them the option of their preferences. Women may choose to prioritize a higher salary, or the ability to work from home, over more generous contraceptive coverage. And older women, in particular, may prioritize other health benefits, like cancer coverage.

This case is about more than contraception. It is about the principles of liberty that animate our Constitution. It is about empowering women to choose the healthcare and salary options that best fit their needs. And it is about employers, many of them women, being able to follow their deeply held religious conviction that life begins at conception.

IWF believes in a pluralistic society and that the Government should not require individuals to pay for services contrary to their faith. The burden becomes clear when one's own moral wrong is required by law. *See* JONATHAN HAIDT, THE RIGHTEOUS MIND (2012). Take, for example, a hypothetical example of a different administration requiring that all group health insurance plans cover conversion and reparative therapy. The fact that an employee would make the individual choice to receive such therapy would do little to assuage the moral qualms of individuals and companies who support same-sex couples. Such individuals and companies would be forced to pay premiums for, and facilitate use of, health services they find abhorrent.

There is historical precedent for precisely this challenge of conscience versus the perceived greater good. The Quaker faith forbids taking up arms against another. During the Revolutionary War, the colonies required able-bodied men to serve in the militia or pay a stiff fine. A wealthy landowner could avoid the draft by hiring a soldier as his substitute. But the Quakers refused not only to fight but also to send someone else to fight in their stead or to pay fines to finance what they saw as a morally objectionable war. *See* KEVIN SEAMUS HASSON, THE RIGHT TO BE WRONG 49-52 (2005).

IWF believes that all of these arguments should not be foreclosed solely because the penalties imposed by the contraception mandate are made payable to the IRS. The Government does not argue that the Anti-Injunction Act applies to this case. Accordingly, the defense is forfeited and poses no bar to resolution of the critical constitutional questions at issue here.

If the Supreme Court's privacy jurisprudence tells us anything, it is that the deeply personal choices about when life begins and whether or not to use birth control are decisions for individuals and families, not the Government. IWF believes that the Government should leave those decisions to women and their families.

SUMMARY OF ARGUMENT

The Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421(a), provides: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." That provision does not bar review of this case. A unanimous Tenth Circuit concluded that the Anti-Injunction Act does not apply because the relevant penalties are not taxes within the meaning of the AIA. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 127-28 (10th Cir. 2013); *see also Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 36-38 (1922) (distinguishing taxes from penalties by heavy burden, scienter, and partial enforcement by a non-IRS agency). But there is no need to answer that question at all. The Anti-Injunction Act does not apply first and foremost because it is not jurisdictional and because the Government has forfeited any reliance on the statute.

It is a hallmark of our judicial system that, subject to standing requirements, a litigant ordinarily is entitled to her day in court before she suffers the penalties for noncompliance with an unconstitutional statute or regulation. Pre-enforcement challenges are a commonplace. To hold that the Anti-Injunction Act bars suit here would turn that principle on its head.

If the AIA were jurisdictional, the Greens and Hahns would be forced to pay millions of dollars in penalties and file a refund suit before raising their First Amendment claims. This is constitutionally troublesome. The choice between massive penalties and conscience rights may not be a realistic one for many employers. And more importantly, pre-enforcement review is almost always available in cases like this one because damage remedies (like a refund) are wholly inadequate to compensate a plaintiff for the loss of a First Amendment right. Douglas Laycock, THE DEATH OF THE IRREPARABLE INJURY RULE, 103 HARV. L. REV. 687, 707-09 (1990). Religious liberty is not a freedom reserved for the wealthy.

The Anti-Injunction Act is not jurisdictional because its text does not contain the clear jurisdictional limitation this Court's cases require. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006). It is a claims-processing statute that speaks to the obligations of litigants, not the power of the federal courts. It is placed in a miscellaneous tax code provision that governs administration and procedure. And it contains numerous statutory and judicially created exceptions. While the Court occasionally has referred in passing to the AIA as "jurisdictional," this Court's more recent cases teach that loose language does not a jurisdictional provision make. It is the substance of this Court's decisions, and not imprecise use of the term jurisdiction that governs. *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (courts may not rely on "less than meticulous" use of the term "jurisdictional").

From its earliest days, moreover, this Court has interpreted the AIA to be non-jurisdictional. The Court consistently has held the AIA subject to traditional equitable exceptions. *See, e.g., Miller v. Standard Nut*, 284 U.S. 498 (1932). These exceptions have culminated in two well-established exceptions today. *See Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962); *South Carolina v. Regan*, 465 U.S. 367 (1984). In several cases, moreover, the Court also has permitted the Government to waive the AIA defense and proceeded to the merits. *See, e.g., Helvering v. Davis*, 301 U.S. 619 (1937). If a provision is truly jurisdictional, equitable exceptions are taboo and waiver impossible. Taken individually, then, each of these precedents would cast doubt on a jurisdictional AIA; taken as a whole, they foreclose that possibility.

ARGUMENT

I. THE ANTI-INJUNCTION ACT IS NOT JURISDICTIONAL AND THIS COURT NEED NOT CONSIDER WHETHER IT APPLIES

The federal government has forfeited any reliance upon the Anti-Injunction Act and this Court need not consider whether it applies unless the prohibition is jurisdictional. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). The AIA is not jurisdictional and this Court may proceed to the merits.

This Court recently has emphasized that jurisdiction has become "a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998). Because courts have been overinclusive—"profligate" even, *see Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 81 (2009)—in their use of the term, this Court has sought to restore "discipline" to the phrase jurisdictional. *Henderson*, 131 S. Ct. at 1202-03.

There is a distinction, this Court's recent cases teach, between "claims-processing" rules and truly jurisdictional provisions. Jurisdictional statutes speak to the very power of a federal court to hear a case; they govern the court's "adjudicatory authority." *Kontrick*, 540 U. S. at 455; *see also Steel Co.*, 523 U.S. at 89 ("subject-matter jurisdiction" refers to "the courts' statutory or constitutional *power* to adjudicate the case") (emphasis in original). In contrast, claims-processing rules simply "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203.

To differentiate between claims-processing rules and jurisdictional limitations, this Court looks to text, structure, and context. First, the Court employs a "clear-statement principle," to determine whether the text plainly indicates that a procedural requirement is jurisdictional. *Gonzalez v. Thaler*, 132 S. Ct. 641, 649 (2012). The Court then considers whether the structure of the statute compels a jurisdictional conclusion. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245-46 (2010). Finally, the Court considers context, which sometimes may include past precedent. *See Bowles v. Russell*, 551 U.S. 205, 209-11 (2007). Each of these factors indicates that the Anti-Injunction Act is not jurisdictional.

A. The AIA's Text Does Not Clearly Indicate Jurisdictional Status

The first question is whether the text of the AIA contains a clear statement limiting jurisdiction. *Henderson*, 131 S. Ct. at 1203 (citing *Arbaugh*, 546 U.S. at 515-16). The answer is no. A provision is jurisdictional only where Congress "clearly state[s] that [the] threshold limitation on a statute's scope shall count as jurisdictional. . . ." *Arbaugh*, 546 U.S. at 515-16. In contrast, "when Congress does not rank a statutory limitation as jurisdictional, then courts should treat the provision as nonjurisdictional in character." *Id.*

The text of the AIA contains no such clear statement. At the outset, the AIA does not mention jurisdiction in so many words. *See Thaler*, 132 S. Ct. at 651 (citing *Henderson*, 131 S. Ct. at 1205) (rejecting notion that "all mandatory prescriptions, however emphatic, are . . . properly typed jurisdictional"); *Dolan v. United States*, 130 S. Ct. 2533, 2539 (2010) ("shall" does not render a requirement jurisdictional). This is important because Congress knows how to speak in jurisdictional terms when it chooses. Consider some forthrightly jurisdictional statutes. The Tax Injunction Act, for example, is directed to the adjudicatory power of the federal courts: "The *district courts shall not* enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341 (emphasis added). Congress's failure to use similar "unambiguous jurisdictional terms," *Thaler*, 132 S. Ct. at 649, "indicates" that the AIA operates differently. *Williams Packing*, 370 U.S. at 6 (if Congress desired the AIA to have the same effect as the TIA "it would have said so explicitly"); *see also Thaler*, 132 S. Ct. at 649 ("unambiguous jurisdictional terms" in a related statute are evidence that Congress "would have spoken in clearer terms if it intended [the statute] to have similar jurisdictional force").

What the text indicates instead is that the AIA is a claims-processing statute. As this Court previously has explained, the AIA "was merely intended to require taxpayers to litigate their claims in a designated proceeding." *Regan*, 465 U.S. at 374. This is the very definition of a claims-processing rule. The AIA does nothing more than "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203 (defining claims-processing rules).

The AIA, in other words, is not jurisdictional because it is addressed to litigants, not the adjudicatory authority of federal courts. "[J]urisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'" *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) (quoting *Republican Nat. Bank of Miami*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)). The AIA focuses on party obligations. Section 7421(a) provides that "no suit [to restrain taxes] shall be maintained in any court by *any person*." 26 U.S.C. § 7421(a) (emphasis added). Congress amended the AIA in 1964 to add the phrase "by any person whether or not the person is the person against whom such tax was assessed." This phrase clarifies that the AIA applies to persons whether or not that person bears the incidence of the tax, *see Regan*, 465 U.S. at 377, and confirms that the AIA speaks to litigants, not the federal courts.

The requirement that a party satisfy some step prior to bringing suit in federal court is hardly novel: it is an exhaustion requirement. Exhaustion requirements are "quintessential claims-processing rules." *Henderson*, 131 S. Ct. at 1203. Because exhaustion requirements merely "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times," *id.*, this Court has time and again found them to be non-jurisdictional. *See e.g., Reed Elsevier, Inc.*, 130 S. Ct. at 1246-47 (citing cases).

In *Jones v. Bock*, for instance, this Court held that the Prison Litigation Reform Act's administrative exhaustion requirement—"no action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted" is not jurisdictional. 549 U.S. 199, 211-12 (2007). So too here. The AIA is not jurisdictional because it focuses on a litigant's exhaustion obligations. And like other exhaustion regimes, the AIA does not forever bar federal court review of a class of cases (as does the Tax Injunction Act), but instead assumes that suits blocked by the AIA eventually may end up in federal court.

Reed Elsevier, Inc. v. Muchnick is also instructive. In that case, the Court held Section 411(a) of the Copyright Act—"no civil action for infringement of the copyright in any United States work shall be instituted" until the copyright is registered—to be non-jurisdictional. *Reed Elsevier*, 130 S. Ct. at 1249. Because Section 411(a) placed conditions on plaintiffs (and not the federal courts), the Court found the provision did not "clearly state[]" that its registration requirement was jurisdictional. *Id.* at 1245-46. The relevant text of Section 411(a)—"no civil action . . . shall be instituted"—bears a striking resemblance to the AIA's language—"no suit . . . shall be maintained." Both are addressed to particular litigants, couched in mandatory language, and part of a remedial scheme. Like Section 411(a), the AIA does not "clearly state" that its pre-payment requirement is jurisdictional.

In sum, the text of the AIA does not *clearly* indicate jurisdictional status. The statute does not employ jurisdictional language, it is addressed to private litigants, and it is part of an exhaustion regime that eventually provides for federal court review.

B. The Structure Of The AIA Indicates That The Statute Is Not Jurisdictional

The structure of the Anti-Injunction Act also indicates that the statute is a "claims-processing" rule, not a jurisdictional bar. Congress did not locate the operative provision in a jurisdiction granting section. This fact supports a non-jurisdictional reading. *Reed Elsevier*, 130 S. Ct. at 1245 (finding provision non-jurisdictional because it "is located in a provision 'separate' from those granting federal courts subject-matter jurisdiction"). Rather, signaling its claims-processing nature, the AIA resides instead in a miscellaneous tax code section that governs procedure and administration.

Moreover, that the AIA expressly authorizes *some* pre-enforcement tax challenges indicates that Congress did not mean to impose an absolute bar on federal court review. The *Reed Elsevier* Court found it "important" that Section 411(a) permitted the adjudication of unregistered claims in three circumstances. *Reed Elsevier*, 130 S. Ct. at 1246. The AIA contains fourteen statutory exceptions. 26 U.S.C. § 7421(a). A taxpayer who receives a deficiency notice may file suit notwithstanding the AIA. §§ 6213(a) and § (c). So too for taxpayers who are innocent joint filers, § 6015(e), who have a third-party interest in property, §§ 7426(a) and (b)(1), and whose property has been levied. § 6330(e)(1). As this Court has explained, "[i]t would be at least unusual to ascribe jurisdictional significance to a condition subject to these sorts of exceptions." *See Reed Elsevier*, 130 S. Ct. at 1246; *Zipes v. TransWorld Airlines*, 455 U.S. 385, 393-94, 397 (1982) (exception to EEOC filing requirement indicates the provision is non-jurisdictional).

This Court has sometimes looked to the purpose of a statute as part of its context inquiry. *See Thaler*, 132 S. Ct. at 650. Here, the purpose of the AIA—to facilitate the prompt and efficient assessment and collection of taxes on which the Government depends, *see Williams Packing*, 370 U.S. at 7—suggests that the AIA is not jurisdictional. As the Government has repeatedly explained, this purpose often may be best served by pre-enforcement review.

In *Helvering v. Davis*, 301 U.S. 619 (1937), for example, a shareholder brought suit to restrain the Edison corporation from deducting payroll taxes as required by the Social Security Act. In light of the serious budgetary and administrative problems that would result from a delay in determining the validity of the Social Security tax, the Government intervened and sought pre-enforcement review from this Court. Brief for Petitioners Helvering & Welch at 22, *Helvering*, 301 U.S. 619 (1937) (No. 910). The AIA did not apply, the Government argued, because it "was enacted to promote, not to discourage, the orderly administration and collection of Government revenues." *Id.* at 31. And in *Helvering*, "the litigation of an injunction suit [wa]s more important for the protection of the revenues than insistence upon adherence to the ordinary procedure of payment followed by a suit for refund." *Id.*

Helvering was not a one-off decision. The Government also sought preenforcement review of the Bituminous Coal Act of 1937 in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940). Brief for the Appellee at 9, *Sunshine Anthracite*, 310 U.S. 381 (1940) (No. 804). Similarly, the Government urged the

Court to review the constitutionality of a tax prior to its enforcement in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 554 (1895).

To clothe the AIA with jurisdictional status would in every case preclude this Court's prompt review of a tax. As the Government argued in *Helvering,* this would "discourage" rather than encourage the "orderly administration and collection of Government revenues." Brief for Petioners Helvering & Welch at 31, *Helvering*, 301 U.S. 619 (1937) (No. 910). The AIA was intended to protect the public treasury, not limit the authority of federal courts. The core purpose of the AIA, and its structure more generally, indicate that the Anti-Injunction Act is not jurisdictional.

C. This Court's Precedents Confirm That The AIA Is Not Jurisdictional

Congress's failure clearly to indicate that a provision is jurisdictional is ordinarily dispositive. *Reed Elsevier*, 130 S. Ct. at 1244; *Arbaugh*, 546 U.S. at 515-16 (Congress must "clearly state[] that a threshold limitation on a statute's scope shall count as jurisdictional."). On rare occasions, however, uniform undeviating precedent may tip the scales. *See Bowles*, 551 U.S. at 209-11.

This Court's precedents are far from uniform. Rather, they are irreconcilable with a jurisdictional reading of the AIA in three ways. First, the Supreme Court's early interpretation of the AIA as an equitable statute subject to a number of exceptions cannot be reconciled with a jurisdictional statute. Second, two judicially-created exceptions to the AIA are well-established: The Supreme Court has long held that the AIA does not apply in "extraordinary circumstances" and also when the party challenging a tax statute has no alternative remedy at law. Finally, the Court has repeatedly accepted the Government's waiver of the AIA defense, and proceeded to the merits—actions inconsistent with a jurisdictional reading of the AIA.

1. Early Precedent Holds That The AIA Is Not Jurisdictional

This Court's early interpretations of the AIA as an equitable statute sound the death knell for a jurisdictional interpretation. Culminating in its 1932 decision in *Miller v. Standard Nut*, 284 U.S. 498 (1932), this Court repeatedly has recognized a variety of equitable exceptions to the AIA. *See* 284 U.S. at 510-11. Because jurisdictional statutes are strict limits on a court's power, each of these judicially created exceptions demonstrates that the AIA is not jurisdictional.

In *Standard Nut*, the IRS imposed a ten-cent per pound back-tax on Southern Nut Product, a vegetable-based spread, under the Oleomargarine Act of 1886. 284 U.S. at 505-06. Prior to the assessment, three federal courts had held similar products non-taxable, and, by letter-ruling, the IRS had informed Standard Nut that its product was not subject to the tax. *Id.* at 504. After Standard Nut marketed its product at a three-cent per pound profit, the IRS changed its mind and sought to collect the ten-cent tax. *Id.* at 508. Standard Nut filed a pre-enforcement suit. *Id.* at 505.

This Court enjoined collection of the tax. The AIA "d[id] not apply," this Court wrote, because of "special and extraordinary facts and circumstances." *Id.* at 511. The Act was merely "declaratory of the principle" that equity usually disallows tax injunction suits. *Id.* at 509. As a result, "extraordinary and exceptional circumstances"—though not mentioned in the text of the AIA—"render[ed] its provisions inapplicable." *Id.* at 510. Foreshadowing the Court's clear statement requirement, the *Standard Nut* Court wrote that "[t]he general words employed [by Congress] are not sufficient, and it would require specific language undoubtedly disclosing that purpose, to warrant the inference that Congress intended to abrogate th[e] salutary and well-established rule" that extraordinary circumstances permit a court to enjoin a tax. *Id.* at 509. The Court noted it had "never held the [AIA] to be absolute"—as would be true of a jurisdictional statute—"but ha[d] repeatedly indicated that extraordinary and exceptional circumstances render its provisions inapplicable." *Id.* at 509-10 (citing cases recognizing extraordinary circumstances exceptions).

Standard Nut is no outlier. It is consistent with a long line of prior cases treating the AIA as a claims-processing statute subject to equitable exceptions. Early lower courts crafted all sorts of exceptions to the AIA[2] and went on to enjoin various taxes.[3] So too for the Supreme Court. *See, e.g.*, *State R.R. Tax Cases*, 92 U.S. 575, 613-14 (1875) (AIA codifies the traditional equitable rules that govern tax injunctions); *Pac. Steam Whaling Co. v. United States*, 187 U.S. 447, 452 (1903) (considering equitable exceptions to the AIA).

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[2] *See, e.g.*, *Frayser v. Russell*, 9 F. Cas. 728, 729 (C.C.E.D. Va. 1878) (challenge does not fall "within the letter, or spirit, or intention" of the AIA; multiplicity of suit exception applies); *Burgdorf v. District of Columbia*, 7 App. D.C. 405, 414 (D.D.C. 1896) (exception for "additional special circumstances, bringing the case under some recognized head of equity jurisdiction, such as irreparable injury, multiplicity of suits, or cloud on the title of the complainant"); *Acklin v. People's Sav. Ass'n*, 293 F. 392, 394 (N.D. Ohio 1923) (recognizing the "existence of exceptional cases" which permit review notwithstanding the AIA); *Lafayette Worsted Co. v. Page*, 6 F.2d 399, 400 (D.R.I. 1925) (exceptional circumstances exception); *French Mortg. & Bond Co. v. Woodworth*, 38 F.2d 841 (E.D. Mich. 1930) (same); *John A. Gebelein, Inc. v. Milbourne*, 12 F. Supp. 105, 121 (D. Md. 1935) (enjoining tax and finding that the AIA does not apply to novel cases resulting in "exceptional and unusual hardship" and "irreparable damage."); *Larabee Flour Mills Co. v. Nee*, 12 F.

Beginning in the early 1900s, this Court repeatedly held that the AIA was "inapplicable" in "extra-

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Supp. 395, 399 (W.D. Mo. 1935) (The AIA "does not prohibit a suit in equity to restrain the collection of a tax where the tax is illegally exacted and where the taxpayer has no adequate remedy at law for its recovery if it is paid by him; [and such] remedy at law must not only be adequate . . . [but also] clear and unquestioned."); *Cohen v. Durning*, 11 F. Supp. 824 (S.D.N.Y. 1935) (adequate remedy at law exception); *Grosvenor-Dale Co. v. Bitgood*, 12 F. Supp. 416 (D. Conn. 1935) (same); *Rieder v. Rogan*, 12 F. Supp. 307 (S.D. Cal. 1935) (same); *Huston v. Iowa Soap Co.*, 85 F.2d 649, 652 (8th Cir. 1936) (The AIA "is not an absolute bar in every case to injunctive relief.").

[3] *Trinacia Real Estate Co. v. Clarke*, 34 F.2d 325 (N.D.N.Y. 1929) (issuing injunction); *Higgins Mfg. Co. v. Page*, 20 F.2d 948, 949 (D.R.I. 1927) (granting injunction; "where there is no adequate remedy at law, the court should have power to grant relief"); *Baltic Mills Co. v. Bitgood*, 12 F. Supp. 132, 135 (D. Conn. 1935) (granting injunction because of inadequate remedy at law and multiplicity of suit); *Danahy Packing Co. v. McGowan*, 11 F. Supp. 920 (W.D.N.Y. 1935) (issuing injunction); *Neild Mfg. Corp. v. Hassett*, 11 F. Supp. 642 (D. Mass. 1935) (same); *Inland Mill. Co. v. Huston*, 11 F. Supp. 813 (S.D. Iowa 1935) (same); *Gold Medal Foods v. Landy*, 11 F. Supp. 65 (D. Minn. 1935) (same); *Regents of Univ. Sys. of Georgia v. Page*, 81 F.2d 577 (5th Cir. 1936) (same); *Kingan & Co. v. Smith*, 16 F. Supp. 549 (S.D. Ind. 1936) (same). Other early cases exist in which the federal courts dismissed under the Anti-Injunction Act but those cases do not indicate that the AIA is jurisdictional. In those cases, the taxpayers argued only that the AIA did not apply to invalid taxes and the federal courts disagreed. *See, e.g.*, *Snyder v. Marks*, 109 U.S. 189, 192-94 (1883); *Kensett v. Stivers*, 10 F. 517, 522-29 (S.D.N.Y. 1880) (describing cases).

ordinary and exceptional circumstance[s]." *Bailey v. George*, 259 U.S. 16, 20 (1922); *Dodge v. Osborn*, 240 U.S. 118, 122 (1916) (the AIA "plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstance its provisions are not applicable").

The Court's early invocation of the extraordinary circumstances exception was not dicta. In *Dodge v. Brady*, the Court relied upon the exception to find the AIA inapplicable: "we think that this [tax] case is so exceptional in character as not to justify us in holding that reversible error was committed by the court below in passing upon the case upon its merits[.]" 240 U.S. 122, 126 (1916). And in 1922, the Court held the AIA inapplicable to tax penalties for regulatory commands in no less than three cases. *See Hill v. Wallace*, 259 U.S. 44 (1922); *Lipke v. Lederer*, 259 U.S. 557 (1922); *Regal Drug Corp. v. Wardell*, 260 U.S. 386 (1922). While the Court subsequently clarified that the AIA would apply to "truly revenue-raising tax statutes," it has not renounced the underlying equitable exception. *See Bob Jones University v. Simon*, 416 U.S. 725, 743 (1974) (citing *Graham v. Du Pont*, 262 U.S. 234 (1923)). And in 1935, this Court granted a "motion[] for injunction restraining the collection of the assailed tax" pending certiorari. *Rickert Rice Mills v. Fontenot*, 296 U.S. 569, 569 (1935). This remarkable injunction and exercise of jurisdiction over a suit seeking to "restrain[] the collection" of a tax is irreconcilable with a jurisdictional AIA.

From its earliest days, the AIA also was interpreted to permit a taxpayer without an adequate remedy at law to enjoin a tax. Beginning in the late 1800s, this Court permitted shareholders to challenge "the assessment or collection" of corporate income taxes on grounds that the shareholders had no adequate remedy at law once tax voluntarily was paid. *Brushaber v. Union Pac. R.R.* Co., 240 U.S. 1, 21-24 (1916); *Graham*, 262 U.S. at 257; *Pollock*, 157 U.S. at 554. The AIA was "inapplicable" where the remedy provided by law was inadequate. *Allen v. Regents of University of Georgia*, 304 U.S. 439, 448-49 (1938). Each of these shareholder cases fell squarely within the terms of the AIA, and yet because equity authorized federal courts to enjoin tax cases when the remedy at law was inadequate, the Court repeatedly found jurisdiction to exist.

Early interpretations of the AIA as an equitable statute did not escape notice. Commentators routinely described a non-jurisdictional AIA. The AIA, Professor Charles Miller wrote, "prohibits the granting of an injunction restraining the collection of federal taxes unless its provisions are rendered inapplicable to a particular case because of extraordinary and exceptional circumstances." Clarence A. Miller, *Restraining the Collection of Federal Taxes and Penalties by Injunction*, 71 U. PA. L. REV. 318, 339 (1922-23). *See also* John C. Gall, *Enjoining the United States*, 10 VA. L. REV. 194, 194 (1923-24) ("[D]espite the fact that the text of the AIA does not "make any provision whatever for unusual cases which may arise . . . upon an examination of the decided cases we find that a great number of suits of this character have been entertained in the federal courts."); Joseph L. Lewinson, *Restraining the Assessment or Collection of a Federal Tax*, 14 CAL. L. REV. 461, 462 (1925-26) (summarizing case law and concluding "it would appear that [the AIA] may not be read literally").

Jurisdictional limits are not descriptions of general equitable principles and the Court's early precedents holding the AIA synonymous with equitable rules are irreconcilable with a jurisdictional reading. In short, as the Supreme Court explained in *Standard Nut*, while the early Supreme Court gave effect to the AIA in a number of cases, "[i]t had never held the rule to be absolute," 284 U.S. at 510-11—as would be true of a jurisdictional statute.

2. This Court's Repeated Invocation Of Two Judicially Created Exceptions Confirms That The AIA Is Not Jurisdictional

The early case law authorizing federal courts to entertain tax challenges has resulted in two well-established judicial exceptions to the AIA. Because federal courts are not authorized to craft equitable exceptions to jurisdictional rules, these present-day exceptions demonstrate that the AIA is not a jurisdictional statute.

a. The Extraordinary Circumstances Exception

As explained above, the Supreme Court has long taken the view that the Anti-Injunction Act does not always apply to cases seemingly within its terms. In 1962, the Court reaffirmed that equitable exceptions apply to the AIA. In *Williams Packing*, the Court of Appeals had enjoined a tax on the ground that "collection would destroy [the taxpayer's] business." 370 U.S. at 2. This Court reversed, but not because the AIA is an absolute bar on federal court review. Far from repudiating exceptions to the AIA, the *Williams Packing* Court endorsed them: "if it is clear that under no circumstances could the Government ultimately prevail, the attempted collection may be enjoined if equity jurisdiction otherwise exists." *Id*. at 7. This merits-based inquiry cannot be squared with a jurisdictional AIA.

Bob Jones University also confirms that the AIA is not jurisdictional. That case involved a University's constitutional challenge to the IRS's revocation of its tax-exempt status. *Bob Jones*, 416 U.S. at 735-36. This Court first held that the action was a suit "for the purpose of restraining the assessment or collection of any tax" within the terms of the Anti-Injunction Act. *Id.* at 737-38. But that was not the end of the matter. The Court went on to describe a two-factor exception to the "literal terms of § 7421(a)": "first, irreparable injury . . . ; and second, certainty of success on the merits." *Id.* at 737. This Court's recognition of a success-on-the-merits exception means the AIA is not jurisdictional.[4]

b. The No Alternative Remedy At Law Exception

A second present-day exception to the AIA is well-established. As late as 1984, in *South Carolina v. Regan*, this Court confirmed that the AIA does not apply when the remedy at law is inadequate. 465 U.S.

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[4] These two cases do refer to the AIA as "jurisdictional." In *Williams Packing*, the Supreme Court wrote, "The object of § 7421(a) is to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." 370 U.S. at 5. In *Bob Jones University*, the Court wrote that "the Court of Appeals did not err in holding that § 7421(a) deprived the District Court of jurisdiction to issue the injunctive relief petitioner sought." *Bob Jones*, 416 U.S. at 749. The substance of the cases, however, and the equitable exceptions they endorse make plain that the statute is anything but jurisdictional. Any loose language as to jurisdiction is entitled to no "precedential effect." *See Arbaugh*, 546 U.S. at 511–512.

367, 373-74 (1984). In *Regan*, South Carolina challenged the constitutionality of "a tax on the interest earned on state obligations issued in bearer form." *Id.* at 372. The Court acknowledged that an identical lawsuit by a bondholder would have been barred. *Id.* If the AIA governed jurisdiction, the Court would have been required to dismiss. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Instead, this Court looked to the purposes of the AIA.

Using claims-processing language, the *Regan* Court noted that the AIA "was merely intended to require taxpayers to litigate their claims in a designated proceeding." *Regan*, 465 U.S. at 374. Since South Carolina was "unable to utilize any statutory procedure" to challenge the bond tax, it had no alternate remedy at law, and the AIA did not prevent the issuance of an injunction. *Id.* at 378. Under *Regan*, the AIA is a claims-processing rule with equitable exceptions; it directs litigants, but does not speak to the power of the courts.

This Court's continued adherence to two equitable exceptions cannot be reconciled with a jurisdictional AIA. These judicial carve-outs cannot be gleaned from the text of the AIA and courts have "no authority to create equitable exceptions to jurisdictional requirements." *Bowles*, 551 U.S. at 214; *Kontrick*, 540 U.S. at 452 ("Only Congress may determine a lower federal court's subject-matter jurisdiction"). Because the Court's power to hear a case is granted by Congress, Congress alone may determine "the manner in which the case shall be brought," and courts "ha[ve] no power to dispense with any of these provisions, nor to change or modify them." *United States v. Curry*, 47 U.S. 106, 113 (1848).

3. This Court's Repeated Waiver Of The AIA Confirms That The AIA Is Not Jurisdictional

The AIA cannot be jurisdictional because, in addition to subjecting the statute to equitable exceptions, the Court has permitted waiver in at least three cases. Because federal courts "must raise and decide jurisdictional questions" on their own, *Henderson*, 131 S. Ct. at 1202, waiver of a jurisdictional limitation is "impossible." *Bowles*, 551 U.S. at 216. Yet the Government repeatedly has argued that it might waive the AIA defense, and this Court repeatedly has proceeded to the merits.

In 1937, the Government explained its view that the AIA "may be waived by an appropriate officer of the United States." Br. for Pet'rs Helvering & Welch at 31, *Helvering v. Davis*, 301 U.S. 619 (1937) (No. 36-910). In *Helvering*, the First Circuit held that payroll taxes violated the Tenth Amendment. 301 U.S. at 638. Before this Court, the Government argued, not that the First Circuit's decision was premature, but that the Court "should render a decision on the merits" because "waiver [of the AIA] is certainly within the power of the appropriate officers of the Government[.]" Brief for Petioners Helvering & Welch at 28, 31, *Helvering*, 301 U.S. 619 (1937) (No. 910). This Court did just that.

Helvering is not an anomaly. This Court has accepted the Government's waiver of the AIA in other pre-enforcement challenges to federal taxes. In *Sunshine Anthracite*, the plaintiff brought suit "praying for a temporary injunction suspending and restraining the assessing and collecting or attempting to assess and collect" two taxes imposed by the Bituminous Coal Act of 1937. Statement as to Jurisdiction at 11, *Sunshine Anthracite*, 310 U.S. 381 (1940) (No. 804). Even though the prayer for relief fell within the terms of the AIA, the Government "expressly waived" its defense under the AIA, and the Court decided the case on the merits. *See* Brief for the Appellee at 9, *Sunshine Anthracite*, 310 U.S. 381 (1940) (No. 804). Even earlier, in *Pollock*, the Government "explicitly waived" any question as to the AIA during oral argument. 157 U.S. at 554. Once again, the Court rendered a decision on the merits.

Waiver is not an attribute of a jurisdictional statute. This series of cases demonstrates that this Court has long considered the AIA to be non-jurisdictional. *See Bowles*, 551 U.S. at 216 ("[I]f a limit is taken to be jurisdictional, waiver becomes impossible[.]").

At the end of the day, this Court's precedents from *Standard Nut* to *Williams Packing* to *Helvering* foreclose any argument that the AIA is jurisdictional. Under all of these cases, the federal courts retain discretion to exercise jurisdiction in circumstances not contemplated by the plain text. Because the AIA is not "absolute," *Standard Nut*, 284 U.S. at 509-10, it is not jurisdictional.

CONCLUSION

The conscience rights asserted by the plaintiffs in these consolidated cases raise important questions about fundamental liberty interests. Because this Court's cases teach that the AIA is not jurisdictional, it need consider the AIA no further, and may reach the weighty constitutional issues implicated by the contraception mandate.

Respectfully submitted,

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January 28, 2004

AMICUS
CURIAE
BRIEF

Nos. 13-354 & 13-356

In the

Supreme Court of the United States

KATHLEEN SEBELIUS ET AL., *Petitioners*
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP., ET AL., *Petitioners*
v.
KATHLEEN SEBELIUS, ET AL., *Respondents*

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

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BRIEF OF THE INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA WOOD SPECIALTIES, ET AL.

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QUESTIONS PRESENTED FOR REVIEW

Whether the religious owners of a family business, or their closely-held business corporation, have free exercise rights that are violated by the application of the contraceptive-coverage Mandate of the Patient Protection and Affordable Care Act of 2010 ("ACA").

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INTERESTS OF *AMICUS CURIAE* [1]

The International Conference of Evangelical Chaplain Endorsers (ICECE), as its name implies, is a conference of evangelical organizations whose main function is to endorse chaplains to the military and other organizations requiring chaplains.[2] ICECE was organized specifically to identify, define, and address issues of particular importance to evangelical military chaplains and the military personnel they represent. ICECE's most important issue is the protection and advancement of religious liberty for chaplains and all military personnel.

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[1] No counsel for any party on this brief in whole or in part, and no counsel or party made a contribution intended to fund the preparation or submission of this brief. No individual other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission. The parties have consented to the filing of this brief.

[2] Endorsement is the process by which a DOD recognized religious organization certifies that its clergy or religious leader meet the required education, training and experience and is qualified to provide religious ministry to the endorsing agents military members; facilitate the free exercise of other military personnel, dependents and other authorized DOD personnel, and care for all service personnel. *See* DOD Instruction 1304.28 (describing endorsement process and criteria).

ICECE recognizes that a conscience that honors the rule of law and the worth of the individual is an important product of free exercise. It is the free exercise of religion that both supports and forms a mature conscience and sustains military personnel in the unique and challenging rigors of the military profession.

Nurturing the spiritual aspect of an American military person's life is, in and of itself, a compelling and critical secular objective. Gen. George C. Marshall, reflecting the opinion of many military leaders, stated it was the soldier's spiritual aspect that sustained the soldier in his duty.

> I look upon the spiritual life of the soldiers as even more important than his physical equipment...the soldier's heart, the soldier's spirit, the soldier's soul are everything. Unless the soldier's soul sustains him, he cannot be relied upon and will fail himself and his commander and his country in the end. It's morale, and I mean morale, which wins the victory in the ultimate, and that type of morale can only come out of the religious fervor in his soul.

Gen. George C. Marshall, quoted in JCS Joint Pub 1-05, Religious Ministry Support for Joint Operations, 1996.

The issues specifically identified by the competing petitioners and respondents concerning the reach and legality of the Department of Health and Human Services Mandate (the "HHS Mandate") under the ACA address whether " religious owners of a family business, or their closely-held business corporation, have free exercise rights" or can assert a claim under the Religious Freedom Restoration Act (RFRA) when they enter the public arena and engage in commercial business.

The Court may avoid the constitutional Free Exercise question resolving the RFRA issue and find it applies to business persons as well as individuals. But if it does not, the Court will have to address the underlying Free Exercise issue which is of great concern to ICECE because of its impact on the military services, its chaplains, and people of faith chaplains represent and the military personnel they serve.

For ICECE, the problem is not merely whether the government can force a civilian for-profit organization organized and run on faith-based principles to violate its owners' religious principles in order to comply with onerous regulations violating the very core of the business owners faith.

The underlying issue is whether the Constitution grants the government power to (1) limit the scope of the Free Exercise guarantees to a person's home, church, or religious ministry; (2) determine for all citizens the appropriate matters of conscience, and (3) punish those whose lives are governed by conscience as formed by their faith when their faith and conscience are in conflict with the government's approved definition of the correct conscience, including no conscience at all.

This answer has great and serious implications in the military, which this Court has recognized is a special society which demands an obedience unknown by civilian society and to whom the judiciary grants great deference. *See Parker v. Levy*, 417 U.S. 733, 743-44 (1974); *Chapell v. Wallace*, 462 U.S. 296, 299-301 (1983). If the government can usurp the role of religion in becoming the ultimate referee of what is right and wrong and therefore define the only acceptable standard for conscience or matters of conscience, the Constitution has become a sham, and the Court invites the military to become instruments of tyranny to replace the rule of law.

As explained herein, the heart of this issue is the meaning of "free exercise": is it merely something that takes place in the mind of the adherent or within the walls of the adherent's home or church, or does it encompass the application of those faith principles to the way an adherent lives? Consequently, The Court's decision in this case has implications and applications far beyond the facts and situations presented in the competing briefs.

CONSTITUTIONAL PROVISIONS

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof .....

SUMMARY OF ARGUMENT

1. The history of the founding of this nation and the adoption of the Constitution show the term "free exercise" as it applies to religion was meant to preserve the widest scope of religious liberty and allow its enjoyment in every aspect of national life. In adopting the Constitution, the nation established a government of limited powers and specifically excluded the government's power to interfere with the exercise of religion, in all its forms, except that which threatened grave harm to the nation.

2. The HHS Mandate attacks both free conscience and destroys the free exercise of religion. The Framers recognized that conscience and free exercise of religion were intertwined and dependent on each other. The HHS Mandate seeks to replace the free exercise and conscience of the family business owners before this Court with the government's own transient view of free exercise and conscience. The government has no authority to do this.

3. The government has neither authority to define the appropriate standards of right and wrong that form individual conscience nor redefine the natural and historical meaning of Free Exercise.

ARGUMENT

I. THE FOUNDERS VISION OF FREE EXERCISE OF RELIGION MEANT THE ABILITY TO APPLY THE PRINCIPLES OF ONE'S FAITH IN EVERY ASPECT OF THEIR LIFE INCLUDING BUSINESS

A. The Government Presents a Distorted Picture of Religion's Impact on America

The government's representation that American society limited free exercise of religion to its churches or other limited venues, *see* U.S. Brief ("USBr.") at 21, and religion played no part in business, improperly implies religion had a limited influence on and in American civil society. That suggestion is inaccurate, misleading and deceptive. Even a cursory study of history shows Americans understood and fully embraced the liberty right of exercising one's faith in the pursuit of life and happiness.

The statements by those closer to the time of the Constitution's passage are surely more reflective of the nation's view towards and understanding of the importance of religious liberty.

In the 1850s citizen groups made at least four petitions to Congress to do away with chaplains for both Congress and the Armed Forces. Congress soundly rejected each of those petitions, recognizing the importance of prayer and faith in this nation's life, its leaders, and particularly in the history of its military forces. Congress's past judgments reject the government's attempts today to recast or reinvent history and would appear applicable to the issues before the Court.

> Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience. *** But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy. Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous

cause which they commended to his care.[3]

Congress also cited the obligation to provide the means for its military personnel to exercise their freedom of religion, and specifically cited the difficulty of doing that in the Navy whose ships were often in ports presenting sailors language and cultural difficulties.[4]

In rejecting those efforts, Congress pointed to the importance of fath and prayer in our history. Congress cited the Revolutionary War and Ben Franklin's speech to the Constitutional Convention when it was on the verge of failing. Mr Franklin reminded the delegates of God's blessing on the nation in response to Congress's and the nation's prayer:

> In the beginning of the contest with Great Britain, when we were sensible to our danger, *we had daily prayer in this room for divine protection.* Our prayers, sir, were heard, and they were graciously answered. All of us who were engaged in the struggle must have observed frequent instances of a superintending Providence in our favor.

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[3] S. Rep. 376, p. 4., 32d Cong., 2d Sess. (1/24/1853).

[4] H. Rep. 171, p. 3-4, 31st Cong., 1st Sess. (3/13/1850); *see also* H. Rep. 124, p. 8, 33d Cong., 2d Sess. (3/27/1854).

> To that kind Providence we owe this happy opportunity of consulting in peace on the means of establishing our future national felicity. And have we not forgotten our powerful friend? Or so we imagine that we no longer need his assistance?
>
> I have lived sir, a long time, and the longer I live the more convincing proofs I see of this truth – *that God intervenes in the affairs of men*[.][5]

Congress also took pains to point out the importance of chaplains, prayer and faith to those who fought and won America's battles. "Naval commanders have often desired to have their crews unite in devotions before commencing action."[6] These historical examples and manifestations of religion's importance and impact were not aberrations, rather they expressed they sprang from the hearts of people accustomed to practicing their faith in their daily lives.

The government completely ignores the impact of faith in the nation's settlement, the pre-religious revival or awakening movements that prepared the foundation for the War of Independence, the insistence on a Bill of Rights to guarantee religious liberty as a condition for ratification of the Constitution, numerous revivals that took place after the nation's founding, the impact of religion and conscience in fighting the evils of slavery, the influence of well-known revivalists such as Billy Sunday, the temperance movement and even the modern-day civil rights movement which was led, supported and fought by men of faith.

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[5] H. Rep. 124 at 3-4 (quoting Elliott's Debates. vol.5, p. 253) (emphasis in the original).

[6] *Id.* at p. 8.

B. The Constitution Withdrew the Power of the Government to Interfere with the Free Exercise of Religion Except in the Most Egregious Circumstances

The Government seeks to exercise a power it does not have, to not only interfere with if not suppress the free exercise of religion, but also to compel speech these religious families would not otherwise speak through their payments to support practices they abhor on religious grounds. *See Riley v. Nat'l Fed. Of the Blind of N.C, Inc.*, 487 U.S. 781, 795 (1988) (laws mandating speech are considered "content-based regulations" subject descriptor scrutiny). This Court has made it clear the government has no such power because the Constitution created a government of limited powers and withheld the power to interfere with free speech and the free exercise of religion from the power granted to the government. The constitutional prohibition against interference with the free exercise of religion has no exceptions or qualifications granting the government power to interfere with or restrict religious exercise in all areas outside of the church, home, or the individual's mind.

As the discussion below shows, this Court recognized only the most compelling governmental reasons justified minimal intrusion on the broad right protected by the words of the Constitution prior to *Smith v. Employment Division,*494 U.S. 872 (1990).[7] Those principles and facts are illustrated by *West Virginia Board of Ed. v. Barnette*, 319 U.S. 624 (1943), whose underlying facts and legal issues are not unlike this case. *Barnette* clearly illustrates the error of the United States's erroneous assertions and arguments.

The plaintiff, a Jehovah's Witness, sued the state education board for an injunction protecting his children from having to salute the flag as required by the board's regulation. The practice was enforced by expulsion from school. *Barnette* is highlighted by the fact it involved a challenge by a Jehovah Witnesses family to saluting the flag during the nation's desperate struggle during the early days of World War II when nationalism and patriotism were at their height. *Barnette* also required the Court to overrule an earlier case *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), which had earlier found the same practice constitutional.

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[7] *Smith* does not apply here. As Conestoga Wood Specialties and Hobby Lobby have made clear, the mandate's many exceptions show the ACA is not neutral.

Barnette began its analysis with the fact the "freedom asserted by these appellees does not bring them into collusion with rights asserted by any other individual." *Id.* at 630. That is true here, those families protesting the HHS mandate are not in conflict with the rights asserted by other citizens. "Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between [alleged] authority and rights of the individual." *Id.* The asserted authority is the right to drive the Free Exercise Clause out of the area of commerce. As stated, ICECE's concern is where does that authority logically stop if the Amendment's clear words of prohibition can be so easily ignored as the government argues here.

Barnette noted requiring compliance with the government directive, there, a hand salute, also required "the individual to communicate by word and sign his acceptance of the political ideas [the practice] bespeaks", a form of coercion "well known to the framers of the Bill of Rights." *Id.* at 633. Paying for abortifacients these business families find deeply morally objectionable and contrary to their religious beliefs, is no less the same symbol of acceptance here. In effect, the government argues "a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to honor what is not in his mind." *Id.* at 634. As in *Barnette*, "religion supplies [the families'] motive for enduring the discomforts of making the issue in this case", *id.*, and it is the scope the Free Exercise Clause that protects that religious expression.

> Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today ... is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

Id. at 636-37.

Barnette expressed the need for "scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes", *id.* at 637, which seems to be the United States' position because its argument clearly "discounts" the Free Exercise Clause and its historical linkage to conscience. *Barnette* clearly rejected such a concept.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty,

> and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Id. at 638.

The Court distinguished the state's right to regulate a public utility, not unlike the situation here, but emphasized"freedoms of speech and press, assembly and of worship, may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." *Id.* at 639. The record fails to address any grave and immediate dangers.

Here, the government asks the Court to sanction the suppression of free exercise despite the lack of a clear-cut congressional finding that the issue at hand, providing morally objectionable abortifacients, is a necessary and compelling government objective. Instead, the HHS mandate rests on an executive officer's judgment that ignores the moral controversy over the subject of abortion, including the confused debate and conflicting public statements by the executive and party leaders as to whether the ACA would provide funding for abortions. Nothing in the ACA itself mandates such a requirement and many members of the Congress that passed the ACA lost in the next election. Hardly a ringing public endorsement.

Barnette recognized the Bill of Rights confirmed "that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs." *Id.* at 639-40. And while conditions change, the Court's responsibility to address the infringement of liberty remained. *Id.* at 640. The Court was not afraid limiting government and protecting the "freedom to be intellectually and spiritually diverse or even contrary" would somehow result in society's disintegration. *Id.* at 641.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 642.

Here, the HHS seeks to prescribe what is orthodox and unorthodox in religion and preclude and disrespect the free exercise of religion with which it disagrees. *Barnette* requires this alleged authority be rejected. "Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the' severest contests in which I have ever been engaged.'", *Id.* at 646 (Murphy, J. concurring) (citation omitted).[8]

ICECE is concerned the government will use the same flawed rational and concepts it argues to justify overriding long-established principles of free conscience and the Free Exercise Clause's clear prohibitions to fundamentally transform the free exercise of religion in the military. Current religious contrivers and conflicts, heretofore unknown in the military, confirm those concerns.

II. THE HHS MANDATE IS A DIRECT ATTACK ON FREEDOM OF CONSCIENCE AND MEANINGFUL FREE EXERCISE

The HHS Mandate's efforts to force the families operating Hobby Lobby and Conestoga Wood Specialties to violate their conscience under force of law is an effort to force the Secretary's own fervently held beliefs upon the families' conscience. Absent some compelling purpose which the record fails to disclose, this is unconstitutional. The HHS Mandate is hostile to religion and seeks to replace liberty with toleration, a concept the Constitution rejected.

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[8] Justice Murphy stated he had "no loftier duty or responsibility to uphold that spiritual freedom ['which the Constitution specifically shelters"] to his farthest reaches." *Id.* at 645.

A. The Constitution's History Shows Conscience Was a Critical Element of its Structure and the Foundation of Liberty

The classical Greek understanding of "conscience" referred to knowledge, not simply a knowledge of facts, but a knowledge of one's own history (reflexive knowledge), which involved "evaluations and judgments about the criterion of good and evil." Colin Brown, "Conscience" 348, *The New International Dictionary of the New Testament*, Vol. 1. (H. C. Hahn ed., Zondervan Publishing Co. 1975).

> "Conscience is the moral sense; the faculty of judging the moral qualities of actions, or of discriminating between right and wrong; particularly applied to one's perception judgment of the moral qualities of his own conduct, but in a wider sense denoting a similar application of the standards of morality to the acts of others. The sense of right and wrong inherent in every person by virtue of his existence is a social entity[.]

Black's Law Dictionary 159 (Abridged. 5th ed. 1983).

Conscience is inextricably linked to morality, right and wrong, good and evil. It is an internal alarm system that warns when questionable decisions are being considered or made; it sounds off loudly when one becomes involved in actions inconsistent with one's core beliefs. Its role is to encourage superior or non-destructive behaviors, thereby protecting individuals, couples, families, communities and a nation from decisions and actions that cause harm while it compels each individual or group toward decisions and actions producing positive outcomes. The conscience "convicts, reproves and exposes"[9] inferior or destructive behaviors, offering a person the opportunity to change one's mind in order to learn from or avoid negative and harmful consequences. The Framers knew conscience was intended to be an innate and essential ally in the human struggle to live with oneself and others securely, peacefully and profitably. They wanted a good and clear functioning conscience to be the safety-net for human existence and its quest for freedom and liberty.

James Madison addressed his position on the freedom of conscience in discussions with members of the General Assembly about giving the Anglican Church in Virginia legal status over other denominations, among them the Baptist, Mennonites, and Quakers who also lived in Virginia and had already endured religious persecution from the larger Anglican community, such as not being able to preach without permission. Madison feared using the force of law to establish one denomination over another would intensify religious conflicts. The idea that persons of faith would influence and participate in a republican government was a given, but he and others wanted that participation without religious conflict, favoritism or division that would underline the unity of a common effort and exercise of liberty. The Signers of the Declaration, despite their different faiths, had worked in a unity of spirit respecting their religious differences.

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[9] H. C. Hahn, On the Understanding of Conscience by Philo, 349

Madison penned his June 20, 1785, *Memorial and Remonstrance Against Religious Assessments* to plead against legislating conscience, *i.e.*, individual core beliefs, the inevitable result of establishing a state church. Madison's treatise provided fifteen reasons not to use the force of law to give any religion existence or credibility.

Madison believed each individual comes into the world as a free and independent person with natural rights that are not to be abridged. Therefore, government's role is to keep each person in this state of being by not enacting legislation that dictates or mandates core religious (which would include atheist, agnostic, or secularist) beliefs, but rather protects the freedom of conscience as each free person lives in the context of every others person's right to life, liberty, and the pursuit of happiness.

The Declaration of Independence and the Bill of Rights were meant to be the barriers protecting and defending freedom of conscience, providing the best framework within for a nation to organize in order to pursue and develop a civil, peaceful and prosperous society. Any government that is guilty of encroachment upon these basic rights "exceed[s] the commission from which [it] derive[s] [its] authority, and are tyrants. The people who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves." James Madison, *Memorial and Remonstrance Against Religious Assessments*, 30-31, Writings (The Library of America, 1999).

Thomas Jefferson reflected on the negative effect of government coercion in matters of conscience; it "makes one half the world fools" for thinking that government can resolve issues of conscience and create a civil society by force of law, "and the other half hypocrites" because they are forced to live in a matter contrary to the dictates of conscience. No matter the religion or philosophy one espouses, if it is favored or disfavored by force of law, "millions of innocent men, women, and children, since the introduction of [enter whatever religion/philosophy you want], have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch toward uniformity". Thomas Jefferson, *Jefferson: Writings*, 286, in Notes on the State of Virginia (The Library of America, 1984).

Madison recognized the legal establishment of Christianity had been unproductive. "What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry, and persecution." Madison, Writings 32. Without a free and active conscience in a society, beliefs and their adherents eventually become corrupted and dangerous to civil society. The still small voice, freely expressed among a multitude, has the power to prevent, adjust, or abolish what would otherwise become disastrous courses of action. The common thread that links religions and secular philosophies with tyranny, torment, and terror is the suppression of matters of conscience by force of law. Establishment of one core set of beliefs by law usually results in the suppression of others, as HHS seeks to do here.

A functioning and productive society requires a balanced relationship between law and conscience. Our constitutional society requires law to give deference to conscience. Madison's first argument against using the force of law to grant the Anglican tradition superiority over others explained the dictates of conscience must be free from the forces of law and one's conscience must not be granted legal authority over another's conscience. If a conscience is to be persuaded in another direction, it must be swayed by intellectual argument and/or by the consistencies and values emanating from another's conscience, *i.e.*, core beliefs in action.

> It is a fundamental and undeniable truth 'that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directled only by reason and conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man, and it is the right of every man to exercise it as these

> may dictate. This right is in its nature *an unalienable right*. It is unalienable, because the opinions of men depending only on the evidence contemplated by their own minds cannot follow the dictates of other men. It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. *The duty is precedent*, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governour of the Universe. And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the General Authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that *Religion is wholly exempt* from its cognizance"

James Madison, Memorial and Remonstrance against Religious Assessment, *Writings* 30 (Emphases added).

The founding generation's desire was to resolve a millenniums old human struggle with tyranny and violence by creating what the Newport, RI, Jewish community would describe as a nation which "to bigotry gives no sanction and to persecution no assistance—but generously affording to all liberty of conscience, and immunities of citizenship—deeming everyone, of whatever nation, tongue, or language equal parts of the great governmental machine." Character Counts, Leadership Qualities in Washington, Wilberforce, Lincoln, and Solzhenitsyn, 58 (Os Guinness, ed., Baker Books, 1999). President George Washington's response (quoted later) to this letter concurred wholeheartedly.

The consequence of diminishing conscience by the force of law is the gradual fleecing of republican democracy until freedom is lost. Some form of totalitarianism will take root and eventually be established because it is conscience that protects liberty. Understanding the future possibility of this undesired fate, the Founding generation provided the spawning nation with three unalienable principles in the form of God-given rights to all to form the foundation upon which a prosperous, productive civil society would be built: life, liberty, and the pursuit of happiness.

The Declaration of Independence laid these principles out before the American people, not only as a reason to separate an historic bond from one nation, but to establish the standard by which a new nation would be formed and given the opportunity to survive. The framers of the Declaration of Independence and the United States Constitution did not believe God-given and, therefore, unalienable rights were safe simply because the first American generation established them. They created the framework to provide both the means and incentives to protect life, liberty, and pursuits that spring from one's own beliefs, talents and gifts. That relied on protecting conscience in a manner to keep it from being victimized and silenced with the result that favoritism would replace justice and incivility and oppression of every kind would replace righteousness. An effective conscience was necessary to ensure politicians and judges respected human rights and were servants of the people. The alternative result flowing from a lack of conscience is rule by ideological edicts, purveyors of oppression, and consumers of property and wealth while the people over whom the new elites rule live lives legally forced into hypocrisy.

B. The HHS Mandate Seeks To Replace Religious Freedom with Toleration

The constitutional structure founded on unalienable rights that shaped America is incompatible with totalitarianism, fascism, communism, socialism and radical Islam. These cannot survive in an environment that respects all human life, freedom of thought and the innovation and creativity of the human spirit because these essential distinctive qualities must be repressed for the sake of the philosophy and ideology. These repressive "isms" cannot allow free conscience, but depend for their very existence upon the destruction of competing values and the maintenance of a cold, insensitive conscience to preclude all challenges.

America's representative democracy, like any government system, must hold its citizens together with some unifying theme. That unifying theme is "liberty" for all and rests on the three unalienable rights the Declaration of Independence proclaimed and which the War of Independence established, establishing equality before the law for all. But as previously shown, the Founders understood that the maintenance of those values depended upon a free conscience and the freedom to form that conscience through free speech and religion. The danger the Founders foresaw underlies this case because government seeks to replace and therefore squelch individual conscience with its own view of what is right and wrong, unhinged from historic religious or moral principles and reinforced by the force of law. Alexander Solzhenitsyn warned on this unhappy state and its consequences.

> There is a disaster, however, which has already been under way for quite some time. I am referring to the calamity of a despiritualized and irreligious humanistic consciousness. To such consciousness, man is the touchstone in judging everything on earth -- imperfect man, who is never free of pride, self-interest, envy, vanity, and dozens of other defects.

Alexander Solzhenitsyn, *A World Split Apart*, June 8,1978, 327th Harvard University Commencement Address. The ultimate product of such a "despiritualized and irreligious" consciousness is a society where the crimes addressed by the Nürnberg and Tokyo War Crimes Tribunals and illustrated by The Rape of Nanking, Auschwitz, the Katyn Forrest Massacre, Malmedy, Me Lai (Vietnam), Abu Grab (Iraq) become the norm.

During contemplation of the free exercise of religion clause for the Virginia Constitution, James Madison helped in its final phrasing by addressing his concern of the use of the word "toleration", which he viewed as an impediment to the liberty of conscience. George Mason had suggested that the language read: "all men shou'd enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience." Ralph Ketcham, *James Madison: A Biography,* 72 (American Political Biography Press) (1971). Having been influenced by Thomas Paine, who believed that tolerance was nothing more than the imitation of intolerance, both being despotisms, Madison believed that "tolerance" was inherently a calculated offense deployed to belittle and threaten less influential faiths. Therefore, Madison worked to have the word stricken from the Constitution.

His rewrite, which was adopted and included in the Virginia Constitution, reads: "all men are created equally entitled to the full and free exercise of religion according to the dictates of Conscience; and therefore that no man or class of man ought, on account of religion to be invested with peculiar emoluments or privileges." *Id.* at 72. This meant that equal expressions of faith and the dictates of conscience could not be undermined by force of law. "The change is crucial because it made liberty of conscience a substantive right, the unalienable privilege of all men equally, rather than a disposition conferred as privilege by established authorities." *Id.* at 73. Religious beliefs were not be "put up with" or tolerated – they are the equal expressions of conscience by equal and free men, one not better than another. Though the expressions of a free conscience may not be equal in value or be accepted by the majority, they are, nonetheless, able to be held and practiced privately and within one's own "conscience group," without the force of law either pro or con, and welcomed in the public square where they can be debated and accepted or rejected by others.

The history of the HHS Mandate shows it is a perfect example of toleration at work. HHS established a standard of orthodoxy that was supposed to apply to all citizens and all businesses but then granted numerous exemptions for a variety of reasons. Whether the exemptions are based on party loyalty, paybacks for election or legislative support, favoritism or mere whim of Executive Branch officials, the result is the same. The Secretary tolerates some groups, *i.e.*, has favorites such as supporting labor unions, and finds Hobby Lobby, Conestoga Wood Specialties and others intolerable, disfavored or enemies because they hold dearly to traditional and historic religious views. It requires those disfavored because of their religious beliefs, which control their actions, to adhere to the standard enforced with draconian fines and penalties that threaten the existence of these family businesses and those they support and employ. This is representative of rule by tyrants.

C. The HHS Mandate Is an Unconstitutional Attack on Free Conscience and Free Exercise

The above discussion shows that conscience and free exercise were inseparable. Religion was supposed to inform the conscience and the conscious was supposed to direct the individual's action in conformity with what it knew in the right or wrong. Both were essential to the preservation and exercise of liberty.

The Framers recognized there is only one indispensable and revealing caveat to the liberty promised under our Constitution — ideas, whether religious or secular, should not be permitted to endanger the "preservation of equal liberty or the existence of the State." Ketcham, *Id*. at. 72 (quoting Madison). Those philosophies/faiths, which reject the requisite principle, that all men are equal and free to live by the dictates of a conscience, are a clear and present danger to the Republic and, therefore, should *not be tolerated by the government,* especially the judiciary, which is primarily empowered to protect the unalienable rights of its citizens.

George Washington echoed James Madison's concern over the use of the word "tolerance" and the the important role of conscience in a statement he read to the Newport, RI, Jewish community.

> All [the citizens of the United States] possess alike liberty of conscience and immunities of citizenship. *It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their own natural rights*. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection demean themselves as good citizens, in *giving it on all occasions* their effectual support

Os Guinness, 59, (emphases added).

The Court must not tolerate one branch of the government's claim to rule in a way that threatens America's citizenry's natural and protected rights. The HHS Mandate, in effect, rejects the underlying principles espoused in the Declaration of God-given unalienable rights, and assumes for itself a power the Constitution does not by its words, history or spirit grant to any official or branch of government. See

The HHS Mandate assumes for itself the right to establish the standard for conscience hostile to religion and those who respect life. The HHS Mandate does not enhance liberty but crushes, if not kills, it by substituting HHS's conscience for these family members and their businesses, without clear congressional authorization to violate the religious liberty principle that was a prerequisite to the Bill of Rights and the precondition for ratification of the Constitution.

As shown in section I above, the free "exercise" of religion meant that the dictates of conscience, as formed by religious principles, were to be expressed in the lives of ordinary citizens. The HHS Mandate seeks to eliminate both the word "free" and "exercise" from the Constitution, replacing them with "private exercise" whose scope has yet to be determined as an exercise of toleration by somebody official, rather than the country through a constitutional convention. This is anathema to America's history, culture, and vision.

A mature conscience is vital for the continued protection of life, liberty, and the pursuit of happiness. It is a morally sensitive and necessary component of every human being if he or she is to be spiritually, emotionally and physically productive in life and genuinely free from human nature's natural inclination to despise moral authority. When conscience is denied expression or squelched by government fiat as HHS seeks to do here, it remains or becomes immature and is, therefore, unable to protect as divinely intended. This case illustrates that once government legislatively creates its own standard for conscience, bigotry and persecution follow. To survive as a vital constitutional democracy in a world of disparate thought, *freedom of conscience must be protected*. The HHS Mandate must be rejected as exceeding the Constitution's grant of authority.

III. THE UNCHECKED AUTHORITY TO DEFINE THE APPROPRIATE STANDARD FOR CONSCIENCE AND RESTRICT FREE EXERCISE RIGHTS IS UNCONSTITUTIONAL AND DANGEROUS

A. Free Exercise Means the ability to Practice One's Faith Without Restriction

Inherent in the government's argument are two dangerous concepts. The first is "free exercise" does not mean free exercise as that term has historically been known and understood. Rather, now it means the actual exercise or practice of one's faith in everyday life is not free but subject to government control or sanction.

Second is the concept that a citizen can disregard what his religion tells him he should not do in his everyday life in the workplace. The government argues devout Christians should now stifle their conscience when it conflicts with the government's determination of what is **now** right and wrong, even if the forced activities defining what is now "right" are not matters of national security or other well recognized compelling interests.

Such concepts would be unknown to the Founders who recognized that faith was intertwined with conscience and "exercise" meant that one lived in accord with what one believed. The Signers of the Declaration of Independence affirmation of their "firm reliance on the protection of divine Providence" was not an exercise of mere civic religion, ceremonial Deism or a gratuitous statement for publicity purposes. When they placed their names of that document, America had a ragtag Army, some ships but no Navy, no arms industry nor did Congress have a ready source of funds, friendly financial backers with deep pockets or international support. The Signers and the colonists they represented challenged the superpower of their day who had a professional Army, a large Navy, and a Parliament willing to spend money, including hiring mercenaries, to suppress a rebellion by bunch of upstarts who didn't like having their rights as Englishmen violated.

The Signers could not have foreseen that it would be the French fleet which kept General Cornwallis from being either reinforced or being evacuated from Yorktown, VA. Yet, they had no other source of hope except their faith and knowledge of the Divine Creator whom they believed endowed them with the unalienable rights of life, liberty and the pursuit of happiness. They trusted that God would intervene and find a way for them to enjoy the blessings of liberty. In the end, they were convinced God did act on their behalf, as Ben Franklin reminded the Constitutional Convention.

To require Christians to violate their conscience and religion is clearly unconstitutional because it makes government hostile to religion in violation of the Establishment Clause. To be a follower of Christ means there is no separation between what one believes as revealed in the Scriptures and the way one is to live out his or her life. Religious persons are presumed to follow the dictates and practices of their faith.

The teachings of Paul, John, and the other apostles make it clear that Christians were to transform their thinking, to live lives in accordance with God's word and to oppose the evil works of darkness. The families and persons who are the object of the government's wrath here are attempting to live out their faith as many before them have done.

It is destructive of society to redefine the free exercise of religion as only that which takes place inside a church or the privacy of one's mind or family. It is destructive because it eventually leads to an empty conscience were right and wrong have no difference.

B. Not to protect the Right to Free Exercise Is Destructive of the Military Conscience

Conscience is particularly important in the military because it provides the internal discipline which produces loyalty to the chain of command and the nation, and stability in the midst of great stress.

Empty consciences are without moral restraint, have produced the incidents cited in section II.B and illustrate the depravity man is capable of when the internal guides have been erased in support of some national objective or destructive philosophy.

The ability to arbitrarily decide which laws to enforce and which to ignore have great implications for the military and its culture. ICECE's concern is where the government draws the line in terms of behavior, speech, and practices. If the government can exclude religion from the public square in the area of commerce and business, there is nothing to stop it from excluding free exercise in other areas, particularly in the military.

The issue of conscience protection in the military for both chaplains and military personnel was of such concern that Congress passed section 533 of the 2013 National Defense Authorization Act[10] (NDAA) and similar protections in the 2014 NDAA in an effort to protect the right of conscience for chaplains and service personnel. Numerous examples abound of threats to religious liberty. An Air Force officer was told to take a Bible off his office desk because it might "offend" someone. It is unusual for the display of a Bible to be contrary to good order and discipline. An article written by chaplain for a post newspaper was removed when an atheist was offended because the article explained the origin of the phrase "no atheists in foxholes." *See* frc.org/clearpresentdanger (A Clear and Present Danger: The Threat to Religious Liberty in the Military. December 12, 2013) (listing incidents involving threats to religious liberty in the military). ICECE has been involved in these issues and is currently addressing an incident of censorship of a chaplain's sermon and other questions about discrimination because of faith issues.

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[10] Title 10 Chapter 53

The fact that the government can redefine the term "free exercise" and yet ask military to give their lives defending what is an empty right undermines trust in the system and confidence in the nation's leaders, including military, civilian, and judicial.

The military by nature engages in violent acts of destruction and places its personnel in situations which require not only discipline, but consciences reflective of the concept of ordered liberty enshrined in the Constitution. The nation has historically relied on men of conscience to do the right thing. It is in the interests of the nation that conscience, which determines right and wrong, be reinforced so the power to destroy is always used under the control of authorized leaders acting under law and not abused.

It is a grave risk to the rule of law and order of society to adopt policies which allow the conscience of both military and civilian to be dulled by validating laws forcing them to violate that conscience. The result for the military when conscience is dictated by the state and religion excluded as a source or reference are acts which resulted in men and women being labeled war criminals. It breeds only contempt for those who initiate and perpetrate such a system given our national history and culture.

CONCLUSION

The meaning of "free exercise" is at the heart of this case. Is it merely something that takes place in the mind of the adherent or within the walls of the adherent's home or church, or does it encompass the application of those faith principles to the way an adherent lives? ICECE urges the court to strike down the HHS Mandate because it violates the Constitution by restricting conscience and prohibiting the Free Exercise of religion.

Respectfully submitted,
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BRIEF

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In the

Supreme Court of the United States

KATHLEEN SEBELIUS ET AL., *Petitioners*
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP., ET AL., *Petitioners*
v.
KATHLEEN SEBELIUS, ET AL., *Respondents*

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

BRIEF OF *AMICI CURIAE* J.E. DUNN CONSTRUCTION GROUP, INC. AND J.J. WHITE, INC. IN SUPPORT OF HOBBY LOBBY STORES, INC. AND CONESTOGA WOOD SPECIALTIES CORP.

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INTERESTS OF AMICI[1]

J.E. Dunn Construction Group, Inc. ("J.E. Dunn") is a family-owned construction company based in Kansas City, Missouri. Since its founding in 1924, J.E. Dunn has grown into one of the leading general building contractors in the nation with 20 office locations across the country and roughly 1,200 employees. Members of the Dunn family own 90% of the outstanding shares of J.E. Dunn and operate the company according to the moral and religious teachings of the Catholic Church. These religious values have led J.E. Dunn to, among other things, annually commit more than 10% of its pre-tax earnings to charities and to direct that its insurance policies not cover any drugs, such as Plan B (the "morning after pill") and Ella (the "week after pill"), that the Dunns believe, based on the teachings of their Catholic Christian faith, act as abortifacients. The contraceptive coverage mandate of the Patient Protection and Affordable Care Act ("ACA") forces J.E. Dunn and the members of the Dunn family to violate their sincerely held religious beliefs or face exorbitant fines and penalties.

J.J. White, Inc. ("J.J. White") is a single-source, multi-trade contractor with operations in the mid-Atlantic and mid-Western regions of the United States. Since its founding in 1920, J.J. White has been dedicated to the Blessed Virgin Mary of Lourdes, reflecting the deep religious convictions of the White family, which continues to own and operate the company. In implementing this faith in its business, J.J. White has been actively involved in community service and establishing policies that are consistent with its Catholic Christian heritage, such as excluding insurance coverage for drugs that act as abortifacients. The contraceptive coverage mandate now requires J.J. White to provide no cost insurance for such drugs, which directly contradicts the religious views of J.J. White and its owners.

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[1] The parties have consented to the filing of this brief. As required by Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

As a result, J.E. Dunn and J.J. White have a direct interest in the contraceptive coverage mandate at issue in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) ("*Hobby Lobby*") and *Conestoga Wood Specialties Corp. v. Sect. of U.S. Dept. of Health and Human Servs.*, 724 F.3d 377 (3d Cir. 2013) ("*Conestoga*") and its effect on family-owned, for-profit businesses that seek to exercise religious principles in and through the corporate form. Moreover, J.E. Dunn and J.J. White believe that their years of experience in incorporating their religious beliefs in their business dealings and through their civic and charitable work will provide this Court with an important perspective on the Free Exercise Clause issues implicated by the contraceptive coverage mandate.

SUMMARY OF ARGUMENT

A threshold question in these cases is whether the contraceptive coverage mandate of the ACA infringes on religious activity of closely-held corporations that the First Amendment was meant to protect. Although the Supreme Court has not addressed this question directly, *see Hobby Lobby Stores, Inc. v. Sebelius*, 133 S.Ct. 641, 643 (Sotomayor, Circuit Justice 2012) ("This Court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders"), it has explained when corporations and other organizations can invoke the protections of the First Amendment.[2] Under this Court's analysis in *First Nat'l Bank of Boston v. Bellotti*, the Constitution protects the speech and religious activity of corporations—both non-profit and closely-held—unless these rights are "purely personal" in that "the 'historic function' of the particular guarantee[s have] been limited to the protection of individuals." 435 U.S. 765, 778 n.14 (1978).

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[2] Although *Conestoga* and *Hobby Lobby* involve claims under the Free Exercise Clause and the Religious Freedom Restoration Act ("RFRA"), this amicus brief focuses only on the Free Exercise Clause for two reasons. First, RFRA was meant to codify this Court's pre-*Smith* free exercise jurisprudence. Consequently, if the Free Exercise Clause protects the free exercise rights of family-run companies prior to and after *Smith*, then RFRA should as well. Second, under RFRA, "person" is defined to include corporations unless the context indicates otherwise. *See* 1 U.S.C. § 1 (defining "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"). Thus, if closely-held corporations can exercise religion under the Free Exercise Clause, there is no basis for concluding that RFRA does not apply in the context of family-run businesses objecting to the ACA.

As *Roberts v. United States Jaycees* demonstrates, however, the First Amendment does not protect purely personal rights because it applies to the expressive and religious activity of individuals as well as associations of individuals: "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed." 468 U.S. 609, 622 (1984). Consistent with *Roberts*, this Court has held that the Free Exercise Clause applies to groups of individuals who adopt the corporate form. *See Bob Jones University v. United States*, 461 U.S. 574, 604 n.29 (1983) (holding that two incorporated schools, which were not "churches or other purely religious institutions," could bring free exercise claims) and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) (permitting an incorporated church to assert claims under the Free Exercise Clause). Thus, the free exercise of religion is not a purely personal right, and groups of individuals, including non-profit and closely-held corporations can claim its protection.

That the Free Exercise Clause protects closely-held businesses is not surprising. In the First Amendment context, this Court has emphasized that courts must focus on the nature of the activity (whether speech or religious exercise), not the "person"—whether an individual, non-profit, for-profit, or sole-proprietor—who is invoking the right. In particular, when determining whether the First Amendment protects closely-held corporations "[t]he proper question ... is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons." *Bellotti*, 435 U.S. at 776. Rather, "the question must be whether" the challenged statute infringes on an activity that "the First Amendment was meant to protect." *Id.* In *Bellotti*, this involved asking whether a statute, which prohibited corporations from spending money to publicize their views on a state-law referendum, abridged expression that the First Amendment safeguarded. Because, "[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech," this Court held that the First Amendment protected the speech of a for-profit corporation. 435 U.S. at 777.

In the present cases, the proper question is whether the ACA's contraceptive coverage mandate infringes on religious exercise that the First Amendment protects. The answer to that question is undoubtedly "yes." As in *Bellotti*, if the "persons" objecting to the mandate were sole proprietors instead of closely-held corporations, the individual owners could invoke the Free Exercise Clause and RFRA. *See United States v. Lee*, 455 U.S. 252 (1982); *Braunfeld v. Brown*, 366 U.S. 599, 601 (1961). Challenging government regulations that infringe on sincerely held religious beliefs, therefore, constitutes religious activity that the Free Exercise Clause was meant to protect, and closely-held corporations can challenge the mandate on free exercise grounds.

Moreover, acknowledging that closely-held corporations, such as J.E. Dunn and J.J. White, that operate their businesses according to religious principles have free exercise rights does not permit all corporations to assert Free Exercise Clause challenges to the ACA or any other statute. Many corporations—closely-held and publicly traded—may not seek to exercise religion through their business operations. Those that do, however, have the right to claim the protection of the Free Exercise Clause and RFRA, allowing the courts to decide the merits of these claims under the appropriate standards.

ARGUMENT

In *Conestoga*, the Third Circuit improperly held that corporations such as Conestoga and Hobby Lobby "cannot engage in the exercise of religion" as a result of two fundamental errors. *Conestoga*, 724 F.3d at 388. First, the *Conestoga* court, like the district court in *Bellotti*, asked the wrong question—"whether and to what extent corporations have First Amendment rights." *Bellotti*, 435 U.S. at 776; *Conestoga*, 724 F.3d at 383 (identifying the threshold question as "whether Conestoga, a for-profit, secular corporation, can exercise religion"). Instead of focusing on whether a religiously-based objection to the contraceptive coverage mandate constitutes an exercise of religion under the Free Exercise Clause, the Third Circuit considered only whether a for-profit corporation has free exercise rights like those of natural persons. *Id*. at 385 ("We do not see how a for-profit 'artificial being ... existing in contemplation of law,' that was created to make money could exercise such an inherently 'human' right.") (internal citation omitted).

Second, because the court asked the wrong question, its analysis failed to consider all of the relevant Supreme Court case law. In particular, the Third Circuit relied almost exclusively on *Bellotti*'s discussion of "purely personal" rights in footnote 14 and an isolated sentence in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (stating that the purpose of the Free Exercise Clause "is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority."). A more detailed review of *Bellotti* and this Court's decisions regarding the constitutional rights of corporations reveals that free exercise, like the freedom of speech, is not a "purely personal" right. In fact, limiting free exercise rights to "religious" non-profits discriminates against family-owned businesses whose owners seek to live their faith in all aspects of their lives, including their business operations.

Consequently, the Free Exercise Clause applies to any family-run or non-profit company that exercises religion through the corporate form. *See Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, 450 F.3d 1295, 1305 (11th Cir. 2006) (noting in the context of a religious corporation that all "corporations possess Fourteenth Amendment rights of equal protection, due process, and, through the doctrine of incorporation, the free exercise of religion."); *Commack Self-Service Kosher Meats v. Hooker*, 800 F. Supp.2d 405 (E.D.N.Y. 2011) (allowing a for-profit corporation to challenge a labeling statute on Establishment Clause grounds). This Court, therefore, should reject the Third Circuit's overly narrow interpretation of the Free Exercise Clause and confirm *Bellotti* and *Roberts*, which protect the free exercise of religion regardless of the type of "person" acting on sincerely held religious beliefs.

I. The Free Exercise Clause protects both closely-held and non-profit corporations because, as *Bellotti* and *United States v. White* demonstrate, free exercise is not a "purely personal" right but "serves significant societal interests."

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. 1. The Constitution, therefore, expressly provides that the government cannot prohibit the free *exercise* of religion, not merely private "worship" or "freedom of conscience" as Madison had originally proposed. *See* Michael W. McConnell, 103 HARV. L. REV. 1409, 1488 (1990) (noting that "the term 'free exercise' makes clear that the clause protects religiously motivated conduct as well as belief"). For many believers, including the Dunns and Whites, religious exercise cannot be restricted to the private expression of religion in their homes and places of worship. Their faith permeates all aspects of their lives, leading them to form businesses that embody and promote the values that are central to their faith.

Not surprisingly given the faith of the founding generation, the First Amendment limits the government's ability to interfere with the religious exercise and speech activity of individuals and associations of individuals. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose *institutions* presuppose a Supreme Being") (emphasis added); *Roberts,* 468 U.S. at 622. Nothing in the First Amendment or this Court's prior decisions restricts the fundamental protections of the First Amendment to natural persons in their individual speech activity or exercise of religion. *See, e.g., EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 623 (9th Cir. 1988) (Noonan, J., dissenting) ("The First Amendment does not say that only one kind of corporation enjoys this right [to exercise religion]. The First Amendment does not say that only religious corporations or only not-for-profit corporations are protected. The First Amendment does not authorize Congress to pick and choose the persons or the entities or the organizational forms that are free to exercise their religion.").

That the First Amendment protects speech and the free exercise of religion regardless of *who* is invoking those protections is apparent from *Bellotti*. Instead of focusing on "whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons," *Bellotti* instructs that "the question must be whether" government action abridges an activity "the First Amendment was meant to protect." 435 U.S. at 776. That is, the operative question under the First Amendment is whether the government is infringing on protected speech or religious *activity*, not on *who* (a natural person, a closely-held company, or a non-profit corporation) is speaking or exercising religion. Hence, the *Bellotti* Court emphasized that "[i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." 435 U.S. at 777.

The same reasoning applies in the free exercise context. If Hobby Lobby, Conestoga, J.E. Dunn, and J.J. White were sole proprietorships, there is no doubt that the Free Exercise Clause would protect their religious objections to the contraceptive coverage mandate. Their claims mirror the faith-based challenges to government legislation found in *Lee* and *Braunfeld*. *See United States v. Lee*, 455 U.S. 252 (permitting an Amish business owner to raise a free exercise defense to his alleged failure to pay social security taxes for his employees); *Braunfeld*, 366 U.S. at 601 (allowing sole proprietors to challenge Philadelphia's Sunday-closing laws on free exercise grounds). Thus, closely-held corporations also must be allowed to assert free exercise claims because, as *Bellotti* instructs, it is the religious nature of the activity that is important, not the nature of the "person" that engages in that activity.

The Third Circuit ignored *Bellotti*'s analysis, denying the free exercise claims of Conestoga because the majority did "not see how a for-profit 'artificial being, invisible, intangible, and existing only in contemplation of law,' that was created to make money could exercise such an inherently 'human' right." *Conestoga*, 724 F.3d at 385 (internal citation omitted); Brief for the Petitioners at 13 ("Government's Brief") (denying that closely-held corporations have free exercise rights because incorporation "create[s] a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employees.'") (internal citation omitted). Drawing on footnote 14 in *Bellotti*, the majority claimed that free exercise is a "purely personal" right that is limited to individuals. Although certain religious non-profits may invoke free exercise protection because "the text of the First Amendment ... gives special solicitude to the rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S.Ct. 694 706 (2012), for-profit corporations do not engage in such religious conduct. *See* Government's Brief at 13 (stating that this Court has "recognized free-exercise rights of individuals, churches, and religious communities" but not closely-held corporations). According to the Third Circuit, for-profit, family-run businesses "'do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.'" *Conestoga*, 724 F.3d at 385 (citation omitted).

This analysis is wrong for at least three reasons: (i) the Free Exercise Clause is not a "purely personal" right because it protects non-profits and closely-held companies alike; (ii) just as freedom of speech is not limited to corporations in the "speech business," free exercise is not restricted to organizations (churches and pervasively religious institutions) in the "religion business;" and (iii) limiting free exercise to non-profit religious organizations discriminates against religious individuals who seek to live their faith through their closely-held companies.

A. Free Exercise is not a "purely personal" right that applies only to natural individuals because, as this Court has acknowledged, associations and non-profit corporations can exercise religion.

In *Conestoga*, the majority held that the Free Exercise Clause does not extend to closely-held corporations because it protects a "purely personal" right, one designed to guard the exercise of religion by individuals. 724 F.3d at 383. Whether a constitutional provision is purely personal "depends on the nature, history, and purpose of the particular provision." *Bellotti*, 435 U.S. at 778 n. 14. Drawing primarily on footnote 14 in *Bellotti*, the *Conestoga* panel noted that this Court has refused to extend purely personal rights to corporations and other organizations. Instead of analyzing this Court's precedents discussing "purely personal" rights or evaluating "the nature, history, and purpose" of the Free Exercise Clause, though, the *Conestoga* majority attempted to establish the individual nature of free exercise by invoking the *Bellotti* footnote and a single sentence from *Schempp*: "the purpose of the Free Exercise Clause 'is to secure religious liberty *in the individual* by prohibiting any invasions thereof by civil authority.'" 724 F.3d at 385 (quoting *Schempp*, 374 U.S. at 223) (emphasis added by the *Conestoga* panel). Because the majority could "not see how a for-profit [corporation] ... that was created to make money could exercise such an inherently 'human' right," it concluded that free exercise must be a purely personal right. *Id.*

The Third Circuit's interpretation of the Free Exercise Clause is flawed for at least two reasons.

First, recognizing that the First Amendment safeguards the rights of "individuals" does not preclude organizations from invoking those rights. After all, this Court previously described free speech as an individual or personal right: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Gitlow v. New York*, 268 U.S. 652, 666 (1925). *See also Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) (describing freedom of speech as a "fundamental personal right[]"). The fact that free speech is a fundamental "personal" right, however, did not stop this Court from extending free speech rights to corporations. As this Court confirmed in *Citizens United*, "First Amendment protection extends to corporations ... [, and this Court] has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 342 (2010) (quoting *Bellotti*, 435 U.S. at 776).

Given that the religion clauses protect liberties that are as fundamental (and individual) as the right to free speech, *Citizen United*'s reasoning applies with equal force to the free exercise of religion by closely-held businesses. *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944) ("[I]t may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. All are interwoven there together."). Even though free exercise protects "the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience," *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985), associations of individuals (including non-profits and family-run businesses) can come together and exercise religion. In fact, as *Roberts* instructs, preserving the right to come together for group action is critical to insure that the protections of the First Amendment are safeguarded: "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed." 468 U.S. at 622.

Second, the Third Circuit ignores this Court's discussion of "purely personal" rights (such as the right against self-incrimination and the right to privacy) in *United States v. White* and *California Bankers Association v. Schultz*, which demonstrate why free exercise cannot be limited to individuals. Although *Bellotti* did not explain why self-incrimination and privacy are purely personal rights that are unavailable to any type of corporation, it cited *White*, which provides a detailed discussion of what makes a right purely personal.

In *White*, the district court subpoenaed documents from a union as part of a grand jury investigation into alleged irregularities in the construction of a Navy supply depot. An assistant supervisor of the union refused to produce the documents, invoking the right against self-incrimination because, he argued, the documents might incriminate the union or the assistant supervisor, in his official or individual capacity. On appeal, the Supreme Court rejected the assistant supervisor's claim, holding that "[t]he constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals." 322 U.S. 694, 698 (1944).

In determining whether the right against self-incrimination was "purely personal," the *White* Court looked to the nature of the right at issue, not the Third Circuit's distinction between for-profit and non-profit corporations. Even though the labor union was an unincorporated, non-profit organization, it could not claim the privilege against self-incrimination given the "personal" nature of the right: "[s]ince the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of *any organization*." *Id.* at 699 (emphasis added).

In reaching this conclusion, *White* set out a test to determine whether "a particular type of organization" can invoke a personal privilege. *Id.* at 701. According to the Court, an organization cannot avail itself of a "purely personal" right if it has "a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." *Id.* Unions and corporations (whether non-profit or closely-held) cannot invoke purely personal rights, therefore, because they do not represent the personal interests of the individuals who comprise those organizations. Instead, unions and corporations "represent[] organized, institutional activity as contrasted with wholly individual activity," their existence is "perpetual" and does not "depend[] upon the life of any members," their various activities cannot "be said to be the private undertakings of the members," they have no "authority to act for the members in matters affecting only the individual rights of such members," they "own[] separate real and personal property," and "the official ... books and records are distinct from the personal books and records of the individuals." *Id.* at 701-02.

Similarly, in *California Bankers Association v. Schultz*, this Court focused on the personal nature of the right to privacy rather than any differences between non-profit and closely-held corporations. According to *Schultz*, the right to privacy applies only to information about which the public does not have a right to know. Because "'law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest,'" "corporations can claim no equality with individuals in the enjoyment of a right to privacy." *Schultz*, 416 U.S. 21, 66 (1974). The same is true for the right against self-incrimination. Neither non-profit nor for-profit corporations can invoke that privilege because of "the reservation of the visitatorial power of the state, and in the authority of the national government where the corporate activities are in the domain subject to the powers of Congress." *Wilson v. United States*, 221 U.S. 361, 382 (1911).

White, Schultz, and *Wilson* highlight two important reasons why closely-held corporations can invoke the protection of the Free Exercise Clause. First, unlike the privacy and self-incrimination contexts, the government has no right to satisfy itself that "corporate behavior is consistent with" certain state approved religious beliefs or practices. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."). The exercise of religion, unlike the production of business documents in *Wilson*, is not "in the domain subject to the powers of Congress." *See, e.g., Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith or the validity of particular litigants' interpretations of [their] creeds.").

Second, *Schultz* recognizes that corporations are endowed with "public attributes" and "have a collective impact on society." *Schultz*, 416 U.S. at 65. Under *Bellotti*, this societal impact is a main reason why the First Amendment protects speech and religion regardless of the "person" who is speaking or exercising religion: "The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests." 435 U.S. at 776. Because the First Amendment is meant to protect both individual and collective interests, freedom of speech and religious exercise are not purely personal rights.

Stated differently, *Conestoga*'s conclusion—that for-profit corporations cannot exercise religion because free exercise is a "purely personal" right—is inconsistent with *White*, *Schultz*, and *Bellotti*. Under these precedents, neither non-profits nor closely-held businesses can exercise purely personal rights. *White*, 322 U.S. at 699 (stating that purely personal rights "cannot be utilized by or on behalf of *any organization*") (emphasis added). Given that religious non-profits *can* claim the protection of the Free Exercise Clause, *see Bob Jones University*, 461 U.S. 574 and *Hosanna-Tabor*, 132 S.Ct. 694, free exercise cannot be a purely personal right. Thus, the Free Exercise Clause extends to individuals and associations, including family-owned and operated businesses like J.E. Dunn and J.J. White.

B. The First Amendment protects speech and religious activity generally and is not limited to businesses that are in the "speech business" or the "religious business."

In *Conestoga*, the Third Circuit claims that the profit-making nature of closely-held corporations somehow disqualifies them from seeking the protections of the Free Exercise Clause. *See Conestoga*, 724 F.3d at 385 ("We simply cannot understand how a for-profit, secular corporation ... can exercise religion."). The majority does not state whether it is the corporate form, the profit-making motive, or the "secular" nature of closely-held businesses that prevents them from receiving free exercise protection.

The problem with the Third Circuit's analysis is that this Court has never held that the corporate form or a for-profit motive precludes application of any First Amendment rights. Consistent with *Bellotti*, this Court has recognized that a non-profit corporation can invoke the Free Exercise Clause, even when it is not a pervasively "religious organization" such as a church. In *Bob Jones University v. United States*, the Court held that two religious schools, which were not "churches or other purely religious institutions," 461 U.S. at 604 n.29, could assert free exercise claims on behalf of the corporations, not merely on behalf of the individuals who comprised them. The Court permitted the schools to pursue their claim that the IRS violated the Free Exercise Clause by rescinding their tax-exempt status as a result of allegedly discriminatory admissions policies.

Similarly, last term in *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, the Court acknowledged that another organization, this time a church and school, could invoke the protection of the Free Exercise Clause. Although noting that "the text of the First Amendment itself ... gives special solicitude to the rights of religious organizations," 132 S.Ct. at 706, this Court did not limit the Free Exercise Clause to such religious organizations or distinguish its prior holding in *Bob Jones University*. Rather, this Court focused on the only issue before it: whether a religious organization has the "freedom to select its own ministers." *Id.*

Although non-profit organizations, the schools in *Bob Jones University* and *Hosanna Tabor* sought to generate revenue just like closely-held businesses do.

Instead of distributing any surplus revenue to shareholders, these non-profits simply funneled any surplus moneys back into the institutions. Under *Bellotti*, though, the way in which surplus revenue is distributed has no bearing on whether the underlying activity implicates the Free Exercise Clause. In the First Amendment context, the focus is on what was done—the particular speech or religious activity—not on whether the actor is a non-profit or closely-held corporation.

That a profit or revenue generating motive does not move activity outside the scope of the First Amendment also is clear from *Lee* and *Braunfeld*. The sole proprietors in these cases were engaged in for-profit businesses and sought to protect the exercise of their religious beliefs through their business operations. In each case, this Court upheld the right of the sole proprietors to invoke the protection of the Free Exercise Clause. In *United States v. Lee*, the Court held that an Amish business owner, who ran a farm and a carpentry shop, could raise a free exercise defense to his alleged failure to pay social security taxes for his employees. Because the Old Order Amish "believe it sinful not to provide for their own elderly and needy," the employer "object[ed] on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds." 455 U.S. at 255, 254.

Likewise, in *Braunfeld v. Brown*, "merchants" in Philadelphia challenged the city's Sunday-closing laws because the laws allegedly infringed on their free exercise of religion. The merchants were Orthodox Jews who observed the Sabbath on

Saturday. As a result of the Sunday-closing laws and their faith, the merchants could not open their stores on the weekends. Given their desire to live out their religious beliefs in their businesses, they argued that the law violated the Free Exercise Clause because it "impair[ed] the ability of all appellants to earn a livelihood." 366 U.S. at 601. This Court addressed their claims on the merits.

Since neither the corporate form nor a profit motive strips a family-owned company of its First Amendment rights, the Third Circuit must base its conclusion on the allegedly secular nature of a closely-held corporation. *See Conestoga*, 724 F.3d at 386 ("That churches—as means by which individuals practice religion—have long enjoyed the protections of the Free Exercise Clause is not determinative of the question whether for-profit, secular corporations should be granted these same protections."). In emphasizing the "secular" nature of corporations, however, the Third Circuit makes two fundamental errors.

First, the majority impermissibly limits the Free Exercise Clause to the *practice* of religion instead of the *exercise* of religion. Under *Conestoga*, only churches and religious institutions that pray and worship are sufficiently "religious" to qualify for Free Exercise Clause protection. But courts are constitutionally prohibited from weighing the nature or importance of a person's or group's religious beliefs: "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith." *Thomas*, 450 U.S. at 715-16. Given that courts cannot determine whether a corporation is sufficiently religious to invoke the Free Exercise Clause, any organization that seeks to implement its sincerely held religious beliefs in its business activities may claim the protection of that clause. *See West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

Second, the majority in *Conestoga* makes the same mistake that the lower court made in *Bellotti* when it held "that corporate speech is protected by the First Amendment only when it pertains directly to the corporation's business interests." 435 U.S. at 777. In *Bellotti*, the district court improperly held that only corporations in the "speech business"—media corporations and the press—could claim the protection of the Free Speech Clause. The *Conestoga* majority does the same thing—limiting religious exercise to non-profit corporations that are in the *religion* business: "We will not draw the conclusion that, just because courts have recognized the free exercise rights of churches and other religious entities, it necessarily follow that for-profit, secular corporations can exercise religion." 724 F.3d at 385. In so holding, the Third Circuit (like the district court in *Bellotti*) imposes a "novel and restrictive gloss on the First Amendment" by impermissibly restricting the Free Exercise Clause to religious non-profits. *Bellotti*, 435 U.S. at 777.

This Court's precedents, however, do not support such a "novel and restrictive" interpretation of the Free Exercise Clause. *Bellotti* and *Citizens United* preclude the government's limiting free speech to businesses in the "speech business." *Id.* at 784-85 ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."); *Citizens United*, 558 U.S. at 352 ("There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.").

And the reasoning in these cases likewise prohibits the government's restricting free exercise to businesses that are in the "religion business" (which the Third Circuit defines as "churches and other religious entities," *Conestoga*, 724 F.3d at 385). As *Bellotti* warns, "[i]f a legislature may direct business corporations to 'stick to business,' it also may limit other corporations—religious, charitable, or civic—to their respective 'business' when addressing the public." 435 U.S. at 785. Under *Conestoga*'s and the government's position, civic-minded or environmentally aware corporations could be forced to stick to the business of profit maximization, precluding individuals from using the corporate form to advance religious, ethical, environmental, or other social values. Under this restrictive interpretation, J.E. Dunn could be required to stop donating 10% of its pre-tax earnings to charity, and J.J. White could be precluded from supporting various Catholic charities.

Yet there is nothing about the corporate form or the Free Exercise Clause that requires closely-held companies to so limit their activities. As J.E. Dunn and J.J. White demonstrate, while pursuing profits is one purpose of a corporation, the officers, directors, and shareholders may decide to advance other ends as well—religious, environmental, civic, or political. Two well-known examples of corporations that advance goals other than profit maximization illustrate the importance of protecting the right of corporations to pursue civic or religious values. According to its website, Ben & Jerry's corporate mission involves three goals:

> Social Mission: To operate the Company in a way that actively recognizes the central role that business plays in society by initiating innovative ways to improve the quality of life locally, nationally and internationally.
>
> Product Mission: To make, distribute and sell the finest quality all natural ice cream and euphoric concoctions with a continued commitment to incorporating wholesome, natural ingredients and promoting business practices that respect the Earth and the Environment.
>
> Economic Mission: To operate the Company on a sustainable financial basis of profitable growth, increasing value for our stakeholders and expanding opportunities for development and career growth for our employees.

Ben & Jerry's Mission Statement (http://www.benjerry.com/activism/mission-statement/) (last visited Jan. 20, 2014). Although Ben & Jerry's is a for-profit corporation, only its economic mission focuses narrowly on profits. The company also seeks to improve "the quality of life" generally and to "promot[e] business practices that respect the Earth and the Environment." *Id.*

Similarly, Chick-fil-A predicates its business on biblical values and closes its stores on Sundays in observance of the Christian Sabbath. *See* http://www.chick-fil-a.com/Company/HighlightsFact-Sheets (last visited Jan. 20, 2014). Its corporate purpose is "[t]o glorify God by being a faithful steward of all that is entrusted to us. To have a positive influence on all who come in contact with Chick-fil-A." *See* http://www.chick-fil-a.com/Press room/Fact-Sheets/sunday_2012) (last visited Jan. 20, 2014). Following its religious values, the company has given money to certain advocacy groups that promote what Chick-fil-A believes is a Christian view on various issues, including marriage. Some of these donations caused national controversy in the summer of 2012, leading political leaders in Boston and Chicago to threaten to block Chick-fil-A's bid to open franchises in those cities.

The fact that Chick-fil-A is a for-profit corporation, though, should make no difference to the free exercise analysis. Because Chick-fil-A is the entity that made the donations and sought to open the stores, Chick-fil-A is the "person" that would be injured if retaliated against for the exercise of its religious beliefs. Under the narrow interpretation of free exercise that the Third Circuit and the government adopt, however, neither Chick-fil-A nor its owners could challenge such religious discrimination because for-profit organizations lack free exercise rights and their owners are legally distinct from the entity that suffered the injury. *See Conestoga*, 724 F.3d at 389; Government's Brief at 23.

This view is untenable in light of *Bellotti* and *Roberts*. Just as the government's attempt "to channel the expression of views is unacceptable under the First Amendment," *Bellotti*, 435 U.S. at 785, the effort to channel the free exercise of religion to individual worship or religious non-profits also is unacceptable under the Free Exercise Clause. The contraceptive coverage mandate and the threats by public officials in Chicago and Boston to deny permits to Chick-fil-A show why family-run businesses need the protection of the Free Exercise Clause—without it public officials can force associations of individuals to engage in conduct that violates their sincerely held religious beliefs. *See Citizens United*, 558 U.S. at 340 (noting that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content").

Extending free exercise protection to all corporations that exercise religion (as opposed to only those non-profits in the "religion business") not only is required by the Constitution, but also makes good sense. Corporations, whether for-profit or non-profit, do not engage in exclusively religious or secular activity. As this Court observed in *Hosanna-Tabor*, even in "purely religious" organizations, there may not be any "employees who perform exclusively religious functions:" "The heads of congregations themselves often have a mix of duties, including secular ones such as helping to manage the congregation's finances, supervising purely secular personnel, and overseeing the upkeep of facilities." 132 S.Ct. at 709. In the same way, not all for-profit organizations perform exclusively secular functions. Many faiths direct the faithful to implement their faith and religious beliefs in their businesses.

For example, in "Vocation of the Business Leader: A Reflection," the Vatican's Pontifical Counsel for Justice and Peace explains that for Catholics "[t]he vocation of the businessperson is a genuine human and Christian calling." Vocation of the Business Leader: A Reflection at ¶ 6 (available at http://www.stthomas.edu/cathstudies/cst/conferences/Logic%20of%20Gift%20Semina/Logicofgiftdoc/FinalsoftproofVocati.pdf). According to the Counsel, one of the greatest obstacles to fulfilling this Christian calling "at a personal level is a 'divided life,' or what Vatican II described as 'the split between the faith which many profess and their daily lives.'… Dividing the demands of one's faith from one's work in business is a fundamental error which contributes to much of the damage done by businesses in our world today…. The divided life is not unified or integrated; it is fundamentally disordered, and thus fails to live up to God's call." *Id.* at ¶ 10. Like the business owners in *Conestoga* and *Hobby Lobby*, the Dunns and Whites expressly seek to do just that—live their religious calling in and through their businesses. *See Hobby Lobby*, 723 F.3d at 1122 ("[T]he Greens have organized their businesses with express religious principles in mind … [and] allow their faith to guide business decisions for both companies.").

Under the Third Circuit's decision in *Conestoga*, however, individuals who desire to "live up to God's call" and implement the values of their faith in their businesses must choose between living a "divided life" in a corporation that pays for services deemed immoral, forgoing the corporate form altogether, or adhering to their religious beliefs and paying exorbitant penalties and fines. Yet, as this Court has stated in other contexts, the government cannot condition a benefit—such as the limited liability that attaches to the corporate form—on the relinquishment of one's free speech or free exercise rights: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.... [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert v. Verner*, 374 U.S. 398, 404-06 (1963); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 699 (1994) ("It is true that religious people (or groups of religious people) cannot be denied the opportunity to exercise the rights of citizens simply because of their religious affiliations or commitments, for such a disability would violate the right to religious free exercise, ..., which the First Amendment guarantees as certainly as it bars any establishment.").

But this is exactly what *Conestoga* does. It conditions the closely-held corporate form on a family's' willingness to give up living their faith in and through their family businesses. In the Third Circuit, religiously motivated business owners, such as the Dunns and Whites, now must provide insurance coverage that violates their faith or conduct their businesses in a manner consistent with their religion and pay large fines and penalties. *See, e.g.*, 26 U.S.C. § 4980D (providing for a tax of $100 per day per employee if a company fails to comply with ACA's coverage provisions, subject to caps for certain failures); 26 U.S.C. § 4980H (setting forth an annual tax assessment if a company fails to comply with the ACA's coverage requirements). The Free Exercise Clause prohibits imposing this type of Hobson's choice. Neither non-profits nor for-profits can be forced to choose between receiving the benefits of incorporation and maintaining their religious beliefs.

C. Restricting the Free Exercise Clause to pervasively religious organizations impermissibly discriminates against family-owned businesses that promote religious views and their owners who seek to live their faiths through their business activities.

According to the Third Circuit, religious non-profits are fundamentally different from for-profit corporations when it comes to exercising religion: "General business corporations" cannot exercise religion because they "'do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors.'" *Conestoga*, 724 F.3d at 385 (quoting *Hobby Lobby Stores, Inc. v.*

Sebelius, 870 F. Supp.2d 1278, 1291 (W.D. Okla. 2012), *rev'd en banc*, 723 F.3d 1114 (10th Cir. 2013)).

What the *Conestoga* majority apparently fails to recognize is that non-profit religious organizations also "do not pray, worship, observe sacraments or take other religiously-motivated actions" independently of the individuals who comprise the organization. The not-for-profit corporations that are the Dioceses of Kansas City and Philadelphia, in which J.E. Dunn and J.J. White are based, do not themselves pray, worship, observe sacraments, or take other religious actions. All such activities are conducted by the individuals who are members of those non-profit organizations—the priests, religious, and lay members of the faith.

The same holds true with respect to closely-held companies. Whether exercising their speech rights or implementing their religious beliefs in their business operations, family-run businesses act only through the individual owners/members of the organizations. This is not surprising given that the distinction between for-profit and non-profit corporations does not consist in the latter's ability to conduct religious activities independently of their members. Both types of corporations are creatures of the State that depend on individuals to carry out all of their activities—from engaging in speech to exercising religion.

The government's argument (that because "a corporation is legally distinct from its owners" the beliefs of the owners cannot be attributed to the corporation, Government's Brief at 25), therefore, is inconsistent with both this Court's First Amendment speech precedents and its treatment of non-profit corporations. If the government is correct, then *Bellotti* and *Citizens United* were wrongly decided. Both cases are predicated on the idea that corporations can and do speak. But the views expressed by a corporation are traceable to the individuals who manage the company. As *Roberts* notes, the corporate form simply permits these individuals to come together and more effectively exercise their First Amendment rights. *Roberts*, 468 U.S. at 622. In the process, though, the First Amendment extends its protection to the speech and religious activity of the association of individuals. This is why the schools in *Bob Jones* and *Hosanna-Tabor* could raise free exercise claims despite the fact that they were corporations.

In addition, the majority's reasoning in *Conestoga* impermissibly discriminates among religious believers by giving certain groups of religious people (those that operate through non-profit corporations) the ability to exercise religion as a group while denying that opportunity to individuals who sincerely try to live their beliefs through all aspects of their lives, including their family-run businesses. *See Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *Wilson v. NLRB*, 920 F.2d 1282, 1285-88 (6th Cir. 1990) (holding that a statutory exemption limited to individuals who are "member[s] of and adhere[] to established and traditional tenets ... of a bona fide religion, body, or sect which has historically held conscientious objections to [a certain practice]" are unconstitutional because they prefer members of established denominations over those with more idiosyncratic religious beliefs).

In *Larson*, the Court struck down a rule that exempted certain organizations from Minnesota's reporting requirements because the so-called fifty per cent rule (exempting religious organizations that received more than half of their total contributions from members or affiliated organizations) "makes explicit and deliberate distinctions between different religious organizations.... [T]he provision effectively distinguishes between 'well-established churches' that have 'achieved strong but not total financial support from their members' ... and 'churches which are new and lacking in a constituency, or which, as a matter of policy, may favor public solicitation over general reliance on financial support from members.'" 456 U.S. at 246 n.28.

The Third Circuit's distinction between non-profits and for-profits does the same thing. By limiting free exercise to religious non-profits, the Third Circuit discriminates in favor of preferred or established religious organizations and their members, denying free exercise protection to closely-held businesses that are directed at advancing the religious beliefs of their owners.

Yet not all religiously motivated people are called to be priests, ministers, religious, or lay persons who work for a religious non-profit. Some individuals, such as the Dunns and Whites, sincerely believe that they are called to live their faith through their family-run businesses. As Pope John Paul II instructed the Catholic faithful in *Centesimus Annus*: "In fact, the purpose of a business firm is not simply to make a profit, but is also to be found in its very existence as a community of persons who in various ways are endeavoring to satisfy their basic needs, and who form a particular group at the service of the whole society. Profit is a regulator of the life of a business, but it is not the only one; other human and moral factors must also be considered which, in the long term, are at least equally important for the life of a business." John Paul II, *Centesimus Annus*, ¶ 35 (1991) (*available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centes imus-annus_en.html).

Under *Conestoga*, two organizations (one a non-profit corporation and the other a closely-held business) that are comprised of members of the same faith may object to the contraceptive coverage mandate for exactly the same reasons, but only one—the religious non-profit—may claim the protection of the Free Exercise Clause. This result flies in the face of *Bellotti*, which expressly holds that the proper "question must be whether [the government regulation] abridges [activity] that the First Amendment was meant to protect." 435 U.S. at 776. Because, as this Court has confirmed, religious non-profits are protected by the Free Exercise Clause, the First Amendment *is* meant to protect this type of activity—objecting to government regulations on religious grounds. The fact that the person conducting the religious activity is a "for-profit corporate person" instead of a "natural person" or a "non-profit corporate person" is irrelevant. *Bellotti*, 435 U.S. at 776 ("The proper question therefore is not whether corporations 'have' First

Amendment rights and, if so, whether they are coextensive with those of natural persons.").

Contrary to the Third Circuit's and the government's claims, acknowledging that closely-held companies can exercise speech and religion does not "eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners." *Conestoga*, 724 F.3d at 389. Rather, it simply confirms what this Court previously established—that "[t]he First Amendment ... serves significant societal interests," *Bellotti*, 435 U.S. at 776, and that free exercise rights "could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward these ends were not also guaranteed." *Roberts*, 468 U.S. at 622.

II. Although the Free Exercise Clause applies to closely-held corporations, such corporations can invoke its protection only if they are exercising religion.

To recognize that family-run businesses, such as J.E. Dunn and J.J. White, can raise a free exercise claim is not to determine that a particular corporation's free exercise claim has merit. Rather, acknowledging that corporations can invoke the Free Exercise Clause and RFRA simply permits corporations to litigate their claims and to have a neutral court apply (whatever it decides is) the appropriate standard under the circumstances. Many corporations—perhaps most—will not engage in religious activities or attempt to implement the religious convictions of their owners. In particular, large, publicly traded corporations (in which ownership and control are separate) may decline to adopt, maintain, or implement a set of religious beliefs as part of their business model. A publicly traded company could adopt such a business plan if its management and shareholders decide to do so, but such cases are apt to be rare.

The key is that there is no constitutional basis for this Court to preclude such an association from invoking the Free Exercise Clause *a priori*. The decision as to what type of business model to pursue is left to the corporation—whether publicly or privately owned—not the courts. As this Court has acknowledged in the free speech context, "[u]ltimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues. Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit to challenge corporate disbursements alleged to have been made for improper corporate purposes or merely to further the personal interests of management." 435 U.S. at 794.

The same is true with respect to corporate decisions to pursue religious, environmental, or other civic activities. If a closely-held business is owned and operated by individuals like the Dunns and Whites who are deeply committed to a particular faith, then it may be unsurprising that the company will reflect the religious principles of its owners. As J.E. Dunn and J.J. White demonstrate, some business owners seek to implement religious principles regarding corporate responsibility, attempting to promote the well-being of their employees in a financial and moral sense. According to these companies, the contraceptive coverage mandate of the ACA requires them to provide insurance coverage for medical services, such as abortifacients, contraceptives, and sterilization, which violate the religious values that underscore their operations. As such, the ACA infringes on the religious activities of the corporation and requires the company to take specific actions that are inconsistent with their ethical guidelines. Under this Court's precedents, J.E. Dunn and J.J. White can invoke the Free Exercise Clause and RFRA to protect their religious activities, and the courts are left to determine whether their claims are meritorious under the appropriate standard.

CONCLUSION

For the reasons set forth above, this Court should hold that closely-held companies have standing to bring claims under the Free Exercise Clause and RFRA.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

Nos. 13-354; 13-356

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AND
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Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF
HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,

Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,

Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF
HEALTH AND HUMAN SERVICES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS
OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

BRIEF OF *AMICUS CURIAE* JEWISH SOCIAL POLICY ACTION NETWORK IN SUPPORT OF THE GOVERNMENT

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INTEREST OF *AMICUS CURIAE*

The Jewish Social Policy Action Network ("JSPAN") is a non-profit organization dedicated to protecting the constitutional and civil rights of minorities and the vulnerable. It strives to reflect the Jewish obligation to engage in *tikkun olam*, the "repair of the world."[1]

JSPAN's interest in this case stems from the longstanding commitment of the American Jewish community to the promotion of religious pluralism and the free expression of religion by citizens of diverse faiths, and to the protection of the public health and welfare. As stated in the *amicus* brief JSPAN filed with this Court supporting the constitutionality of the minimum coverage provisions of the Affordable Care Act ("ACA"), Jewish tradition considers among its core teachings the essential role of the community in caring for the sick:

> Preserving life and health is one of the highest of communal duties in the Jewish tradition, taking precedence even over the construction of a synagogue.[2]

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[1] Letters of consent to the filing of *amicus* briefs in support of either party or neither party have been lodged with the Clerk of the Court by the government and by Conestoga. Counsel for Hobby Lobby has also consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus* states the following: (1) no party's counsel authored this brief in whole or in part, and (2) no party, party's counsel, or person other than *amicus*, its members, or its counsel, contributed money intended to fund the brief's preparation or submission.

[2] *Br. of Amici Curiae Jewish Alliance For Law & Social Action, et al.*, at 1, *Dep't of Health & Human Servs. v. Florida*,

Thus, supporting the right to adequate healthcare and health insurance for all Americans, including the right of women to access reproductive healthcare, is a core value of the American Jewish community.

A. JSPAN IS DEEPLY COMMITTED TO PROTECTING THE INTERESTS OF MINORITY FAITHS AND ALL THOSE WHO WISH TO EXPRESS THEMSELVES ON MATTERS OF CONSCIENCE.

For most of the last two thousand years, Jews lived as minority communities in countries where religion and state were one. Under both Christendom and Islam, Jews faced discrimination, persecution, expulsion or worse. Faith was frequently invoked to limit Jews in all manner of business and commerce, excluding Jews from certain professions or confining them to others. The United States was different. Here, one could be both fully an American and, at the same time, fully Jewish. Still, even less than a generation ago in this country, deeds for real property prevented sales to Jews and service businesses refused to serve Jewish patrons. *E.g.*, *Mayers v. Ridley*, 465 F.2d 630, 631 n.2 (D.C. Cir. 1972); Harold Earl Quinn & Charles Young Glock, *Anti-Semitism in America* vii (1979).[3]

(2012) (No. 11-398) (consolidated with *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012)).

[3] Quotas also were used to limit admission of Jews to private universities, including medical and law schools. In 1922, A. Lawrence Lowell, President of Harvard University, proposed the use of such quotas to limit Jewish admissions. *Anti-Semitism in the U.S.: Harvard's Jewish Problem*, http://www.jewishvirtuallibrary.org/jsource/anti-semitism/harvard.html (last visited Jan. 27, 2014);

Mindful of this history, Jews have been at the forefront of efforts to expand civil liberties and promote equality in all spheres, including commerce. JSPAN is especially sensitive to the careful balance that must be maintained so that the religious interests of one group do not run roughshod over the rights and interests of others. It seeks to ensure both the protection of religious liberty *from* government and the facilitation of equality *through* government

B. ENSURING THE PUBLIC HEALTH, INCLUDING THE REPRODUCTIVE HEALTH OF WOMEN, IS AT THE CORE OF JEWISH VALUES AND TRADITIONS.

Judaism teaches that promoting health and well-being is both a communal duty and a duty for each individual Jew. Elliot N. Dorff, *Matters of Life and Death: A Jewish Approach to Modern Medical Ethics*, at 31-32 (Jewish Publication Soc'y, 1st ed., 1998). The concern for health in Jewish tradition has also led to the development of Jewish commentaries on a host of medical ethics questions facing modern society. Jewish scholarship addresses such issues as in vitro fertilization; sperm donation; surrogacy; whether to provide medical therapy to someone with terminal illness; the use of implantable medical devices derived from non-kosher animals; blood donation and

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Edward C. Halperin, *The Jewish Problem in U.S. Medical Education 1920-1955*, Journal of the History of Medicine and Allied Sciences, Vol.56, No. 2, at 140-167 (April 2001). Quotas at Yale University persisted until as late as the 1960s. Elyssa Folk, *For Jews at Yale, a struggle to be accepted*, Yale Daily News (April 4, 2001), http://yaledailynews.com/blog/2001/04/04/for-jews-at-yale-a-struggle-to-be-accepted/.

transfusion; decisions to remove life support; decisions to employ or not employ extraordinary measures to preserve life; genetic testing; and autopsies. *See, e.g.*, The Rabbinical Assembly, Committee on Jewish Law and Standards, *Opinions on Marriage and Fertility*, http://www.rabbinicalassembly.org/jewish-law/committee-jewish-law-and-standards/even-haezer (last visited January 26, 2014).

Judaism's emphasis on communal and individual health is particularly reflected in the important role Jewish women activists played in the contraceptive movement since its inception in the early 20th century. Rebecca Davis, *American Birth Control Movement*, Jewish Women's Archive, http://jwa.org/encyclopedia/article/american-birth-control-movement (last visited January 26, 2013). Studies spanning multiple decades also reflect that American Jewish adults have long been committed to family planning, and supportive of access to the full range of FDA-approved reproductive healthcare options. *See* William D. Mosher & Calvin Goldscheider, *Contraceptive Patterns of Religious and Racial Groups in the United States, 1955-76: Convergence and Distinctiveness*, Studies in Family Planning, Vol. 15, No. 3, at 107 (May/June 1984) (noting, in a study comparing contraceptive practices among various religions, that "[t]he proportion using contraception is highest among Jewish women (76 percent)"). Indeed, Judaism's emphasis on ensuring mental and physical well-being comports with granting women the freedom to make contraceptive choices that persons of other faiths may not endorse. *See, e.g.*, Jacob Berkman, *The Morning After Pill and Judaism*, http://www.myjewishlearning.com/beliefs/Issues/Bioethics/Abortion/Parameters/0The_Morning_After_Pill.shtml (last visited Jan. 26, 2014) (noting general acceptance of Plan B by Jewish groups). Ensuring all women reproductive choice remains a central concern of the American Jewish community. *Jewish Views on Women's Rights & Reproductive Choice*, http://www.reformjudaism.org/jewish-views-womens-rights-reproductive-choice (last visited January 26, 2014).

This is not to say that all Jews answer questions of medical ethics in the same way.[4] Still, Jewish teaching on both public and private healthcare matters is just that – Jewish – an outgrowth of faith, religious law, and tradition. Such teaching may, but should not be presumed to, align with the teaching of other faiths or with the views espoused by those advocating a secular humanist approach to matters of medical ethics.[5]

Because of its own religiously-based roots, JSPAN appreciates that for the Hahn and Green families, like all people of faith, deeply held religious convictions may find expression in matters of health, and specifically reproductive health, which may or may not be shared by others. Thus, there is a delicate balance to be struck lest the shield protecting each person's right of free expression become the sword cutting off the protected rights of persons of different faiths, or of no faith. JSPAN is committed to preserving that balance.

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[4] 4. There are multiple denominations within Judaism, reflecting a spectrum of beliefs and practices. Even those within the same branch of Judaism often interpret the obligations of religious commandments differently. Free exercise protects this diversity. *See, e.g.*, *Thomas v. Review Board of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-16 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.").

[5] 5. Judaism is, for example, notably unlike religions that advocate faith healing or otherwise eschew modern medicine to treat disease and prevent death. Far from questioning the authority of human beings to intervene in God's plan to cause or heal illness, Judaism treats protecting and preserving the health of others as a commandment. Dorff, *supra*, at 325.

SUMMARY OF ARGUMENT

By granting for-profit corporations RFRA rights, the Court will be drastically expanding RFRA beyond its historical limitations and will set itself on a course it will ultimately regret. First, there is no statutory basis for limiting Conestoga's and Hobby Lobby's reasoning to family-owned businesses; if their arguments are embraced, any for-profit corporation could invoke RFRA. Second, extension of RFRA to for-profit corporations will result in a morass of litigation to make sense of just how a secular for-profit business operation exercises religion based on the beliefs of its owners. Third, extending RFRA to for-profit corporations would potentially call into question a vast array of federal laws that extend substantive rights to individuals regardless of their personal religious views. Were the Court to expand RFRA in this manner, it would upset the delicate balance that has been struck that allows America to function as a pluralist democracy in which one individual's right of religious expression does not cut off the protected rights of persons of different faiths.

ARGUMENT

I. CONESTOGA'S AND HOBBY LOBBY'S REASONING WILL CREATE AN UNPRECEDENTED AND HARMFUL SHIFT IN THE DELICATE BALANCE BETWEEN RELIGIOUS EXERCISE RIGHTS AND OTHER FEDERALLY PROTECTED INTERESTS.

Passed in response to *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), RFRA is an extraordinarily broad statute. It allows "persons whose religious exercise is substantially burdened by government" to avoid any federal law or regulation unless the government can show *both* a "compelling governmental interest" and that the challenged provision represents "the least restrictive means of furthering that . . . interest." 42 U.S.C. §§ 2000BB(b)(2); 2000BB-1(b). The legitimate intent of Congress was to restore as a matter of statutory grant the scope of protection for religious exercise that had previously existed under *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). But that restoration did not provide protections that reached further. As this Court observed, RFRA "adopts a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). RFRA, likewise, cannot change the fact that "governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment." *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) (citing *Wallace v. Jaffree*, 472 U.S. 38, 52-55 (1985)).

Conestoga and Hobby Lobby seek to characterize their RFRA claim as, at most, a modest step in religious exercise jurisprudence. Describing as deeply personal the relationship between the Hahn and Green family members and the corporations they own, Conestoga and Hobby Lobby essentially argue that, *for religious exercise purposes only*, distinctions between the corporate entities and the individual family members should be ignored. They assert that the corporations are merely one of many means through which the family members practice their faith, and that the family members should be as free to express their religious beliefs through their businesses as through any other aspect of their lives. *See, e.g., Conestoga, Br. for Petitioners*, at 12 ("The Hahns are a Mennonite Christian family whose faith permeates their entire lives."); *Hobby Lobby, Br. for Respondents on Petition for Cert.*, at 2 ("The Greens commit to '[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.'").

The Government's brief, as well as the opinion of the Third Circuit in *Conestoga*, provide excellent discussions of how this reasoning turns a basic principle of corporate law on its head. Whereas the law recognizes that owners and employees of a corporation perform their corporate duties solely as agents of the corporation, the Hahns and Greens claim the reverse – that the actions they take on behalf of Conestoga and Hobby Lobby are made by them as individuals and necessarily implicate their personal religious values and goals. Under existing law, the Hahns and Greens cannot have the best of both worlds. They cannot enjoy the benefits of the corporate form for all of their for-profit business purposes, yet also maintain that the corporations are mere extensions of, and conduits for, the expression of their faith when they wish to vindicate free exercise rights under RFRA. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013) *cert. granted*, 134 S. Ct. 678 (2013) ("The corporate form offers several advantages . . . but in return, the shareholder must give up some prerogatives, 'including that of direct legal action to redress an injury to him as primary stockholder in the business.'"); *Hobby Lobby, Br. for Petitioners*, at 23-26 (citing *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001)) ("As this Court has emphasized, 'incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs.'").

JSPAN writes separately on this issue to make three additional points. First, if "person" includes for-profit corporations under RFRA, there is no basis upon which a holding in Conestoga's and Hobby Lobby's favor can be confined to closely-held family businesses. The unavoidable consequence of their reasoning is that *any* for-profit corporation, whether large or small, public or private, family-owned or publicly-traded, will be able to use the expansive power of RFRA to gain exemption from any otherwise neutral federal law.[6] Second, the extension of RFRA rights to for-profit corporations based on the religious beliefs of the individuals who own those corporations will be entirely unworkable and will draw the federal courts into increasingly strained efforts to justify the extension of RFRA to secular for-profit businesses. Third, extending RFRA to for-profit corporations will create a fundamental shift in the delicate balance between religious exercise rights and other federally protected interests.

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[6] Conestoga and Hobby Lobby also rely on free speech jurisprudence, particularly this Court's decision in *Citizens United*, as precedent for their claim that corporations have free exercise rights. This reliance is misplaced. Free speech is about the right of all members of society to participate in the market place of ideas. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 334 (2010) (chilling speech harms "society as a whole, which is deprived of an uninhibited marketplace of ideas."). Free exercise, by contrast, is

A. CONESTOGA'S AND HOBBY LOBBY'S REASONING WOULD ENABLE ALL FOR-PROFIT CORPORATIONS TO BRING RFRA CLAIMS.

Conestoga and Hobby Lobby argue that RFRA should apply to closely held businesses owned by members of a single, religiously committed family.[7] The facts related to Conestoga and Hobby Lobby, however, provide little comfort that RFRA's reach into the secular business world will be limited. It is plain that Conestoga and Hobby Lobby are nothing like sole proprietorships or "d/b/a's" run by a family patriarch, with siblings and spouses pitching

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about conscience – a fundamentally human right to express one's religious convictions. *See Hobby Lobby, Br. of Constitutional Accountability Center as Amicus Curiae in Support of Petitioners*, at 11-16.

[7] Conestoga's sole question presented on appeal is "[w]hether the religious owners of a family business, or their closely-held business corporation, have free exercise rights. . ." *Conestoga, Petitioners' Br.*, at i. Hobby Lobby's question presented similarly states that "Respondents are a family and their closely held businesses, which they operate according to their religious beliefs." *Hobby Lobby, Br. for Respondents on Petition for Cert.*, at i.

in. They are major business enterprises operating in interstate commerce, with good reason to have elected the corporate form, accepting both its benefits and limitations. Conestoga employs 950 people. *Conestoga, Br. for Petitioners*, at 5. Hobby Lobby and its related company, Mardel, collectively employ approximately 13,400 people. *Hobby Lobby, Br. for Respondents on Petition for Cert.*, at 1. Although they focus on the decision-making authority of the founding family members, it is surely the case that many unrelated employees make decisions for the corporation in the course of their employment and have authority to bind the businesses in various ways. These non-family member employees are hired – as required by law – without regard to personal faith or religious practice. *See* 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion.") They are hired not to perform any religious duty, but to further the companies' efforts to sell wood cabinets and arts and crafts materials.

Beyond these facts, the basic statutory argument made by Conestoga and Hobby Lobby simply proves too much. If one accepts their claim that the Dictionary Act definition of "person" under RFRA includes for-profit corporations, there would be no statutory basis for limiting RFRA's reach. *Conestoga, Br. for Petitioners*, at 25. Nothing in the language of RFRA or the Dictionary Act[8] supports a conclusion that "person" includes for-profit corporations owned by family members who share a single faith but does not include all other types of for-profit corporations. If "person" includes corporations pursuant to the Dictionary Act, then it will be argued that RFRA includes all for-profit corporations, whether family owned, owned by unrelated private parties, or owned by shareholders trading shares on a public exchange. Indeed, the definition would also include all "firms, partnerships, societies and joint stock companies." 1 U.S.C. § 1 (defining "person" as including "corporations, companies, associations, firms, partnerships, societies, and joint stock companies.")[9] Thus, if this Court were to allow RFRA claims to be brought based on Conestoga's and Hobby Lobby's statutory construction argument, it

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[8] See, for example, the *amicus* brief submitted in support of Hobby Lobby in the Tenth Circuit by Wywatch Family Action, Inc. and Eagle Forum, 2013 WL 773285 at *26-28, which argues that

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there is no constitutional basis, *a priori*, to deny religious exercise rights to publicly traded corporations.

[9] Conestoga also argues that the definition of "person" under RFRA is informed by RLUIPA, which applies to both a "person" and an "entity." *Conestoga, Br. for Petitioners*, at 25. But the term "entity" within RLUIPA is found only in the section related to land use and buildings and must be understood within that proper context. Specifically, section 2000cc-5(7)(B) clarifies that in matters involving the "use, building, or conversion of real property" the "religious exercise" claim belongs to the "person or entity that uses or intends to use the property" for a religious purpose. 42 U.S.C. § 2000cc-5(7). The focus of RLUIPA was the real problem of discrimination in local zoning practices restricting land access for religious persons, "including a religious assembly or institution." 42 U.S.C. § 2000CC(a)(1). RLUIPA was not concerned with the interests of for-profit secular entities, such as corporations selling wooden cabinets or art supplies. RLUIPA's reference to "entity" simply cannot be used to justify an expansive reading of "person" under RFRA. *See Anselmo v. Cnty. of Shasta, Cal.*, 873 F. Supp. 2d 1247, 1264 (E.D. Cal. 2012) ("the court has been unable to find a single RLUIPA case protecting the religious exercise rights of a non-religious organization such as Seven Hills.")

would embark down a slippery slope from which it would be hard to return.[10]

B. GIVING FOR-PROFIT CORPORATIONS RIGHTS UNDER RFRA WILL CREATE A HOST OF LEGAL PROBLEMS NEVER ENVISIONED BY CONGRESS.

At the time Congress adopted RFRA in an effort to create a statutory end-run around this Court's decision in *Smith*, the established law was stated by this Court in *United States v. Lee*, 455 U.S. 252, 261 (1982): "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Smith* in turn spoke of free exercise rights not relieving the "individual" of "his" duty to comply with "valid and neutral laws of general applicability." *Smith*, 494 U.S. at 879. The lack of any body of law recognizing a right of a for-profit corporation to exercise religion should give this Court pause.

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[10] This Court need not reach the issue, which may arise in very rare cases, of whether a for-profit corporation that expressly serves a religious communal interest might have a RFRA claim because a federal law burdens its ability to serve that religious communal interest. Examples include a funeral home seeking to prepare a body for burial without autopsy or a kosher butcher shop seeking to slaughter animals under rabbinic standards. Neither of these examples would turn on the religious exercise rights of the owners of the business, but rather on the religious rights of members of the community or the religious rights of the customers.

Extending RFRA rights to for-profit corporations based on the beliefs of their owners will be entirely unworkable and will draw the Court into increasingly untenable efforts to explain how corporations founded to make profits and engaged in secular business activities have religious "beliefs" or engage in the "exercise" of religion. Examples of questions that will inevitably flow from such a decision include:

- Who determines the beliefs of a for-profit corporation owned by family members who share the same faith but adhere to different levels of observance and follow different practices?

- What happens when different generations of the same family, through intermarriage or otherwise, no longer share the same faith as the founding generation?

- Whose beliefs constitute the beliefs of a private for-profit corporation owned by unrelated individuals of different faiths?

- Can a simple majority of shareholders of a for-profit corporation determine the RFRA claims to be asserted by the corporation?

- Can a corporation have a RFRA claim if a significant minority, but no majority, of owners asserts a burden on the corporation's religious interests?

- Can shareholders of a corporation that are themselves corporations or partnerships determine the RFRA claims it should assert?

- Can pension funds for religiously affiliated institutions determine the RFRA claims of for-profit corporations in which they invest?

- Do the religious "beliefs" of the corporation change with each change in ownership and control, thus changing the applicable RFRA analysis, and will federal law have to accommodate accordingly?

- How should a court respond if some shareholders are motivated by religion while others are motivated by "personal and philosophical" views?[11]

- Will a single employee with the authority to act on behalf of the corporation be able to use RFRA to challenge a federal law that is binding on the corporation, but not him individually?

- Does that employee have to be an owner or at a management level or could someone who merely authorizes health insurance payments for the corporation bring a RFRA claim?

Even asking these questions reveals the intellectual gymnastics one must engage in to hold that a corporate owners' religious beliefs can be imputed to a for-profit corporation, or that a for-profit corporation has religious exercise rights it can vindicate, derivative of its owners' religious beliefs.

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11. In *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972), this Court held that only beliefs rooted in religion are protected by the Free Exercise Clause, while those that are personal and philosophical are not. As the Court noted, such determinations "may present a most delicate question." *Id.* at 215.

C. GIVING FOR-PROFIT CORPORATIONS RIGHTS UNDER RFRA WILL CREATE A FUNDAMENTAL SHIFT IN THE DELICATE BALANCE BETWEEN RELIGIOUS EXERCISE RIGHTS AND OTHER FEDERALLY PROTECTED INTERESTS.

There is hardly anything the government can do, from mandating contraceptive coverage to naming a bridge, that will not draw the objection of someone on religious grounds.[12] Conestoga's and Hobby Lobby's arguments threaten to burden the federal government with justifying, on a case-by-case and challenge-by-challenge basis, virtually every federal rule and regulation governing business, potentially creating a web of contradictory rulings and favoring religion over irreligion. At the same time, granting RFRA rights to corporations will threaten the delicate balance of religious and other civil liberty interests that is at the core of our pluralistic society.

Almost any religious exercise right asserted by a corporation has the potential to impact the federally protected interests, including religious rights, of the corporation's employees and others with whom it interacts. As immediate proof of this problem, one need only look to the Tenth Circuit's rationalization that Hobby Lobby objects to "only" four of twenty potential contraceptive options. *Hobby Lobby Stores, Inc. v. Sebelius*, 723

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[12] See Joann P. Kreig, *Democracy in Action: Naming a Bridge for Walt Whitman*, Walt Whitman Quarterly Review, vol. 12, No. 2, 108 at 111 (1994), which describes objections raised on religious grounds to naming a bridge after Walt Whitman because, among other things, he was homosexual, "held Christianity in contempt," and "attempted to teach rebellion against the natural law of God." *See also Catholics Decry Whitman Bridge*, N.Y. TIMES, December 17, 1955, at 16.

F.3d 1114, 1144 (10th Cir. 2013) *cert. granted*, 134 S. Ct. 678 (U.S. 2013). The Tenth Circuit cites no basis for its judgment regarding how many FDA-approved contraceptive options, which a doctor might advise and prescribe in light of contemporary medical standards for reproductive healthcare, a woman should be able to do without. At the same time, other employers have challenged the reproductive healthcare mandate in other courts and objected to offering coverage for any birth control options or sterilization within their plans. *E.g., Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C. Cir. 2013); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013); *Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013).

Must the federal government accommodate all of these competing requests or entirely forfeit the option of covered contraception? Is the elimination of four of twenty options a request the government must accommodate but six or eight of twenty not? Does it matter what the basis is for the religious objection? For example, does it make a difference if the employer's religious objection derives from a belief that unmarried women should not have access to contraceptive services under the ACA because they should not be sexually active, rather than from a belief about when life begins? *See Eisenstadt v. Baird*, 405 U.S. 438, 454, (1972) (relying on the Equal Protection Clause to invalidate a ban on providing contraceptives to unmarried persons).

As discussed in Judge Rovner's well-reasoned dissent in *Korte v. Sebelius*, 735 F.3d 654, 689-93 (7th Cir. 2013), it is also the case that many different religious objections, unrelated to contraception, could be raised to the ACA, undermining any federal system of ensuring comprehensive employee health insurance. Consider the following examples:

- A devout Methodist that follows the United Methodist Church's teachings on stem cells could use RFRA to hamper access to trial studies for employees suffering from life-threatening diseases.

- A for-profit corporation owned by a member of the Church of Christ, Scientist could invoke RFRA to claim that it was willing to provide healthcare benefits, but those must be in accordance with the religious exercise of the corporation and therefore must be limited solely to readings provided by a Christian Science practitioner.

- A company owned by a Hindu or Greek Orthodox might object to a plan that covers use of heart valves from animal parts.

- A company owned by a Jehovah's Witness may complain that its plan should not cover blood transfusions, or that its plan should cover in vitro fertilization only if the donor is married to the recipient.

Frankly, even the same employer could seek conflicting or inconsistent exemptions to the ACA depending on changes in doctrinal teachings of the religious institution to which it purports to adhere, or a natural progression in its owner's level of religious adherence. These examples do not take into account the myriad quirks in coverage under the ACA that federal law might be required to accept based on the doctrine of lesser-known religious faiths, faiths that have not yet been created, or various idiosyncrasies in the practice of known faiths, all of which are equally covered by the protections of RFRA. *See, e.g.*, *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961) ("[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference."); *Thomas v. Review Board of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) ("The guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect.").

Beyond the ACA, the full range of federal laws and regulations is potentially impacted, as seen by RFRA challenges brought in lower courts or before administrative bodies by organizations claiming to be of a religious nature. In *Ukiah Valley Medical Center*, 332 N.L.R.B. 602 (N.L.R.B. 2000), the employer asserted that RFRA precluded the NLRB from asserting jurisdiction over it because it followed the teachings of the Seventh Day Adventist faith which prohibited it from recognizing, bargaining with, or even operating with the presence of a labor union. The NLRB rejected the employer's claim and there was no appeal. This kind of challenge could well be raised again with renewed force by a for-profit corporation claiming that religion infuses all aspects of its business practices.

Similarly, in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002), the Court of Appeals did not reach the RFRA issue in a case in which a Catholic university argued that the NLRB could not invoke jurisdiction over it. Instead, the court determined that the university was exempt from NLRB jurisdiction under this

Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The Court of Appeals then noted:

> Under *Catholic Bishop*, the NLRB must determine whether an entity is altogether exempt from the NLRA. We have laid forth a bright-line test for the Board to use in making this determination. However, a ruling that an entity is not exempt from Board jurisdiction under *Catholic Bishop* may not foreclose a claim that requiring that entity to engage in collective bargaining would "substantially burden" its "exercise of religion." 42 U.S.C. § 2000bb-1(a). Moreover, even if the act of collective bargaining would not be a "substantial burden," RFRA might still be applicable if remedying a particular NLRA violation would be a "substantial burden." As none of these questions are properly before us, we need not explore them further.

278 F.3d at 1347. Privately owned for-profit companies such as Conestoga and Hobby Lobby will not be able to satisfy this Court's test in *NLRB v. Bishop of Chicago*; but every business with a religious objection will be able to challenge the NLRB's jurisdiction. It will then fall to the various courts of appeals, and perhaps this Court, to determine which specific aspects of the National Labor Relations Act are supported by a compelling interest and are sufficiently narrowly tailored as to be valid under RFRA.[13] The broad potential impact on the statutory

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[13] It is not only the Seventh Day Adventist faith which opposes unions. Since at least 1927, the Protestant Reformed Church

scheme created by the NRLA is nowhere contemplated in the legislative history of RFRA.

The possibility of invoking RFRA also implicates federal employment discrimination laws. Consider the corporation that claims its religious exercise requires that "during the early years of a child's growth, the mother's place is in the home." *See Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932, 935 (6th Cir. 1985). An employment policy embodying this rule would no doubt violate the ban on sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a). Surely the federal government has a compelling interest in outlawing gender discrimination in employment. But using the logic Conestoga and Hobby employ here, an employer might note that Title VII includes exemptions and exclusions for certain categories of employers — including religious employers – and so might raise a host of issues regarding whether Title VII is sufficiently narrowly tailored.

Given ongoing opposition to same-sex marriage on religious grounds, it also is not hard to imagine how, in light of this Court's ruling in *United States v. Windsor*, 133 S. Ct. 2675 (2013), owners of a for-profit corporations might

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determined that "unions undermine the God-given authority of the employer." See David J. Engelsma, Professor of Dogmatics in the Protestant Reformed Seminary, *Labor Membership in the Light of Scripture*, (May 2003) http://www.prca.org/pamphlets/pamphlet_86.html. Some members of the Church of Jesus Christ of Latter-Day Saints have also claimed a religious objection to unions. See, e.g., *In re Whitmer*, Case 23447-N-10-0062, Decision 11026 – PECB, (Wash. Public Emp. Relations Comm'n March 24, 2011), http://www.perc.wa.gov/databases/ulp/11026.htm.

invoke RFRA as protecting their desire not to provide benefits to same-sex couples.[14] If for-profit corporations can invoke RFRA, then the federal government will need to show not only a compelling interest in mandating these benefits, but also will have to show that the myriad reporting and disclosure obligations of ERISA satisfy the least restrictive means of furthering that interest.

The same issues obtain for members of our Armed Forces and their families, insofar as many people object to providing any support for military activities on religious grounds. *See Jenkins v. Comm'r*, 483 F.3d 90 (2d Cir. 2007). Owners of for-profit corporations who have such objections may well not wish to have their companies provide any support to employees who seek to take time off from work pursuant to the military family provisions of the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.*[15]

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[14] *See also* U.S. Dept. of Labor, Emp. Benefits Sec. Admin., *Technical Release No. 2013-04, Guidance to Employee Benefit Plans on the Definition of "Spouse" and "Marriage" under ERISA and the Supreme Court's Decision in United States v. Windsor*, (Sept. 18, 2013) ("the term 'spouse' will be read to refer to any individuals who are lawfully married under any state law, including individuals married to a person of the same sex.") http://www.dol.gov/ebsa/newsroom/tr13-04.html; *Cf. Cozen O'Connor, P.C. v. Tibits*, Civil Action No. 11-0045, 2013 WL 3878688 (E.D. Pa. July 29, 2013), (holding that *Windsor* entitles same-sex spouses to ERISA benefits where the employer's profit sharing plan did not define the term "spouse")

[15] U.S. Dept. of Labor, Wage & Hour Div., *Fact Sheet #28: The Military Family Leave Provisions under the Family and Medical Leave Act*, (Revised Feb. 2013) ("A covered employer must grant an eligible employee up to 12 workweeks of unpaid, job-protected leave

Consider also, for example, a challenge under RFRA to federal environmental laws. Could not an owner of a for-profit corporation invoking Genesis 1:28 as a commandment to have "dominion" over the earth and to "subdue it" (King James Bible) challenge one or more aspects of the scheme of federal environmental regulation? Similarly, one may expect challenges to public accommodation laws, like the ones in the District of Columbia prohibiting discrimination on the basis of marital status. D.C. Human Rights Act of 1977, as amended, D.C. Official Code Section 2-1401.01 *et seq.*

In short, granting RFRA rights to for-profit corporations would dramatically expand the potential for free exercise claims and leave the government to repeatedly justify the trade-off between corporate religious exercise rights, a workable and fair scheme of federal regulation needed to advance the general good, and the rights of individuals, both religious and secular. Moreover, because corporate decisions are much more likely than individual decisions to impact the rights of others, extending RFRA to for-profit businesses will lead to numerous challenges arising from competing constitutionally protected interests. *See Hobby Lobby*, 723 F.3d at 1144 (acknowledging that by Hobby Lobby's refusal to comply with the contraceptive mandate it was "in effect, imposing their religious views on their employees or otherwise burdening their employees' religious beliefs."); *Tex. Monthly, Inc. v. Bullock*, 489

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during any 12-month period for qualifying exigencies that arise when the employee's spouse, son, daughter, or parent is on covered active duty or has been notified of an impending call or order to covered active duty."), http://www.dol.gov/whd/regs/compliance/whdfs28.htm.

U.S. 1, 18 n. 8, (1989) (plurality) (noting significance, in free exercise and establishment clause jurisprudence, of extent to which proposed exemptions for religious groups would burden the rights of third parties). The risk of harm to individual freedoms, including freedoms for religious minorities that free exercise was meant to protect, cannot be ignored.

II. RFRA HAS NEVER BEEN AND SHOULD NOT BE READ TO ALLOW A RELIGIOUS EXEMPTION TO A TAX, WHICH IS ALL THE ACA IMPOSES ON CONESTOGA AND HOBBY LOBBY.

In *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012) ("*NFIB*") this Court upheld the ACA's individual mandate as constitutional in light of the alternative it provided of taxing those individuals who remained uninsured. As explained by Chief Justice Roberts, the Federal Government *does not have the power* to order people to buy health insurance. The Federal Government does, however, have the power to impose a tax on those without health insurance. The individual mandate is therefore constitutional because it can reasonably be read as a tax. *Id.* at 2601. Subsequently, in *Liberty University, Inc. v. Geithner*, the Supreme Court directed the Fourth Circuit to consider the constitutionality of the employer mandate in light of its holding in *NFIB*. 133 S. Ct. 679 (2012). Applying the reasoning of *NFIB*, the Fourth Circuit noted that the employer mandate was also a tax and thus constitutional. *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 95 (4th Cir. 2013) *cert. denied*, 134 S. Ct. 683 (2013). Employers are not compelled by the ACA to purchase health insurance; nor are they penalized for not purchasing health insurance. As explained well in the *amicus* brief drafted by Americans United for Separation of Church and State, employers who choose not to purchase health insurance for any reason, including a religious objection, have the option of paying a tax of $2000 per year for 30 fewer than the employer's total number of full-time employees, an amount that would likely be less than the cost of insurance.[16] *See Br. of Faith Groups As Amici Curiae Supporting the Government.*

Were this Court to grant Conestoga's and Hobby Lobby's challenge to the ACA, it would represent an unprecedented extension of RFRA, allowing a for-profit corporation to avoid an otherwise neutral and non-penal tax. In *Jenkins v. Commissioner*, 483 F.3d 90, 91 (2d Cir. 2007), for example, the taxpayer sought to withhold part of his tax obligation until it could be directed to a purpose other than military spending, which he found objectionable on religious grounds. The Tax Court granted summary judgment and the Second Circuit affirmed.

Even more analogous, in *Adams v. Commissioner*, 170 F.3d 173, 174-75 (3d Cir. 1999), the Third Circuit affirmed the Tax Court's determination that Adams, a devout Quaker, was not exempt from payment of taxes under RFRA, and was liable for deficiencies and penalties assessed against her. Adams did not refuse to pay taxes, she merely did not want her money directed to military expenditures. The court found that her religious exercise was not substantially burdened and rejected Adam's accommodation argument, asking the court to direct her tax dollars to only non-military purposes:

---

[16] Even if the alternative tax imposed an additional cost, this would not make it invalid. "It is well established that there is no substantial burden placed on an individual's free exercise of religion where a law or policy merely operates so as to make the practice of the individual's religious beliefs more expensive." *Goodall by Goodal v. Stafford Cnty. Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) (internal quotation marks omitted).

> [Adams] asserts that she would voluntarily pay all of her federal income taxes if the money she paid were directed to a fund that supported only non-military spending, or if her payments could be directed to nonmilitary expenditures, or that, with the consultation of a clearness committee, she would be willing to consider any other form of accommodation of her beliefs that could be offered by the government.

Id.

Any objection that Conestoga or Hobby Lobby might have to the alternative tax option of the ACA is even less compelling than that in *Adams*. In fact, Conestoga and Hobby Lobby both rather surprisingly argue that an alternative to the ACA obligation would be for the federal government to provide women with the contraceptive services to which the Hahns and Greens object. *Conestoga, Br. for Petitioners*, at 3; *Hobby Lobby, Br. for Respondents on Petition for Cert.*, at 34-35. From where would the money for such services come, other than the government's authority to tax? Having admitted, indeed argued, that federal government funds can be used to provide the full range of FDA-approved reproductive health options, it would strain credulity to grant a religious exemption from the alternative tax option of the ACA.

CONCLUSION

The Jewish community has worked tirelessly for decades to extend civil rights and protect individuals from being subjected to restrictions on their liberty to live their own lives based on the religious views of others – whether those restrictions were imposed by government or by private institutions seeking to impose the limits of someone else's faith on them. Extending the definition of "person" in RFRA to for-profit corporations would upset the delicate balance and lead us down a path where individuals could be deprived of federally protected rights because they did not share the religious views of the company's owners.

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IN THE

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v.

KATHLEEN SEBELIUS, ET AL.,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE TENTH AND THIRD CIRCUITS, RESPECTIVELY

Brief of *Amicus Curiae* John A. Ryan Institute for Catholic Social Thought In Support of Hobby Lobby, Conestoga, et al.

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INTEREST OF *AMICUS CURIAE*[1]

The John A. Ryan Institute for Catholic Social Thought ("Ryan Institute") is an academic research center at the University of St. Thomas in Saint Paul, Minnesota. It is dedicated to examining the intersection of Catholic social tradition and business theory, and working with business leaders to engage the practical challenges of organizational life and the spiritual and moral claims of faith. The Ryan Institute has a direct and substantial interest in establishing the legal proposition that the protections of the Religious Freedom Restoration Act and Free Exercise Clause of the First Amendment extend to all corporations manifesting religious beliefs.

SUMMARY OF THE ARGUMENT

Nothing inherent in the legal form or status of a corporation precludes religious motivations and ideals as the basis, or one of the bases, of the association of human persons comprising a corporation. This is true regardless of whether the corporation is recognized as a non-profit or for-profit business. A business is a specialized human association organized for the purpose of providing goods or services to others. Many businesses adopt the legal form of corporations to facilitate the pooling of capital, the refinement of skills and services, and to allocate the financial liabilities and rewards among the human persons comprising the association. None of these actions of pooling capital, refinement of skills and services, or allocation of financial liabilities and rewards are inherently inimical to or inconsistent with religious purpose or beliefs. Thus the decision by a human person or association to embrace the corporate legal status does not preclude manifestation of religious beliefs in the corporate identity, mission, stewardship of resources, or other corporate actions. These religious beliefs and actions are entitled to protection under the Religious Freedom Restoration Act and Free Exercise Clause of the First Amendment.

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Hobby Lobby's letter evidencing such consent has been filed with the Clerk of the Court, and all other parties have granted blanket consents. Further, pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did such counsel or party make a monetary contribution to the preparation or submission of this brief. Only *amicus curiae* made such a monetary contribution.

ARGUMENT

The threshold question in these cases is whether the Religious Freedom Restoration Act and Free Exercise Clause of the First Amendment afford protection to closely-held corporations seeking to act in accordance with the religious beliefs of the owners. In answering this question, it is important to note that not all corporations are identical and the diversity in corporate cultures is the product of deliberate choices made by the people comprising the human association comprising the corporation. These choices, when religiously motivated, are entitled to legal protection under the Religious Freedom Restoration Act and Free Exercise Clause of the First Amendment.

I. Corporations as associations of human persons act in accordance with the beliefs of those persons.

The fundamental error inherent in the opinion of the Court of Appeals for the Third Circuit below is that corporations exist completely independent of the people who create, own and operate them. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 388 (3rd Cir. 2013) ("[s]ince Conestoga is distinct from the Hahns, the Mandate does not actually require the Hahns to do anything."). *Accord Autocam Corp. v. Sebelius*, 730 F.3d 618 (6th Cir. 2013).[2]

This ruling is contrary to reason, experience, and this Court's jurisprudence. Corporations are not found in the state of nature, nor do they come into being absent human agency—agency exercised both by the community of persons comprising the state that, subject to constitutional limitations, defines the legal requirements, rights, and duties of those seeking to associate and act through a corporate form, and by those persons who form the association that is "incorporated."

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[2] This ruling directly conflicts with the judgments of federal courts of appeals in the Third, Seventh, Ninth, Tenth and DC Circuits, all of which recognize either the right of a closely-held corporation or its owners to assert religious liberty claims. *See Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013) (owners and closely-held corporation can assert religious liberty claims); *Annex Medical, Inc. v. Sebelius*, 2013 WL 1276025 (8th Cir. Feb 01, 2013) (corporation could assert religious liberty claims); *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir.2009) (pharmacy owned by family corporation could raise religious objections to state requirement that it stock abortifacients); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. June 27, 2013) (closely-held corporation could assert religious liberty claims); and *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208 (D.C.Cir.2013) (owners of closely-held corporation could assert religious liberty claims).

This Court has long rejected the claim that citizens lose all constitutional rights when they choose to assume the legal form of a corporation.

> "The Massachusetts court did not go so far as to accept appellee's argument that corporations, as creatures of the State, have only those rights granted them by the State. The court below recognized that such an extreme position could not be reconciled either with the many decisions holding state laws invalid under the Fourteenth Amendment when they infringe protected speech by corporate bodies, or with decisions affording corporations the protection of constitutional guarantees other than the First Amendment.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n. 14 (1978) (citations omitted).

Given this Court's recognition that corporations can exercise a variety of constitutional rights including speech, the question then becomes: "Is there something unique to the exercise of religion that makes it 'purely personal' or contrary to history, and purpose of the Free Exercise Clause or the provisions of Religious Freedom Restoration Act?" *Id.* Amicus leaves to others, more expert in constitutional history and statutory interpretation the second prong of this test and turns to address the Third Circuit's ruling that religious belief and practice is beyond the capacity of a corporation.

II. Corporate identity, mission, and actions may reflect religious beliefs.

In rejecting the religious liberty claims of Conestoga Wood Specialties Corporation ("Conestoga") the Third Circuit opined that corporations do not "do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 385 (quoting with approval *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F.Supp. 2d 1278, 1291 (W.D.Okla.2012), rev'd *en banc*, 723 F.3d 1114 (10th Cir. 2013). The court does not elaborate on this statement, instead relying upon it as a self-evident truth.

Yet in fact every corporate act is only taken based upon the intention and direction of an individual or a community of actors within the corporation. This is as true of secular acts as it is religious acts. Nor does the court explain the existence and legal recognition of distinctively religious corporations under a variety of state and federal laws. *E.g.* Minn. Stat. Ann. § 315.10 (describing powers of religious corporations).

There is a huge diversity of businesses and corporate cultures in the United States. This diversity reflects the fact that corporations are associations of people and people have diverse interests, skills, and aspirations.

> [B]usinesses are collaborative associations that draw people together . . . because they are attracted by the activities and ambitions of the organization. Real businesses are rarely organized by shareholders seeking an investment; they are almost always organized by people captivated by an idea who turn to capital markets only after they have proven that their idea can attract and hold employees and customers.

Robert G. Kennedy, *Corporations, Common Goods, and Human Persons*, 4 Ave Maria L. Rev. 1, 26-27 (2006).

Like the owners of Hobby Lobby and Conestoga, many people establishing or directing corporations do so as expression of their religious beliefs in service to God and neighbor.

> Business is inherently other-centered: a business joins together people's gifts, talents, energies and skills to serve the needs of others. This in turn supports the development of the people who do the work. The tasks they perform in common bring forth the goods and services needed by a healthy community.

Vocation of the Business Leader: A Reflection, ¶ 41 (Pontifical Council for Peace and Justice pub. 2012) at http://www.stthomas.edu/cathstudies/cst/VocationBusinessLead/VocationTurksonRemar/VocationBk3rdEdition.pdf.

The fact that people found and operate corporations that generate profit does not defeat their religious motivation.

III. Pursuit of profit does not foreclose reliance on religious beliefs or pursuit of religious objectives.

There is nothing inherent in profit that converts business activities from sacred to secular.

> The Church acknowledges the legitimate role of profit as an indication that a business is functioning well. When a firm makes a profit, this means that productive factors have been properly employed and corresponding human needs have been duly satisfied. But profitability is not the only indicator of a firm's condition. It is possible for the financial accounts to be in order, and yet for the people--who make up the firm's most valuable asset--to be humiliated and their dignity offended. Besides being morally inadmissible, this will eventually have negative repercussions on the firm's economic efficiency. In fact, the purpose of a business firm is not simply to make a profit, but is to be found in its very existence as a community of persons who in various ways are endeavoring to satisfy their basic needs, and who form a particular group at the service of the whole of society. Profit is a regulator of the life of a business, but it is not the only one; other human and moral

> factors must also be considered which, in the long term, are at least equally important for the life of a business.

Pope John Paul, II, Encyclical Letter, *Centesimus Annus*, ¶ 35 (1991).

Bob Wahlstedt, a founder of Reell Precision Manufacturing in St. Paul, Minnesota, a closely-held corporation puts it more colloquially.

> We do not define profits as the purpose of the company, but we do recognize that reasonable profitability is necessary to continue in business and to reach our full potential. We see profits in much the same way that you could view food in your personal life. You probably do not define food or eating as the purpose of your life, but recognize that it is essential to maintain your health and strength so you can realize your real purpose.

Michael Naughton, *The Corporation as a Community of Work: Understanding the Firm within the Catholic Social Tradition*, 4 Ave Maria L.Rev. 33, 55 (2006).

The Third Circuit erred in its failure to recognize that closely-held corporations act only upon the intentions and motivations of their founders and that religious beliefs govern the economic activities of many corporate shareholders independent of whether those corporations are characterizes as for-profit or non-profit.

CONCLUSION

This Court should affirm the right to a religious freedom exemption from the abortifacient mandate for corporations manifesting religious beliefs in their corporate identity, mission, or other corporate actions.

Respectfully submitted,

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

BRIEF OF *AMICUS CURIAE* JUDICIAL EDUCATION PROJECT IN SUPPORT OF HOBBY LOBBY STORES, INC., & CONESTOGA WOOD SPECIALTIES CORP., ET AL.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges construe the Constitution, and the impact of court rulings on the nation. JEP's education efforts are conducted through various outlets, including print, broadcast, and internet media.

SUMMARY OF ARGUMENT

Under the Religious Freedom Restoration Act, Pub. L. 103-141, § 2 (1993) (codified at 42 U.S.C. § 2000bb *et seq.*) ("RFRA"), the government many only create substantial burdens on religion when in furtherance of a compelling interest. The First Amendment, similarly, requires strict scrutiny and the identification of a compelling government interest when a law that is not generally applicable burdens religious freedom. Thus, whichever analytical framework this Court ultimately applies in these cases, the issue of compelling interest will be central.

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[1] Counsel for both parties have consented to the filing of this *amicus* brief. The government and Petitioners Conestoga Wood Specialties, Inc., *et al.* have filed blanket consent with the Court, and the written consent of Respondents Hobby Lobby Stores, Inc., *et al.* accompanies this brief. No counsel for a party authored this brief in whole or in part. No person, other than *amicus curiae*, its members, or its counsel, made a monetary contribution that was intended to fund preparing or submitting this brief.

The government, however, does not demonstrate any compelling interest that would justify overriding religious objections to force an employer to pay for the contraceptives used by his or her employees.

To begin with, interests in regulatory uniformity routinely fail strict scrutiny because the recognition of a general compelling interest in the uniformity of laws would eviscerate the many constitutional protections (and statutes like RFRA) that rely on the strict scrutiny framework for their vitality. Recognition of a compelling interest in uniformity would be particularly incongruous in the context of RFRA, which was enacted precisely to restore a system of accommodations for religious practice under generally applicable laws.

A governmental interest in uniformity should be met with particular skepticism here because the Affordable Care Act ("ACA") is nonuniform *by design*, especially when it comes to the contraceptive mandate. Even by conservative estimates, the law fails to require contraceptive coverage for millions of individuals who work for small employers and for millions more with "grandfathered" pre-ACA plans. The government has further undermined its interest in uniformity by granting numerous exemptions for secular reasons.

The government's backup argument, that it has a compelling interest in the uniform availability of private actions under the Employment Retirement Income Security Act (ERISA), fares no better. RFRA by its terms applies to *every* federal statute, passed both previously and subsequently to it, unless a subsequent statute explicitly states otherwise. To allow laws creating private rights of action to trump RFRA's strict scrutiny requirement flies in the face of both the text and intent of RFRA.

The government also advances hazy interests in public health and equal access to preventative health care services. But those claims are both too general and unparticularized to be considered compelling. First, the duty to preserve public health is traditionally a function of state government and not the federal bureaucracy, but even if it were otherwise, these interests are only loosely connected with the scheme at issue in this case: the provision of a particular set of contraceptives by third parties with no cost to the consumer. Finally, any interest in equal access to recommended health services, whatever that means, hardly touches on the real, concrete issue in this case, which is requiring third-party payment for a subset of contraceptives.

ARGUMENT

Under the Free Exercise Clause and RFRA, the federal government must satisfy strict scrutiny when it substantially burdens free religious exercise. *See Sherbert v. Verner*, 374 U.S. 398, 406-07 (1963) (where laws are not neutral and generally-applicable); Religious Freedom Restoration Act of 1993, Pub. L. 103-141, § 2 (1993) (codified at 42 U.S.C. § 2000bb) (all federal law). The government must show that the interests justifying the federal bureaucracy limiting religious expression or coercing violations of conscience are compelling, and that the government has chosen the least restrictive means to achieve its goals. *Gonzales v. O Centro Espirita*

Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006) (hereinafter "*O Centro*"); *Sherbert*, 374 U.S. at 407-08 (even if compelling interest exists, government must prove "that no alternative forms of regulation would combat such abuses without infringing First amendment rights."). The Court must "searchingly examine" each asserted interest in to ensure that it is truly "compelling." *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972). The religious conscientious objectors ("Religious Claimants") in these cases have pursued theories under both the Free Exercise Clause and RFRA. Although strict scrutiny applies in the same way under the Free Exercise Clause and RFRA, the following discussion will focus on a single issue: whether the government has shown a compelling interest in the contraceptive mandate of the Affordable Care Act, Pub. L. 111-148, § 2713 (2010) (codified at 42 U.S.C. § 300gg-13).

The government's asserted interests are not compelling. Despite the government's invocation of a disfavored uniformity interest in the ACA's contraceptive mandate, the mandate does not apply either uniformly or comprehensively, excluding millions of individuals from coverage requirements entirely, exempting millions of small employers from the contraceptive mandate, allowing indefinite continuation of millions of noncompliant "grandfathered" plans, and creating individualized exemptions of various types. Nor does the government have a compelling interest either in conferring a statutory right to free contraceptives provided by third-parties or in private-party enforcement of the mandate through the ERISA. Moreover, the government's asserted interests in equal access to preventive services are too general and unparticularized to qualify as compelling. Consequently, the government has yet to show a compelling interest in forcing religious conscientious objectors generally, much less these Religious Claimants, to violate the tenets of their faith through the contraceptive mandate.[2]

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[2] No court reaching the compelling interest issue has concluded that the government's asserted interests supporting mandatory third-party funding of contraceptives are compelling. *See Gilardi v. U.S. Health & Hum. Svcs.*, 733 F.3d 1208, 1219-24 (D.C. Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143-44 (10th Cir. 2013); *Korte v. Sebelius*, 735 F.3d 654, 685-87 (7th Cir. 2013); *Newland v. Sebelius*, No. 12-1380, 2013 U.S. App. LEXIS 20223, at *10 (10th Cir. Oct. 3, 2013) (citing *Hobby Lobby Stores, Inc.*, 723 F.3d at 1121, 1128, 1142-43); *Ave Maria Found. v. Sebelius*, No. 13-cv-15198, 2014 U.S. Dist. LEXIS 3516, at *18-*20 (E.D. Mich. Jan. 13, 2014); *Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 U.S. Dist. LEXIS 467, at *25-*26 (E.D. Tex. Jan. 2, 2014); *Beckwith Electric Co. v. Sebelius*, No. 8:13-cv-648-T-17MAP, 2013 U.S. Dist. LEXIS 94056, at *58, (M.D. Fla. June 25, 2013); *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 U.S. Dist. LEXIS 180727, at *69-*73 (E.D. Tex. Dec. 27, 2013); *Geneva Coll. v. Sebelius*, 941 F. Supp. 2d 672, 683-85 (W.D. Pa. 2013); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 433-35 (W.D. Pa. 2013) (nonprofit and for-profit), *modified in part by Geneva Coll. v. Sebelius*, 2013 U.S. Dist. LEXIS 179476, at *44-*46 (W.D. Pa. Dec. 23, 2013) (nonprofit); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806-07 (E.D. Mich. 2013); *Roman Catholic Archbishop of Wash. v. Sebelius*, Civil Action No. 13-1441, 2013 U.S. Dist. LEXIS 179317, at *33 (D.D.C. Dec. 20, 2013) (citing *Gilardi*, 733 F.3d at 1217); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12 Civ. 2542, 2013 U.S. Dist. LEXIS 176432, at *51-*59 (E.D.N.Y. Dec. 16, 2013); *S. Nazarene Univ. v. Sebelius*, No. CIV-13-1015-F, 2013 U.S. Dist. LEXIS 179569, at *26-*30 (W.D. Okla. Dec. 23, 2013); *Zubik v. Sebelius*, No. 13cv1459, 2013 U.S. Dist. LEXIS 165922, at *88-*96 (W.D. Pa. Nov. 21, 2013); *Am. Pulverizer Co. v. Sebelius*, No. 12-3459-CV-S-RED, 2012 U.S. Dist. LEXIS 182307, at *13-*14 (W.D. Mo. Dec. 20, 2012); *Legatus v. Sebelius*, 901 F. Supp. 2d 980, 991-995 (E.D. Mich. 2012); *Tyndale House Publrs., Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125-29 (D.D.C.

I. The government has failed to articulate a compelling interest in uniformity

A. Interests in regulatory uniformity are disfavored under RFRA and the Free Exercise Clause

The government's asserted interest in uniformity—in generally foreclosing exceptions to a law—must make a particularly strong showing to be recognized as compelling. The very purpose of RFRA was to restore a system under which the government was encouraged to create exceptions to accommodate freedom of religion. One unfortunate consequence of the reasoning in *Employment Division v. Smith*, 494 U.S. 872 (1990), was the creation of a perverse incentive for governments to pass laws of "general applicability"—that is, without exceptions—in order to avoid opening the door to First Amendment challenges. Congress passed RFRA specifically to correct this inherent bureaucratic bias against individualized determinations. *See O Centro*, 546 U.S. at 436 ("The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rules of general applicability.'"). And Congress intended that if the other branches of government were not appropriately sensitive to the religious exercise rights of conscientious

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2012); *but see Diocese of Fort Wayne-S. Bend, Inc. v. Sebelius*, No. 1:12-CV-159 JD, 2013 U.S. Dist. LEXIS 180641, at *53 (N.D. Ind. Dec. 27, 2013) (assuming without deciding that interests were compelling); *Grace Schs. v. Sebelius*, No. 3:12-CV-459 JD, 2013 U.S. Dist. LEXIS 180576, at *48 (N.D. Ind. Dec. 27, 2013) (same).

objectors, "courts would recognize exceptions—that is how the law works." *O Centro*, 546 U.S. at 434 (citing 42 U. S. C. §2000bb–1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.")). In so doing, RFRA re-imposed a rule that is comparable to the strict scrutiny test from *Sherbert v. Verner* as it pertains to all federal law. *O Centro*, 546 U.S. at 424; Religious Freedom Restoration Act of 1993, Pub. L. 103-141, § 2 (1993) (codified at 42 U.S.C. § 2000bb) *see also Yoder*, 406 U.S. at 220 ("A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.") (citing *Sherbert*). In light of this strong preference for individualized determinations, the government must meet a particularly heavy burden when it asserts a compelling interest in uniformity itself, that is, that there should be no individualized determinations. *O Centro*, 546 U.S. at 436 (uniformity not compelling interest where government's claims rested on "slippery-slope concerns").

B. The contraceptive mandate is not uniform or comprehensive because the government exempts millions of persons and plans

The government principally relies on this Court's decision in *United States v. Lee*, 455 U.S. 252 (1982), one of the rare cases in which an interest in uniformity has been held to be compelling. In *Lee*, the Court concluded that there was a compelling governmental interest in refusing to permit a religious exemption to the Social Security tax for an Amish employer who objected to the taxation on religious grounds. *Lee*, 455 U.S. at 258-59. The Court found a compelling governmental interest because of pervasive uniformity of the program—the participation of each employer and employee in Social Security was "mandatory and continuous," "indispensable to the fiscal vitality" of the scheme, and any individualized exemptions regime would be so "difficult, if not impossible, to administer" as to be "almost a contradiction in terms." 455 U.S. at 258-59.

In the cases at bar, the government arguing that the ACA constitutes a "comprehensive insurance system with a variety of benefits available to all participants." *Sebelius v. Hobby Lobby Stores, Inc. et al.*, No. 13-354, Br. of Pet'r at 38 (citing *Lee*, 455 U.S. at 258) (hereinafter "Opening Br. of U.S."). Thus, according to the government, "individualized religion-based exemptions" to persons such as the Religious Claimants would "directly and materially harm" employees. Opening Br. of U.S. at 38. Moreover, the government argues, allowing exemptions would eliminate the employees' ability to sue these Religious Claimants for failing to provide the objectionable contraceptives. Opening Br. of U.S. at 38.

But "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (*quoting Florida Star v. B. J. F.*, at 541-542 (Scalia, J., concurring in part and concurring in judgment) (citation omitted)) (hereinafter "*Lukumi*"). Although the government claims that the ACA was intended to provide a right to preventive services without cost-sharing, that is, at no cost to the employees, its interest in providing those contraceptives cannot be compelling because it leaves literally millions of persons, employed and otherwise, entirely on their own when it comes to purchasing contraceptives.[3] In a country of over three hundred

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[3] The contraceptive mandate has always been at the periphery of the ACA, and its legislative history illustrates how peripheral the mandate truly is. To begin with, Congress did not specifically create a contraceptive mandate. Rather, the contraceptive mandate arises out of HHS's interpretation of the ACA's requirement to cover "preventive care and screenings." 42 U.S.C. § 300gg-13. That section provides for general preventive health services without cost sharing, including "evidence-based items" having a rating of "A" or "B" from the U.S. Preventive Services Task Force (USPTF), immunizations, and "evidence-informed" preventive care and screenings for infants, children, and adolescents. *Id.* For women, in particular, Congress provided that the Health Resources and Services Administration (HRSA) would "support" comprehensive guidelines for "additional preventive care and screenings not described in paragraph (1)" of the section, that is, evidence-based items or services rated by the USPTF. 42 U.S.C. § 300gg-13(a)(4). HRSA, without notice-and-comment rulemaking, later published these binding "comprehensive guidelines" on a website, not the Federal Register. Health Resources and Services Administration, Women's Preventive Services Guidelines, http://www.hrsa.gov/womensguidelines/ (last visited Jan. 27, 2014).

Although Congress did not define "preventive care and screenings" explicitly, it used parallel language in the same section, namely, "breast cancer screening, mammography, and prevention," 42 U.S.C. § 300gg-13(a)(5), suggesting that Congress had in mind the prevention of disease, rather than pregnancy. This suggestion is amplified by Congress's explicit references to contraceptives elsewhere in the ACA, namely, in provisions regarding sex education. Section 513, for instance, refers to contraception five times. Affordable Care Act, Pub. L. 111-148, § 513 (2010) (codified at 42 U.S.C. § 713). In addition, when the ACA refers to preventive services elsewhere, it does so in connection million, the Tenth Circuit Court of Appeals estimated that the contraceptive mandate did not "presently" extend to even "tens of millions" of people, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1143 (10th Cir. 2013) (en banc). Whatever the exact number of persons left uninsured, the reach of the ACA and its contraceptive mandate is so underinclusive that uniformity of coverage cannot be considered a "compelling interest." The ACA was not intended or expected to create a "comprehensive" and uniform scheme like Social Security. In fact, it leaves millions of persons uninsured *by design*, exempts millions of small employers from the contraceptive mandate *by design*, and exempts millions of "grandfathered" plans from the contraceptive mandate *by design*. These features, all of which are major structural components of the ACA, fatally undermine the government's contention that the ACA is a uniform and comprehensive system within the meaning of *United States v. Lee*.

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with diseases. *See* 42 U.S.C. § 18022(b)(1) (distinguishing between "Maternity and newborn care" and "Preventive and wellness services and chronic disease management"). Likewise, although the congressional record contains incidental references to contraception, the vast majority of discussion anticipated the measures for prevention of diseases like cancer, not normal and healthy conditions like pregnancy. 155 Cong. Rec. S12,114-31, S12,143-44 (2009) (statements of Sens. Feinstein, Vitter, Brown, Coburn, Merkley, Murkowski, Enzi, Baucus, Whitehouse, Burris, & Ensign).

1. The ACA was always expected to leave millions of Americans uninsured, and therefore outside the scope of the contraceptive mandate

Quite apart from the specifics of the employer contraceptive mandate, the ACA has always been expected to leave tens of millions of persons uninsured, and thus outside the scope of the contraceptive mandate. In its March 20, 2010 evaluation of the ACA, for instance, the Congressional Budget Office (CBO) predicted that the proportion of the insured among the nonelderly, non-unauthorized-immigrant population would rise from approximately 81% to 92% by 2016, where it would remain flat through the end of the projected 10-year time horizon, thus leaving—even under the rosiest estimates—approximately 23 million nonelderly persons uninsured. Letter from Douglas W. Elmendorf, Director, Congressional Budget Office, to Hon. Nancy Pelosi, at tbl.4 (Mar. 20, 2010), *available at* http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/113xx/doc11379/amendreconprop.pdf (last visited Jan. 27, 2014). The May 2013 estimates of coverage are less optimistic, estimating a stable uninsured rate of between 30 and 31 million nonelderly persons. Congressional Budget Office, Effects on Health Insurance and the Federal Budget for the Insurance Coverage Provisions in the Affordable Care Act—May 2013 Baseline, tbl.1 (2013), *available at* http://www.cbo.gov/publication/44190 (last visited January 27, 2014); *see also* Associated Press, Poll Finds Drop in Uninsured Rate, Jan. 23, 2014 (16.1 percent of U.S. adults remain uninsured), *available at* http://bigstory.ap.org/article/apnewsbreak-poll-finds-drop-uninsured-rate (last visited Jan. 27, 2014). Thus, even after the projected "transitional" period, at least 30 million nonelderly persons will remain uninsured, and therefore beyond the reach of a supposedly "uniform" contraceptive mandate. *Id.*

Indeed, many of these individuals will also be exempted from paying the individual shared responsibility payment that is the chief incentive for requiring individuals to purchase coverage. HealthCare.gov, How do I qualify for an exemption from the fee for not having health coverage?, https://www.healthcare.gov/exemptions/ (last visited Jan. 27, 2014). And although individual coverage was expected to cover contraceptives, on December 19, 2013, the government announced that individuals whose insurance plans were canceled would be exempted from the individual mandate under the mandate's "hardship exemption" for an additional year. *See* Ezra Klein, The individual mandate no longer applies to people whose plans were canceled, Wonkblog, Dec. 19, 2013, http://www.washingtonpost.com/blogs/wonkblog/wp/2013/12/19/the-obama-administration-just-delayed-the-individual-mandate-for-people-whose-plans-have-been-canceled/ (last visited Jan. 27, 2014). Thus the number of individuals without insurance, and by extension without the "uniform" coverage for contraceptives, will likely be even larger than the CBO estimates initially suggested.

2. The ACA does not require millions of small employers to comply with the contraceptive mandate

Congress also exempted "small employers" (businesses having the equivalent of fewer than 50 full-time employees) from tax penalties associated with failing to provide health coverage, thus relieving them entirely from the contraceptive mandate. *See* 26 U.S.C. § 4980H(c)(2) (exempting employers having fewer than 50 full-time employees); *Newland*, 881 F. Supp. 2d at 1297. These employers represent millions of Americans. According to the latest figures from the U.S. Census Bureau, in 2011, 51,504,770 people worked for 10,574,412 employers having fewer than 50 employees.[4] U.S. Census Bureau, *U.S. & States, NAICS Sectors, Small Employment Sizes* (2011), *available at* http://www2.census.gov/econ/susb/data/2011/us_naicssector_large_emplsize_2011.xls (last visited Jan. 27, 2014). If any one of these millions of small employers chooses not to provide health insurance, their employees may independently buy health insurance that complies with the contraceptive mandate through an exchange. *See* Opening Br. of U.S. at 56.

Under Social Security, by contrast, there was no such flexibility. As the Court observed in *Lee*, some of the Social Security taxes were paid by the employees through withholding and some were paid by the employers through an excise tax, but the taxes were truly uniform. *Lee*, 455 U.S. at 254 n.1 (discussing uniformity of federal Social Security and unemployment taxes). Today, nearly all employment compensation is taxable, and nearly every employer must collect Social Security taxes, even those who are self-employed or have household employees. *See generally* 26 U.S.C. § 1402 (self-employment tax); 26 U.S.C. § 3101 *et seq.* (Federal Insurance Contributions

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[4] Some portion of these small employers will be classified as "large" under the ACA because the 50-employee threshold is calculated based on the number of "full-time equivalent" employees (FTEs), not the number of actual employees, thus sweeping into the employer mandate an unknown number of employers having fewer than 50 full-time employees. *See* 26 U.S.C. § 4980H(c)(2).

Act); *see also* Internal Revenue Service, Publication 926, Household Employer's Tax Guide 3-7 (2014) (discussing obligations of household employers), *available at* http://www.irs.gov/pub/irs-pdf/p926.pdf (last visited Jan. 27, 2014).

In contrast, the ACA gives the employers of these millions of small-business employees the flexibility to determine whether or not to provide health insurance, with the effect that coverage provided by such small employers need not even be "mandatory and continuous." *Lee*, 455 U.S. at 258-59. It is therefore hard to see what compelling interest is served by forcing the Religious Claimants to supply objectionable contraceptives for their employees when the law has provided millions of non-religious small businesses with the option to not supply health insurance at all.[5]

3. The ACA permits millions of plans to be "grandfathered" into the new system without complying with the contraceptive mandate

Congress chose to allow millions of plans that do not comply with the contraceptive mandate to be "grandfathered" and thus exempted from the contraceptive mandate. *See* 42 U.S.C. § 18011; *Newland*

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5. The CBO predicted that the ACA will result in approximately 7 million fewer individuals being covered by employment-based plans over the next ten years. Congressional Budget Office, Effects on Health Insurance and the Federal Budget for the Insurance Coverage Provisions in the Affordable Care Act—May 2013 Baseline, tbl.1 (2013), *available at* http://www.cbo.gov/publication/44190 (last visited Jan. 27, 2014).

v. Sebelius, 881 F. Supp. 2d 1287, 1291 (D. Colo. 2012) ("Unlike some other provisions of the ACA, however, the preventive care coverage mandate does not apply to certain healthcare plans existing on March 23, 2010. This gap in the preventive care coverage mandate is significant. According to government estimates, 191 million Americans belong to plans which may be grandfathered under the ACA." (citations omitted)); *Conestoga Wood Specialties v. Sec'y of the U.S. Dept. of Health & Human Svcs.*, 724 F.3d 377, 414 (3d Cir. 2013) (Jordan, J., dissenting) (citing *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 n.13 (D. Colo. 2012)); Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538, 34,550, 34,555-56 (June 17, 2010).

The government describes the function of "grandfathering" as "allowing a transition period" for compliance, Opening Br. of U.S. at 53. In a sense, this is true. The ACA is designed to work as an incentive scheme, providing tax incentives for the purchase of insurance, either by employers or by individuals. But although the government expected "grandfathered" plans to disappear because employers were influenced by the ACA's incentives, this is an incentive scheme, not a mandatory-compliance scheme like Social Security. And it appears that "grandfathered" plans have lasted much longer than anticipated. Estimates on the Department of Health & Human Services (HHS) website last summer indicated that health plans exempted through "grandfathering" still covered at least 50 million people, and perhaps twice that number. HealthCare.gov, Keeping the Health Plan You Have: The Affordable Care Act and "Grandfathered"

Health Plans (June 20, 2013), *archived at* https://web.archive.org/web/20130620171510/http://www.healthcare.gov/news/factsheets/2010/06/keeping-the-health-plan-you-have-grandfathered.html (last visited Jan. 27, 2014) ("Most of the 133 million Americans with employer-sponsored health insurance through large employers will maintain the coverage they have today. . . . The 133 million Americans with employer-sponsored health insurance through large employers (100 or more workers)—who make up the vast majority of those with private health insurance today—will not see major changes to their coverage as a result of this regulation. This regulation affirms that most of these plans will remain grandfathered—more than three-quarters of firms in 2011—based on the way they changed cost sharing from 2008–2009."); *see also* Interim Final Rules for Group Health Plans and Health Insurance Coverage Relating to Status as a Grandfathered Health Plan Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 34,538, 34,553 (June 17, 2010) (describing projections for grandfathered status).

As the district court observed in *Newland*, "[a]lthough there are many requirements for maintaining grandfathered status, if those requirements are met a plan may be grandfathered for an *indefinite period of time*." 881 F. Supp. 2d at 1291 (citations omitted, emphasis added). The government thus provided the *option* of noncompliance with the contraceptive mandate for millions of plans. And even assuming that most "grandfathered" plans would eventually be cancelled or lose "grandfathered" status, millions of persons would still have been left uncovered by the contraceptive mandate in "grandfathered" plans for a significant period of time. *Beckwith Electric Co. v. Sebelius*, No. 8:13-cv-648-T-17MAP, 2013 U.S. Dist. LEXIS

94056, at *58 (M. D. Fla. June 25, 2013) (best case scenario about lost grandfathering by the end of 2013 "still leaves roughly a third of America's population (i.e., 100 out of 313.0 million) exempt from the contraceptive mandate."); *Newland*, 881 F. Supp. 2d at 1298 n.13 (citing 75 Fed. Reg. 34,538, 34,553). The ACA cannot be "comprehensive" or uniform if it exempts millions of others from the unique conscience burdens that HHS has placed on the Religious Claimants. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1143.

The government has yet to seriously explain how granting religious exemptions to the Religious Claimants would undercut the overall provision of health insurance. After all, the Religious Claimants provided health insurance to their employees out of religious obligation even before the ACA required them to do so. *Conestoga Wood Specialties, Inc. v. Sebelius*, No. 13-356, Br. of Pet'rs at 5; *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354, J.A. at 138-40. Their objection is not to the ACA overall, but is limited instead to a small class of contraceptives that they believe take human life. There is no reason to believe that the government cannot exempt these Religious Claimants from such a small subset of contraceptives when it has simultaneously ensured that multitudes of others remain entirely outside the scope of the contraceptive mandate.

C. Individualized religious exemptions to the contraceptive mandate are easily administrable

The *Lee* court described religious exemptions to Social Security taxes as "difficult, if not impossible, to administer" and concluded that the government interest in a uniform application of the law was thus very high. 455 U.S. at 258-59. But "[i]ndividualized *religion-based* exemptions" to the ACA would not be administratively unworkable, as evidenced by the various other forms of exemptions already being administered. Opening Br. of U.S. at 38 (emphasis added).

First, HHS has already created a process to administer individualized exemptions for certain non-religious persons and some religious conscientious objectors. 45 C.F.R. § 147.131(a). In mid-2013, after an initial attempt to define "religious employers" so narrowly as to exclude nuns serving the non-Catholic poor, *see* 45 C.F.R. § 147.130(a)(i)(iv)(B), HHS issued a new rule setting forth a process for granting religious exemptions to organizations that conscientiously object to providing contraceptives. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870 (July 2, 2013); *Korte v. Sebelius*, 735 F.3d 654, 661-62 (7th Cir. 2013) (discussing evolving definition of "religious employer" exempted from contraceptive mandate). And one of the two explicit exemptions for religious individuals is highly individualized, requiring submission of a five-page application for relief. Centers for Medicare & Medicaid Services, OMB No. 0938-1190, Application for Exemption from the Shared Responsibility Payment for Members of Recognized Religious Sects or Divisions http://marketplace.cms.gov/getofficialresources/publications-and-articles/religious-sect-exemption.pdf (last visited Jan. 27, 2014). It is simply counterfactual for the government to claim that administering individualized "religion-based" exemptions is unworkable because the government *already designed a mechanism to do just that.* The Court should therefore reject the government's dubious assertion that administering *all* individualized exemptions for *religious* objectors would somehow be catastrophic.

Second, and as noted above, persons whose plans were cancelled *as designed by the ACA* will be exempted under the "hardship" exemption and are therefore beyond the incentives of the individual mandate. *See supra* at 10.

Third, HHS has selectively crafted other individualized non-religious exemptions. Centers for Medicare & Medicaid Services, *How do I qualify for an exemption from the fee for not having health coverage?, available at* https://www.healthcare.gov/exemptions/ (last visited Jan. 27, 2014). In such cases, the interest asserted to justify differential treatment is not compelling. *See Lukumi*, 508 U.S. at 546-47 ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.").

In addition to being unfair, this process creates the public perception that such exemptions will be granted selectively and preferentially to discriminate against religious beliefs. *Cf.* John D. McKinnon & Corey Boles, IRS Apologizes for Scrutiny of Conservative Groups, The Wall Street Journal, May 10, 2013, http://online.wsj.com/news/articles/SB10001424127887323744604578474983310370360 (last visited Jan. 27, 2014). For example, the government has selectively modified its regulations to accommodate favored employers. On January 10, 2014, for instance, the U.S. Department of Treasury announced that volunteer firefighter departments and emergency responders would be allowed to avoid classification as "large employers" by not counting volunteer hours toward the average number of hours worked by their employees. *See* U.S. Department of the Treasury, *Treasury Ensures Fair Treatment for Volunteer Firefighters and Emergency Responders Under the Affordable Care Act* (Jan. 10, 2014), *available at* http://www.treasury.gov/connect/blog/Pages/Treasury-Ensures-Fair-Treatment-for-Volunteer-Firefighters-and-Emergency-Responders-under-the-Affordable-Care-Act-Under-ACA.aspx (last visited Jan. 17, 2014). In addition, the HHS waiver process raised selectivity concerns in May 2011 after one news outlet reported that nearly 20 percent of ACA waivers granted in April 2011 were issued to entertainment establishments located in House Minority Leader Nancy Pelosi's congressional district. Matthew Boyle, Nearly 20 percent of new Obamacare waivers are gourmet restaurants, nightclubs, fancy hotels in Nancy Pelosi's district, The Daily Caller, May 17, 2011, http://dailycaller.com/2011/05/17/nearly-20-percent-of-new-obamacare-waivers-are-gourmet-restaurants-nightclubs-fancy-hotels-in-nancy-pelosi%E2%80%99s-district/ (last visited Jan. 27, 2014). RFRA and the First Amendment require at least that much consideration for religious beliefs.

D. The Tenth Circuit properly concluded that the government failed to carry its burden to show a compelling interest in supplying free contraceptives to third parties

The government also argues that it has a compelling governmental interest in denying all religious exemptions to the contraceptive mandate because any such exemptions would harm the employees of the Religious Claimants. Opening Br. of U.S. at 38. This argument is hard to take seriously in light of the literally *millions* of uninsured who, as explained above, are left entirely untouched by the contraceptive mandate. The government is also factually incorrect in saying that the Tenth Circuit "believed that the interests of corporate-respondents' employees are entitled to no weight under RFRA[.]" Opening Br. of U.S. at 39; *see also Sebelius v. Hobby Lobby Stores, Inc. et al.*, No. 13-354, Pet. for Writ of Cert. at 28 ("short shrift"). In fact, the Tenth Circuit explicitly considered those interests and found the government's explanation lacking:

> Finally, we note a concern raised both at oral argument and in the government's briefing that Hobby Lobby and Mardel are, in effect, imposing their religious views on their employees or otherwise burdening their employees' religious beliefs. But Hobby Lobby and Mardel do not prevent employees from using their own money to purchase the four contraceptives at issue here.
>
> Of course, employees of Hobby Lobby and Mardel seeking any of these four contraceptive methods would face an economic burden not shared by employees of companies that cover all twenty methods. But the government must show why the employees' burden creates a compelling interest *that can only be met by requiring the corporations to conform to a mandate.*

Hobby Lobby Stores, Inc., 723 F.3d at 1144 (emphasis added). In other words, the government failed to carry its burden of proving that the contraceptive mandate was the least restrictive means to further its interest, i.e., that there was no other conduit to supply *these* contraceptives except through *these* Religious Claimants. The Tenth

Circuit was simply applying strict scrutiny as this Court applied it in *Yoder* and *Lee*. *Yoder*, 406 U.S. at 210-13, 215-18, 222 (discussing effects of schooling exemption on Amish children); *Lee*, 455 U.S. at 259-60 (Social Security tax was least restrictive means to provide for comprehensive insurance paid for by employers and employees). And the Tenth Circuit was correct: the government has never adequately explained why it must force the Religious Claimants to provide contraceptives when it could either provide contraceptives directly or subsidize contraceptive-covering insurance without implicating the Religious Claimants' sincerely-held beliefs.

II. The existence of a cause of action under ERISA for contraceptive mandate beneficiaries does not constitute a compelling interest

A. The government's ERISA argument would render RFRA meaningless and easily circumventable

The government also asserts (apparently for the first time in this litigation) that the existence of a statutory cause of action for enforcement under ERISA constitutes a compelling governmental interest. Opening Br. of U.S. at 38, 42-44 ("Congress provided those plan participants and beneficiaries a privately-enforceable right to coverage of recommended preventive services without cost sharing. RFRA relief for respondents would extinguish that right[.]"). But like the Free Exercise Clause, RFRA provides a claim *and* defense applicable to federal laws enacted either before or after RFRA unless explicitly indicated otherwise. 42 U.S.C. §§ 2000bb-1(c), 2000bb-3(a)-(b). And RFRA also applies against non-government actors when they wield the power of the government, such as in an enforcement capacity. *See* 42 U.S.C. § 2000bb-2(1) (defining "government" to include any "other person acting under color of law"). Thus, Congress intended for RFRA to mandate strict scrutiny for any "rule of general applicability" that creates a substantial burden, whether ERISA or something else.

The government's argument, although obscure on this point, appears to imply that the simple existence of a freestanding statutory cause of action under ERISA *necessarily* constitutes a compelling interest. Opening Br. at 38-46. That can't be right because under the government's view, the government could always win the "compelling interest" argument by creating a statutory cause of action to be pursued by private parties, even when it could not pursue that cause of action directly. *Cf. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). Under the government's argument, for instance, RFRA would apply to government-initiated lawsuits under a federal statute allowing injunctions against interstate travel to and from a house of worship, but RFRA would not apply to an action by private parties under the same cause of action. This is an absurd result and in any event, is not the law. *See* Shruti Chaganti, Note, *Why The Religious Freedom Restoration Act Provides A Defense In Suits By Private Plaintiffs*, 99 Va. L. Rev. 343, 355-58 (2013) (discussing significant legislative history and structural support for interpreting of RFRA to allow for defense against non-governmental plaintiffs. To the contrary, RFRA explicitly protects against non-government persons "acting under color of law." *See* 42 U.S.C. § 2000bb-2(1) (defining "government"). Moreover, the government's argument would render meaningless the statutory directive that RFRA may be used "as a claim or defense in a judicial proceeding[.]" 42 U.S.C. § 2000bb-1(c). *See, e.g., Bilski v. Kappos*, 130 S. Ct. 3218, 3228-29 (2010) (noting canon against interpreting statutory provisions in a manner that renders another provision superfluous).

B. The government misconstrues a circuit split regarding RFRA's applicability to lawsuits by private parties

Already far afield in search of an argument, and presumably in an effort to give substance to its claim that preserving a statutory cause of action under ERISA is a compelling interest, the government inaccurately describes the circuit split on whether RFRA would apply to enforcement claims brought by private persons under ERISA.[6] The government's opening brief states squarely that "[t]he majority of courts of appeals to address that question have held that it does not." Opening Br. at 43. This is not an accurate representation of circuit authority. Limiting the question to cases addressing the question of whether RFRA can apply in suits brought by private parties under federal dual-enforcement statutes (such as ERISA), the circuit split is 3–0 *in favor of* applying RFRA. And at the much broader level of generality that the government invokes, "whether RFRA applies in litigation between private parties," Opening Br. at 43, the circuit split is 4–1 *in favor of* applying RFRA. *Compare*

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[6] Although the Court need not resolve the circuit split in this case, it is worth noting that RFRA was designed to broadly protect religious liberty against both public and private encroachments. *See generally* Chaganti, 99 Va. L. Rev. at 348-55 (discussing history and structure of RFRA).

Hankins v. Lyght, 441 F.3d 96, 109 (2d Cir. 2006) (RFRA applies); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834, 837-43 (9th Cir. 1999) (RFRA applies against private parties "acting under color of law"); *EEOC v. Catholic Univ. of America,* 83 F.3d 455, 467-70 (D.C. Cir. 1996) (RFRA applied against government and individual plaintiff); *In re Young,* 82 F.3d 1407, 1416-17 (8th Cir. 1996) (RFRA applied against federal bankruptcy trustee); *with General Conf. Corp. v. McGill,* 617 F.3d 402 (6th Cir. 2010) (RFRA did not apply against private plaintiff); *see also Tomic v. Catholic Diocese of Peoria,* 442 F.3d 1036, 1042-43 (7th Cir. 2006) (Posner, J.) (commenting that RFRA would not apply against private plaintiff although issue not raised or briefed).

1. Four courts of appeal have held that RFRA applies to statutes creating private causes of action

In *In re Young,* the Eighth Circuit held that RFRA amended bankruptcy law and in the process, applied RFRA to all federal bankruptcy courts. 82 F.3d 1407, 1416-17 (8th Cir. 1996), *vacated* 521 U.S. 1114 (1997), *reinstated* 141 F.3d 854 (8th Cir. 1998), *cert. denied* 525 U.S. 811 (1998). As the Eighth Circuit reasoned there, the law to be applied was federal, the courts applying the law were "a branch . . . of the United States," *see* 42 U.S.C. § 2000bb-2(1), and the court's decision would involve implementation of federal law. 82 F.3d at 1417. As such, *In re Young* suggests that RFRA applies by its terms to all cases based on federal law and involving federal courts.

A little more than a week later, in *EEOC & Elizabeth McDonough v. The Catholic Univ. of America,* the D.C.

Circuit applied RFRA to a lawsuit by both EEOC and a private litigant under Title VII. 83 F.3d at 467-70. In that case, Sister Elizabeth McDonough filed a charge with the EEOC alleging sex discrimination and retaliatory conduct under Title VII. After an investigation, EEOC and Sister McDonough sued Catholic University, and post-trial, the district court ordered dismissal under the ministerial exception. *Id.* at 459-60. On appeal, the D.C. Circuit affirmed the dismissal on three alternative holdings, two under the ministerial exception (later clarified in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. at 710 (2012)), and the third under RFRA. 83 F.3d at 465, 467-70. The D.C. Circuit hinted that its preferred holding was under RFRA, noting that if the university were correct that RFRA applied, "it wins the case on this basis alone[.]" *Id.* at 467-68.

In 1999, the Ninth Circuit recognized that RFRA can apply against private persons who act "under color of law." *Sutton*, 192 F.3d at 826; *see also* 42 U.S.C. § 2000bb-2(1) (defining "government"). In *Sutton*, the plaintiff sued an employer under RFRA for religious discrimination because he refused to provide a Social Security number for religious reasons. *Sutton*, 192 F.3d at 829-30. Although the Ninth Circuit ultimately concluded that the plaintiff had failed to properly invoke the nexus showing state action, the court explicitly held that the proper test for determining whether a person is "acting under color of law" within the meaning of RFRA is whether they would be "acting under color of law" under 42 U.S.C. § 1983. *Id.* at 834-35. The court went on to list a series of cases in which private parties had been found to be "acting under color of law" under 42 U.S.C. § 1983. *Id.* at 837-43. Thus, the Ninth Circuit held that RFRA does apply as a claim or defense in a lawsuit between private parties so long as the party invoking RFRA properly shows that the opposing party is "acting under color of law." 42 U.S.C. § 2000bb-2(1).

In *Hankins v. Lyght*, the Second Circuit squarely held that RFRA "easily covers" a lawsuit between private parties under the Age Discrimination in Employment Act (ADEA). 441 F.3d at 103, 109. *Hankins* involved a lawsuit by a Methodist minister against a denomination that had forced him to retire after 70 years of age. Although the ministerial exception would have disposed of the case, Second Circuit law on the status of the exception was unresolved at the time. *Hankins*, 441 F.3d at 102. Instead of resolving the constitutional question, therefore, the Second Circuit resolved the case under RFRA, concluding that the RFRA "could not be more on point" because its broad language encompassed lawsuits against a private party under a federal statute[7] that allows for government enforcement. *Hankins*, 441 F.3d at 102. Rejecting an interpretation advanced by the dissent that did not account for RFRA's explicit authorization to invoke the statute against individuals "acting under color of law," the Second Circuit found special significance in the fact that the ADEA allows both private and public enforcement actions. *Id.* at 103-04. On remand, the district court concluded that RFRA's compelling interest test required the same result as the ministerial exception and dismissed the suit. *Hankins v. N.Y. Ann. Conf. of the United Methodist*

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[7] The Second Circuit also noted the existence of lower court opinions allowing parties to raise RFRA defenses in private litigation, even though the RFRA defenses failed on their merits. *Hankins*, 441 F.3d at 103 n.4 (collecting cases).

Church, 516 F. Supp. 2d 225, 237-38 (E.D.N.Y. 2007), *aff'd* 351 F. App'x 489 (2d Cir. 2009) (summary order). Despite one subsequent critical opinion, *Rweyemamu v. Cote*, 520 F.3d 198, 203-04 (2d Cir. 2008) (expressing skepticism but not revisiting the issue), *Hankins* is good law in the Second Circuit. *See, e.g.*, *United States v. Ianniello*, 808 F.2d 184, 190 (2d Cir. 1986) ("This court is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*."), *overruled on other grounds by United States v. Indelicato*, 865 F.2d 1370, 1375-76 (2d Cir. 1989) (*en banc*).

2. Only one court of appeals has directly held that RFRA does not apply to private suits

In *General Conference Corporation v. McGill*, the Sixth Circuit concluded that RFRA did not apply to a trademark infringement lawsuit brought by one religious entity against another. 617 F.3d at 412. Yet *McGill* is distinguishable because it did not involve a dual-enforcement statute allowing suit "under color of law," such as ERISA or ADEA, but rather an intellectual property statute. *Id.* at 410-12. The Sixth Circuit also relied on dubious readings of the existing authority, mistakenly claiming that a Ninth Circuit case had "reached the issue" of whether RFRA applies to suits by private parties when the Ninth Circuit said that it "need not decide this knotty question" because it could dispose of the case on other grounds. *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1121 (9th Cir. 2000) (plaintiff failed to show substantial burden). Likewise, the Sixth Circuit mistakenly interpreted *Sutton* to hold that RFRA does not apply to suits between private parties generally, even though *Sutton* actually said that RFRA would apply as long as the plaintiff could show that the private party was "acting under color of law." *Sutton*, 192 F.3d at 834-43.[8]

III. A governmental interest cannot be "compelling" where it is general and unparticularized

Under the strict scrutiny mandated by RFRA, the Court rejects the "categorical approach" and looks "beyond broadly formulated interests" asserted to scrutinize "the asserted harm of granting specific exemptions to particular religious claimants[,]" on a case-by-case basis. *O Centro*, 546 U.S. at 430-31 (citing *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995)); *Yoder*, 406 U.S. at 228-29 (state's interest in compelling school attendance by Amish children less substantial than requiring such attendance for children generally); *cf. Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (compelling interest analysis "is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the aspect of fairness, privacy, etc., addressed by the law at issue is highly significant."). The text of RFRA makes the individualized nature of the inquiry clear: RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened. *O Centro*, 546 U.S. at 430-31. Thus the Court must determine whether granting an exemption from a small number of contraceptives to these particular claimants would be among "the gravest abuses, endangering paramount interests" that could justify the burden on the claimants' religious exercise. *Sherbert*, 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). The government's asserted interests in public health and equal access to contraceptives, however, are so vague and expansive that they cannot justify application of the contraceptive mandate to these particular Religious Claimants.

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[8] *McGill* cited *Tomic v. Catholic Diocese of Peoria*, a Seventh Circuit case in which the court stated in *dicta* that RFRA would not apply as a defense in an ADEA case, even though no party had briefed or relied on the RFRA issue and the court had already concluded that the ministerial exception disposed of the case. 442 F.3d 1036, 1042-43 (Posner, J). Even interpreting *Tomic* to reach the RFRA issue, the circuit split only becomes slightly less lopsided, 4-2 in favor of applying RFRA to suits between private parties.

A. The asserted governmental interest in public health is general and unparticularized to the Religious Claimants

As the Tenth Circuit observed, the "the government offers almost no justification for not 'granting specific exemptions to particular religious claimants.'" *Hobby Lobby Stores, Inc.*, 723 F.3d at 1143 (citing *O Centro*, 546 U.S. at 431). Indeed, signaling the weakness of its case on this point, the government uses capacious adverbs to describe how the contraceptive mandate advances a governmental public health interest: "directly," "materially," and "tangibly." Opening Br. of U.S. at 46, 48. To support its asserted compelling interest in "public health," the government then cites a list of general facts about unintended pregnancies, birth spacing, and other health benefits. Opening Br. of U.S. at 46-48. In short, the governmental interest amounts to: Contraceptives are good and the contraceptive mandate increases their usage. In a brief feint toward particularity, the government notes that "contraceptive methods are not interchangeable" and goes on to note features of several of the challenged contraceptives. Opening Br. of U.S. at 48.

But strict scrutiny requires more than such generalities. In *O Centro*, for instance, the Court rejected a similar set of interests advanced by the challenged law because they were too general and failed to take relevant differences into account. 546 U.S. at 432-33 (rejecting "general characteristics of Schedule I substances," "high potential for abuse," lack of accepted medical use, and lack of acceptable safety guidelines). Here, likewise, the government's asserted interest in "public health" has been articulated as a "broadly formulated interest[] justifying the general applicability" of the ACA. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1143-44 (citing *O Centro*, 546 U.S. at 431).

1. The government identifies no special need on the part of the Religious Claimants' employees

There is no indication that the Religious Claimants' employees are specially lacking in contraceptives, or that they would benefit from contraceptives more than the millions of Americans whom the ACA—by its very design—leaves either uninsured or exempted. In short, the government's arguments on this point are so general that finding a compelling interest here would effectively nullify the burden of proof that RFRA places squarely on the government. 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3).

2. The government's asserted interest is limitless

Nor has the government articulated a limiting principle for its interest in public health or a threshold at which it would achieve success. *Cf. Fisher v. Univ. of Texas*, 133 S. Ct. 2411, 2419 (2013) (requiring "reasoned, principled explanation" for the objective identified by the government). The resulting governing principle is, in essence, "more." But "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *See Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011); *Grutter v. Bollinger*, 539 U.S. 306, 361 (2003) ("[E]ven if the Law School's racial tinkering produces tangible educational benefits, a marginal improvement in legal education cannot justify racial discrimination where the Law School has no compelling interest in either its existence or in its current educational and admissions policies.").

The absence of a limiting principle is particularly troubling here because the government is asserting a generalized *federal* interest in "public health." Opening Br. of U.S. at 46. In the Constitution's federal scheme, however, the promotion of public health has generally been a matter for the States' police power. *See Jacobson v. Massachusetts*, 197 U.S. 11, 27-28 (1905). And even State police powers are susceptible to particularized constitutional scrutiny to ensure that public health action reaches only as far as the "necessities of the case," *id.* at 28, even requiring judicial relief where the public health action is exercised in an "arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public[.]" *Id.* In the necessities of this case, the contraceptive mandate goes well beyond any governmental interest in providing free contraceptives to the public. And there is no evidence that the contraceptive mandate is tailored to a particular exigency.

B. The asserted governmental interest in equal access to contraceptives is general and unparticularized

The asserted governmental interest in "equal access to recommended health-care services" fails on similar grounds. Opening Br. of U.S. at 49. The government then proceeds to explain why *preventive services* are important, citing statistics about the disproportionate costs of healthcare for men versus women. *Id.* at 49-50. But the government does not explain what proportion of this disparity is attributable to lack of funding for contraceptives, either generally or with respect to the contraceptives at issue in these cases. As noted in the courts of appeals, these Religious Claimants take issue with only a small subset of the HHS-mandated services. *See Hobby Lobby Stores, Inc.*, 723 F.3d at 1125 (4 out of 16); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 392 n.1 (3d Cir. 2013) (Jordan, J., dissenting).

Moreover, the question before the Court is not whether preventive services are important generally or whether medical costs could be more evenly distributed. Of course they are, and of course they could. Rather, the question is whether third-party funding of the particular subset of contraceptives challenged by *these Religious Claimants* is so important that they must be forced to provide them against their religious beliefs. *See O Centro*, 546 U.S. at 432-33.

And as important as equality is, this Court has never held that the government is under an affirmative obligation to fund activities that are generally protected against government invasion. In *Harris v. McRae*, for instance, the Court rejected the contention that because *Roe v. Wade* recognized a right to abortion, there must be a constitutional right to funding for such abortions:

> Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools.

448 U.S. 297, 317-18 (1980) (citations omitted); *see also Maher v. Roe*, 432 U.S. 464 (1977) (no Equal Protection violation for state to refuse to subsidize abortions); *Standridge v. Union Pac. R.R. Co.*, 479 F.3d 936 (8th Cir. 2007) (no Title VII sex discrimination where private company declined to provide contraception for either men or women). Had Congress determined that providing contraceptives was a compelling interest, it

could have used its powers of spending and taxation to provide contraceptives directly, much as it collects and distributes the general Social Security tax upheld in *Lee*. Congress did not do so. Instead, HHS crafted regulations that force the Greens, the Hahns, and their companies to provide contraceptives in violation of their religious faith. Whatever the government's interest in providing contraceptives generally, it does not have a compelling interest in forcing these Religious Claimants to provide them.

CONCLUSION

For the foregoing reasons, as well as those expressed in the Religious Claimants' briefs on the merits, *Amicus* requests that this Court reverse the judgment of the Court of Appeals for the Third Circuit and affirm the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Dated: January 28, 2014

AMICUS
CURIAE
BRIEF

No. 13-354

IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

Judicial Watch is participating as *amicus curiae* in this matter because it believes religious liberty and respect for sincerely held religious beliefs are profoundly important, yet under increasing threat by expanding government, as this case demonstrates.

SUMMARY OF THE ARGUMENT

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, *et seq.*, applies to for-profit corporations like Hobby Lobby Stores, Inc. and Mardel, Inc. (collectively "Hobby Lobby"). The text of the RFRA makes the congressional intent unambiguously clear. Additionally, the Dictionary Act, subsequent congressional actions, and this Court's precedents support applying the RFRA to for-profit corporations such as Hobby Lobby.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters reflecting this blanket consent have been filed with the Clerk.

Applying the RFRA in this case as the U.S. Court of Appeals for Tenth Circuit ("Tenth Circuit") did, it is evident that Hobby Lobby's religious liberties are substantially burdened by the so-called "contraceptive mandate" requirement of the Affordable Care Act of 2010 ("ACA"). It is equally clear that the mandate cannot withstand strict scrutiny and therefore must be overturned.

ARGUMENT

I. THE CONGRESSIONAL INTENT OF THE RELIGIOUS FREEDOM RESTORATION ACT IS UNAMBIGUOUSLY CLEAR.

The ACA, Pub. L. No. 111-148, 124 Stat. 119, has been wholly controversial. This Court has spoken to a number of specific provisions and has reminded us that the

> [m]embers of this Court are vested with the authority to interpret the law; we posses neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.

Nat'l Fed'n v. Sebelius, 132 S. Ct. 2566, 2579 (2012).

The challenged regulation, 78 Fed. Reg. 39,870, is not simply the consequence of poor political choices; it is the product of a dangerous entanglement of Congress and an Executive agency that ultimately tramples on religious liberties.

In an unprecedented grab for power, the U.S. Department of Health and Human Services ("HHS") has not only unilaterally authored, enacted, and changed the contraceptive mandate, but it now seeks to redefine a separate act of Congress – the Religious Freedom Restoration Act – to preserve its power grab. This simply cannot stand.

Our system of governance depends greatly on an adherence to three distinct spheres of power. In the words of James Madison, "an elective despotism was not the government we fought for; but one in which the powers of government should be so divided and balanced among the several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others." FEDERALIST NO. 58. Executive agencies are the furthest removed from the "will of the people." Only when they are kept in check by the Executive himself or Congress are they truly operating "for the people." In this case the Executive has backed Petitioners entirely. Congress, despite several attempts to amend or abolish the contraceptive mandate has failed to do so. As such, people harmed by the contraceptive mandate have turned to the judiciary as their last line of defense in protecting their religious liberties.[2] "It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature; in order, among other things, to keep the latter within the limits assigned to their authority." Alexander Hamilton, FEDERALIST NO. 78.

The Court's task in this case is quite simple: employ the ordinary canons of statutory construction to the RFRA. Doing so, the only logical conclusion the Court can reach is that Congress intended the RFRA to apply to for-profit corporations like Hobby Lobby. Once applied, the contraceptive mandate must fail against Hobby Lobby and similar for-profit corporations.

A. The Plain Meaning of Congress' Words Make Its Intent Clear.

There appears to be no dispute that the RFRA was intended to restore the compelling interest test to situations in which the government had "substantially burdened religious exercise without compelling justification." 42 U.S.C. § 2000bb(a). The debate is centered solely on whether the RFRA was intended by Congress to apply to for-profit corporations. *See* Petitioners' Petition For A Writ Of Certiorari ("Petitoners' Writ") at 16; *see also Hobby Lobby v. Sebelius*, 723 F.3d 1114, 1133 (10th Cir. 2013). Petitioners argue that the term "person" was not intended by Congress to include for-profit corporations like Hobby Lobby. Petitioners' Writ at 16-23. This argument is belied by Congress' own words.

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[2] Legal counsel for Hobby Lobby maintains a website dedicated to the plentiful lawsuits against Petitioners regarding the contraceptive mandate. As of the beginning of 2014 there are 91 lawsuits, including two class action lawsuits and over 300 plaintiffs. *See* becketfund.org/hhsinformationcentral/.

First, in articulating the purpose of the RFRA, Congress stated that the application of the compelling interest test set forth by this Court in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) was guaranteed in "***all cases*** where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1) (emphasis added). The Court should adhere to the plain meaning of "all cases" absent an implausible or contradictory result. "As in any statutory construction, 'we start, of course, with the statutory text,' and proceed from the understanding that 'unless otherwise defined, statutory terms are generally interpreted with their ordinary meaning.'" *Sebelius v. Cloer*, 133 S. Ct 1888, 1893 (2013) (*quoting BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006)). *See also Desert Palace, Inc. v. Costa,* 539 U.S. 90, 98 (2003).

Second, in the applicability section of the RFRA, Congress states that the RFRA applies to "all Federal law ... whether statutory or otherwise, and whether adopted before or after the enactment." 42 U.S.C. § 2000bb-3(a). Petitioners argue that Congress intended to return to pre-*Smith* jurisprudence and ask this Court to simply erase post-*Smith* jurisprudence. Petitioners' Writ at 17-20.[3] However, Congress' words are unambiguous that the RFRA should apply to "all Federal law" and should apply to all federal laws "before and after the enactment." It could not be clearer that Congress intended the RFRA to apply liberally. The rule of law adhered to by this Court is to presume Congress understands the words it writes. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *See Carr v. U.S.*, 560 U.S. 438, 458 (2010)

Lastly is the consideration of the term "person." Petitioners expend a great amount of time and energy attempting to convince the Court that, despite the inclusive language in the RFRA itself, Congress did not intend "person" to include for-profit corporations like Hobby Lobby for the purposes of RFRA protection. Petitioners' theory faces two insurmountable problems. First, Congress has created a default definition of the term "person" for use in any enactment in which the term is not defined specifically or alternatively. The Dictionary Act of 1947 defines "person" as including "corporations, companies, associations, firms, partnerships, societies and joint stock companies." 1 U.S.C. § 1. Second, Congress chose the term "person" rather than the term "individual" in the RFRA. The Court has held that this distinction is not insignificant. In *Mohammed v. Palestinian Authority,* 132 S. Ct. 1702, 1707 (2012), the Court stated that it "routinely uses 'individual' to denote a natural person, and in particular to distinguish between a natural person and a corporation. Congress does not, in the ordinary course, employ the word any differently." (internal citations omitted). *See also Federal Communications Com'n v. AT&T,* 131 S. Ct. 1177 (2011) (affirming use of Dictionary Act's definition of the term "person").

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[3] In *Employment Div. v. Smith*, 494 U.S. 872, 883-890 (1990), this Court held that the government may burden religious practices through "generally applicable laws" and decided that a "case-by-case assessment" was "unnecessary where the burden was caused by facially constitutional laws." The RFRA was Congress' response to *Smith*.

B. Congress' Subsequent Actions Further Support the Clear Intent of the RFRA.

Congress passed the RFRA in 1993. Since that time there have been several amendments to the Act; no amendments have been made, however, to the Act's definition of the term "person." In the twenty years that have passed since the Act's enactment, Congress has rested on its original plain meaning of "person." Even after this Court expressly affirmed First Amendment protections for for-profit corporations in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), Congress did not attempt to alter the term "person" in the RFRA or the Dictionary Act.

It is undisputable that Congress ought to be the author of its intent. It is not for Petitioners to suggest, invent or redefine an intent which is manifestly at odds with the plain meaning of the words chosen by Congress as well as subsequent congressional action and inaction. See *Chevron v. NRDC*, 467 U.S. 837, 843 (1984) ("The judiciary is the final authority on issues of statutory construction and *must reject* administrative constructions that are contrary to clear congressional intent.") (emphasis added).

This is where the judicial inquiry should end regarding the congressional intent behind the RFRA, for when the "words of the statute are unambiguous then, the first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. U.S.*, 449 U.S. 424, 430 (1981)).

It is important to note, however, that this Court's precedents affirm the congressional intent of applying the term "person" to for-profit corporations like Hobby Lobby in the context of the RFRA. First, as shown above, the Court has applied the Dictionary Act in cases involving statutory construction when the term was not alternatively defined in the law at issue. See e.g., *Fed'l Communications Commission v. AT&T*, 131 S. Ct. at 1182; *Mohammed*, 132 S. Ct. at 1707. Second, this Court has explicitly extended First Amendment protection to corporations in both the for-profit and non-profit settings. *See e.g., Citizens United,* 558 U.S. at 342 (affirming First Amendment protection to for-profit corporations); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778, (1978) ("The inherent worth of speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("[W]e have long understood that implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends."); *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 476-77 (2007) (recognizing the 501(c)(4) corporation's First Amendment rights and applying the strict scrutiny test to the restrictive law).

Considering the plain meaning of Congress' words in the RFRA, Congress' actions subsequent to passing the RFRA, and this Court's precedents, it is unmistakable that the RFRA applies to for-profit corporations like Hobby Lobby.

II. PETITIONERS' CONTRACEPTIVE MANDATE HAS SUBSTANTIALLY BURDENED THE RELIGIOUS LIBERTIES OF FOR-PROFIT BUSINESSES LIKE HOBBY LOBBY, AND THE COMPELLING INTEREST TEST CLEARLY WEIGHS IN FAVOR OF HOBBY LOBBY.

The "compelling interest test" has its roots in this Court's *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) decisions. Congress reiterated the compelling interest test in the RFRA and reaffirmed its use in all cases in which free exercise is substantially burdened. 42 U.S.C. § 2000bb(b). The only exception to this prohibition on the free exercise of religion is when the government can demonstrate the law furthers a "compelling government interest and" that the law is the "least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(b); *See also Gonzalez v. O Centro Espirita*, 546 U.S. 418, 424 (2006).

A. Hobby Lobby's Religious Liberties Are Substantially Burdened By the Contraceptive Mandate.

The Tenth Circuit used a three-part analysis to determine whether the contraceptive mandate substantially burdens Hobby Lobby's religious liberties. First, it identified the religious belief at issue. Second, it determined whether that belief was sincere. And third, it resolved the question of whether Petitioners' contraceptive mandate placed substantial pressure on Hobby Lobby. *Hobby Lobby*, 723 F.3d at 1140. The first two inquiries are not and have never been at issue. *See id.* Hobby Lobby's religious belief is clear – that life begins at conception and any action taken to end that life is morally wrong. Petitioner has never questioned the sincerity of Hobby Lobby's belief. *See id.* The only conflict between the two parties is whether the mandate places substantial pressure on Hobby Lobby and similar for-profit corporations.

This Court has already ruled on the matter and in *Sherbert* held that even an indirect burden can be deemed substantial if the pressure exerted by the law or rule requires the person to choose between fidelity to his or her faith or economic benefits. *Sherbert*, 374 U.S. at 404. Surely this works to protect against loss as well – even an indirect burden can be deemed substantial if it requires the person to choose between fidelity to his or her faith or the imposition of unimaginable fines. *Hobby Lobby*, 723 F.3d at 1141.

Petitioners do not dispute that a failure on Hobby Lobby's part to adhere fully to the contraceptive mandate will result in millions of dollars in fees. Instead, Petitioners attempt to convince the Court that the burden is too attenuated because the money paid by Hobby Lobby is too far removed from the actual purchase of contraception. Not only does this disregard this Court's reasoning in *Sherbert*, it also defies the basic principle of religious liberties: it is not "whether the reasonable observer would consider the plaintiff's complicit in an immoral act, but rather how the plaintiff's themselves measure their degree of complicity." *Hobby Lobby*, 723 F.3d at 1142. It is not for Petitioners to decide whether Hobby Lobby is wrong in its religious belief.[4]

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[4] This Court has been very clear that it is contrary to the fundamental purpose of the free exercise right for the government to make judgments on the "worth" of particular religious beliefs. *See e.g.*, *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (religious organizations maintain the "power to decide for themselves ... matters of church government as well as those of faith and doctrine.").

B. Petitioners' Stated Government Interest Does Not Rise to the Level of Compelling.

Once it has been established that Hobby Lobby's religious liberties have been substantially burdened by the contraceptive mandate, the only way Petitioners can defend the application of the law to Hobby Lobby is by demonstrating that its interest is compelling. As this Court has held, compelling does not simply mean important. The government's interest must also rise above a vague or overly general interest. See *Yoder*, 406 U.S. at 221 ("Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases; we must searchingly examine the interests that the State seeks to promote by its requirement."). The stated government interest in this case is the "promotion of public health." *See* Petitioners' Writ at 27. Perhaps seeing how general and vague such an interest is, Petitioners added that the contraceptive mandate specifically was a "key component" of the preventative health services of the ACA because "a lack of contraception use has proven in many cases to have negative health consequences" and because of the need for women to have "equal access to health-care services." *Id.* at 28. Setting aside the question of whether that medical information is as "proven" as Petitioners suggest, it still does not rise to the level of a compelling interest.

First, the stated interest is too vague and general to be considered compelling. As this Court held in *Yoder*, even a strong interest may fail to rise to the level of a "compelling" interest if the government cannot demonstrate with particularity how that interest would be "adversely affected by granting the exemption." *Yoder*, 406 U.S. at 236. Petitioners offer plenty of anecdotal scenarios and general medical information, but they completely fail to demonstrate how granting an exemption for Hobby Lobby and other similar for-profit corporations will affect their broad goals. There is simply no direct or particular correlation.

Second, the contraceptive mandate itself negates the label "compelling" by permitting a number of exemptions. Following closely the death-knell generality of Petitioners' interest is the fact that Petitioners have already granted a large number of exemptions. Several of these exemptions had nothing to do with the contraceptive mandate specifically – grandfathered plans and very small businesses with less than 50 employees – but Petitioners specifically exempted many other businesses for the exact reason Hobby Lobby now seeks an exemption – a clearly defined religious belief that life begins at conception. In fact, Petitioners have expanded the universe of those businesses exempt from the contraceptive mandate for religious reasons on multiple, separate times, and, through the Advanced Notice of Proposed Rulemaking ("ANPRM") of March 21, 2012, even sought to "protect . . . religious organizations from having to contract, arrange, or pay for contraceptive coverage." *Geneva College v. Sebelius*, 2012 U.S. Dist. LEXIS 179476 (W.D. Pa, December 23, 2013) (quoting 77 Fed. Reg. 16,503). Clearly, Petitioners were well aware of the conflict that the contraceptive mandate would cause those espousing certain religious beliefs. In fact, they were aware enough that they carved out exemptions.

It is simply untenable for Petitioners to turn around and claim that for-profit corporations like Hobby Lobby should not be granted the same religious exemption that they have already granted many others. In *Gonzalez*, this Court noted that precluding one group of people from exerting an already recognized religious exemption to the very same law that another group already enjoyed made the government's position very "difficult." *Gonzalez*, 546 U.S. at 433. Indeed, it makes Petitioners' position untenable. *See also Church of Lukumi Babalu v. City of Hialeah*, 508 U.S. 520, 547 ("'a law cannot be regarded as protecting an interest of the 'highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'") (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42, (1989)) (Scalia, J. concurring in part and concurring in judgment).

C. The Contraceptive Mandate Is Not the Least Restrictive Means of Achieving the Government's Interest.

Lastly, Petitioners have not offered a modicum of evidence that the contraceptive mandate is the least restrictive means of accomplishing their extraordinarily general interest. Petitioners only state that the "various forms of FDA-approved contraceptives are not fungible." Petitioners' Writ at 32. Even were this true, it simply does not come close to carrying the least restrictive means burden. Hobby Lobby as well as several *amici* have offered reasonable and feasible alternatives to the contraceptive mandate that would not force Respondents and similar for-profit corporations to choose between violating their religious beliefs or pay crushing fines. *See* Brief for Respondents On Petition for Writ at 35.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court affirm the Tenth Circuit's decision.

Respectfully submitted,

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IN THE
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KATHLEEN SEBELIUS, ET AL., *Petitioners*
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP., ET AL., *Petitioners*
v.
KATHLEEN SEBELIUS, ET AL., *Respondents*

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND TENTH CIRCUITS

BRIEF FOR THE KNIGHTS OF COLUMBUS AS *AMICUS CURIAE* SUPPORTING THE PRIVATE PARTIES

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Mark L. Rienzi, *God & the Profits: Is There Religious Liberty for Moneymakers?*, 21 Geo. Mason L. Rev. 59 (2013) 17, 20, 24

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Zondervan Mission, Values and Publishing Philosophy, http://zondervan.com/about/mission (last visited Jan. 21, 2014) 20

INTEREST OF THE *AMICUS CURIAE*

The Knights of Columbus[1] is a well-known American institution, founded in New Haven, Connecticut in 1882 by Father Michael J. McGivney, a Catholic priest. It was Father McGivney's intent to establish a fraternal society for Catholic men to confirm them in their Catholic faith and to provide an organization through which they could live out the teachings of the Church in their everyday lives. Today, more than 130 years later, the Knights of Columbus remains a thoroughly Catholic organization, committed to its core principles of charity, unity, and fraternity. The organization's Catholic mission and identity are reflected in virtually every aspect of its operations. For example, the Knights of Columbus sponsors numerous events and activities that support the Catholic Church, promote its teachings, and encourage the faithful. As part of its religiously-motivated mission, the Knights of Columbus raises and donates millions of dollars to charitable causes in the United States and abroad, and every year its members contribute millions of volunteer hours to charitable causes. Last year alone, for example, the Knights of Columbus donated $167.5 million and more than 70 million volunteer hours. But the mission of the Knights of Columbus is not limited to religious and charitable endeavors. To accomplish its religious mission, the Knights of Columbus employs nearly

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[1] The Knights of Columbus states that (i) no counsel for a party authored this brief in whole or in part, and (ii) neither the parties, nor their counsel, nor anyone except the Knights of Columbus and its counsel financially contributed to preparing this brief. All parties have consented to the filing of this brief.

1,000 persons and offers these employees a generous non-contributory group health plan. Consistent with Catholic doctrine, this health plan excludes coverage for contraception, abortion-inducing drugs and devices, surgical abortion, and sterilization.

Now comes the Patient Protection and Affordable Care Act (the "Act"). Subject to numerous exemptions, the contraceptive-coverage mandate promulgated pursuant to the Act (the "Mandate") forces many incorporated entities, including thousands of businesses owned by members of the Knights of Columbus, to provide coverage for contraceptives and abortion to their employees. The overarching rationale offered by the government in support of the Mandate's constitutionality—that only individuals and houses of worship, and not any other entities, possess rights under the Free Exercise Clause of the First Amendment or under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*—poses grave risks to all incorporated entities that, in whole or part, pursue a religious mission.

The Knights of Columbus recognizes that "religious freedom is both a natural right and basic civil right guaranteed by the First Amendment of the Constitution" and has therefore worked diligently over the last 125 years "to defend religious freedom for Catholics and all Americans." See Letter from Carl A. Anderson, Supreme Knight of Knights of Columbus, to Centers for Medicare & Medicaid Services, Department of Health and Human Services, Notice of Proposed Rulemaking on Coverage of Certain Preventive Services Under the Affordable Care Act (Apr. 6, 2013), *available at* http://www.kofc.org/mandate. The Knights of Columbus therefore submits this brief to assist the Court in its consideration of the government's aggressive claim that certain incorporated entities should lack any free exercise rights.

STATEMENT

I. The Knights Of Columbus Conducts Its Religious, Fraternal, And Charitable Activities In Accordance With The Catholic Faith.

1. The Knights of Columbus is a Connecticut corporation founded in 1882 to unite men of Catholic faith and to render financial aid to members and their families. It is the world's largest Catholic fraternal service organization, with more than 1.8 million members in the United States, Canada, Mexico, the Philippines, Poland, and other countries. The Knights of Columbus operates through an active system of approximately 14,000 local and state councils that conduct extensive charitable, educational, religious, and social programs.

The Catholic identity of the Knights of Columbus is interwoven into the very fabric of the organization, beginning with its name. See Knights of Columbus, *History*, http://www.kofc.org/un/en/about/history/index.html (last visited Jan. 21, 2014) ("As a symbol that allegiance to their country did not conflict with allegiance to their faith, the organization's members took as their patron Christopher Columbus—recognized as a Catholic and celebrated as the discoverer of America."). Indeed, such is the organization's devotion to the Church that Pope Francis has praised the integrity and loyalty of the

Knights of Columbus and "express[ed]" his "gratitude for the unfailing support" the Knights of Columbus "has always given to the works of the Holy See." *The Pope Praises the Integrity and Loyalty of the Knights of Columbus*, HOLY SEE PRESS OFFICE – VATICAN INFORMATION SERVICE (Oct. 10, 2013), http://visnews-en.blogspot.com/2013/10/the-pope-praises-integrityand-loyalty.html (last visited Jan. 21, 2014).

Members of the Knights of Columbus must be practicing Catholics. The Knights of Columbus further requires its Board of Directors and senior leadership to be members, and hence practicing Catholics, and the organization includes its Supreme Chaplain—currently a Catholic Archbishop—on its Board of Directors and Executive and Finance Committee. The Knights of Columbus employs a full-time priest at its headquarters and offers daily Mass for its employees. And a Catholic priest serves as chaplain to each of the Knights of Columbus' more than 14,000 councils.

The religious faith of the Knights of Columbus inspires the organization to provide aid to those in need—Catholics and non-Catholics alike. Providing donations directly and through its affiliated charitable entity, Knights of Columbus Charities, Inc., the Knights of Columbus supports a variety of national and international charitable initiatives. Examples include helping orphans in Africa, providing artificial limbs for children in Haiti, assisting victims of natural disasters, offering housing and other assistance to women experiencing crisis pregnancies, and supporting the Special Olympics. In addition, Knights of Columbus councils around the United States and abroad regularly provide direct service to their communities, such as restocking shelves at local food pantries, providing new coats to underprivileged children during the winter, and assisting persons with intellectual disabilities. Many of the organization's other charitable activities are directed to religious causes, such as supporting the Sisters of Life, a community of women religious dedicated to the protection and enhancement of human life.[2]

2. The Knights of Columbus conducts its religious, fraternal, and charitable activities in a manner that is consistent with its Catholic mission and identity. Indeed, the Charter for the Knights of Columbus requires the organization to act "always consistent with Catholic values and doctrine." See Charter of the Knights of Columbus § 2 (2013). This includes the Church's teachings on the sanctity of human life, including the Church's belief that contraception and abortion are intrinsically immoral. See CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2258, 2270–75, 2284–87, 2366, 2370, 2399 (2d ed. 1997); see also Pope John Paul II, *Evangelium Vitae* ¶¶ 58–62 (1995), *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jpii_enc_25031995_evangelium-vitae_en.html; KAROL WOJTYLA, LOVE AND RESPONSIBILITY (1981); Pope Paul VI, *Humanae Vitae* (1968), *available at* http://www.vatican.va/holy_father/paul_vi/encyclicals

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[2] Beyond extending significant financial support to the Sisters of Life, the Knights of Columbus owns the Villa Maria Guadalupe Retreat Center in Stamford, Connecticut, at which the Sisters of Life host retreats, educational opportunities, seminars, and weekend programs that draw from the teachings of the Catholic Church.

/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html. It also includes the Church's instruction that Catholics must strive not only to avoid intrinsically immoral activities themselves, but also to avoid directly or indirectly encouraging others to engage in such activities. See CATECHISM OF THE CATHOLIC CHURCH ¶ 2287 (defining sin of "scandal": "Anyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged").

For example, in order to remain true to its religious principles, the Knights of Columbus will not invest its assets in any company that directly profits from activities contrary to Catholic teaching, such as embryonic stem cell research, contraception, abortion, and pornography, willingly forgoing profit opportunities. The Catholic position on the use of contraception, abortion, and the sin of encouraging and facilitating others in employing such practices is further reflected in the health insurance policies that the Knights of Columbus offers to its employees. Only services consistent with Catholic teaching are included in the plans. Accordingly, those plans do not include coverage for contraception, abortion-inducing drugs and devices, surgical abortion, sterilization, or fertilization treatment.

II. The Mandate.

While, based on their religious beliefs, the Knights of Columbus and numerous other Catholic and non-Catholic organizations and businesses have arranged their health insurance policies to exclude or limit, *inter alia*, contraceptive and abortifacient coverage, since 2010 the United States government has sought to override those religious objections and force such coverage on such organizations.

The Act and its implementing regulations force non-exempt group health plans to cover "preventive care and screenings" without requiring co-payments, deductibles, or co-insurance from plan participants. See 42 U.S.C. § 300gg-13(a)(1)–(4). This includes the Mandate, which applies to "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." See Health Resources and Services Administration, *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womens_guidelines (last visited Jan. 21, 2014); 42 U.S.C. § 300gg-13(a)(4) (defining "preventive care and screenings" as provided in Health Resources and Services Administration guidelines); 45 C.F.R. § 147.130(a)(iv) (same).

The government has exempted certain entities from the Mandate. For example, in an incomplete effort to address the serious concerns of religious groups, "religious employers" are excused from the Mandate. See 45 C.F.R. § 147.131(a). A "religious employer" is one that is "organized and operates as a nonprofit entity" and meets the Internal Revenue Code's definition of "churches, their integrated auxiliaries, and conventions or associations of churches" as well as organizations furthering "the exclusively religious activities of any religious order." *Ibid.*[3]

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[3] Religious groups that oppose medical care or insurance as a whole may also be exempt from the entirety of the Act and thus

The government also has announced the availability of an entirely inadequate "accommodation" for eligible, non-exempt faith-based corporations, relieving such organizations that accept the "accommodation" of a duty to directly contract or pay for contraceptive services. See *id.* § 147.131(c)(2). To qualify for the "accommodation," an organization must meet each of the following eligibility requirements:

> (1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.
>
> (2) The organization is organized and operates as a nonprofit entity.
>
> (3) The organization holds itself out as a religious organization.
>
> (4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies.

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would also avoid the Mandate. See 26 U.S.C. §§ 5000A(d)(2)(A), (B). Further, businesses employing fewer than 50 individuals are exempt from compliance with any of the provisions of the Act. See 26 U.S.C. § 4980H(c)(2).

Id. § 147.131(b). Upon receipt of a valid self-certification, the corporation's insurance issuer or plan administrator will provide or arrange for payments for contraceptive services. *Id.* § 147.131(c)(2).

Both the regulation's exemption and accommodation require that a faith-based entity be incorporated and operate as a non-profit in order to avoid the Mandate. Large faith-based corporations that do not qualify for non-profit status under Federal tax law, like Hobby Lobby Stores, Inc., Mardel Christian, and Conestoga Wood Specialties Corp., are offered no relief from the provisions of the Act.

SUMMARY OF ARGUMENT

The crux of the government's argument is that for-profit corporations are incapable of exercising religion and are excluded from the free exercise protections of RFRA. This is not the law.

RFRA makes no distinction—in either its text or its context—between natural persons (individuals) and other persons (including corporations), much less between for-profit and non-profit entities. And for good reason. Incorporated organizations, including churches, religious schools, and other faith-based entities, have long been able to assert claims regarding an infringement of their free exercise of religion. This Court also long has entertained the free exercise claims of sole proprietors engaged in commercial enterprise. The government has marshaled no convincing reason why First Amendment and RFRA protections evaporate for an entity that is both incorporated *and* operated for-profit.

Potential challenges in evaluating the sincerity of religious exercise in the corporate context do not necessitate stripping all corporations of their free exercise rights. While the evidence pertinent to the sincerity analysis will sometimes be different from that used in determining the sincerity of an individual's religious beliefs, courts are already well-acquainted with appraising the genuineness of free exercise claims and motivations for corporate action. And there are readily ascertainable evidentiary markers of the sincerity of a corporation's religious exercise, including corporate governance documents, testimony from corporate owners and officers, and the manner in which the entity conducts its day-to-day operations.

Finally, the government's position could lead to a radical restricting of religious rights. If, as the government asserts, RFRA protects only those incorporated entities that successfully mounted free exercise challenges before adoption of the statute, the only corporations that can truly exercise religion are incorporated religious denominations. The vast majority of faith-based corporations, for-profit and non-profit alike, would potentially lack protection for their sincere religious beliefs under RFRA. This would include for-profit corporations engaged in well-accepted religious exercises such as kosher butchers, halal restaurants, and Christian bookstores, as well as many faith-based, non-profit entities.

ARGUMENT

I. Corporations May Pursue Free Exercise Claims Under RFRA.

The government acknowledges—as it must—that both RFRA and the Free Exercise Clause protect certain incorporated entities, such as churches. So the government must find some distinction between the incorporated plaintiffs in this case and, say, the incorporated Church of the Lukumi Babalu Aye, Inc., plaintiff in one of this Court's most significant free exercise cases before RFRA. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993). The government seeks to draw a bright line between *for-profit* corporations and "religious non-profits," but that distinction has no basis, either in the text of RFRA or in congressional intent to adopt pre-RFRA free exercise doctrine. Nor does it make any sense.

1. Congress enacted RFRA in the wake of *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U.S. 872 (1990), to "restore" strict-scrutiny review of facially-neutral laws that burden religious exercise. 42 U.S.C. § 2000bb(b)(1). RFRA provides that the government may not "substantially burden a person's exercise of religion" unless it shows that the action causing the burden:

> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb–1.

On its face, RFRA contains no definition of "person," and therefore the definition of "person" found in the Dictionary Act, 1 U.S.C. § 1, should be used. The Dictionary Act explicitly defines "person" to "include corporations," and does not distinguish between natural or artificial "persons," or between artificial "persons" that are for-profit or non-profit entities. *Ibid.* If Congress had intended to depart from that standard definition of "person" in RFRA and reserve RFRA's protections only to natural persons, it could easily have done so. See, *e.g.*, 46 U.S.C. § 104 (defining citizens of United States as being "natural persons"); 15 U.S.C. § 1692a (defining "consumer" for purposes of Fair Debt Collection Practices Act as "natural person"). In addition, Congress clearly knows how to specify a protection that extends only to particular faith-based entities. See, *e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 (exempting "a religious corporation, association, educational institution, or society" from prohibitions against employment discrimination on basis of religion).

There is nothing facially absurd with including corporations among the "persons" protected by RFRA. Not even the government disputes that RFRA would apply to an incorporated church. The Knights of Columbus provides an excellent example of another kind of entity that has incorporated religion into its very fabric, practices that religion in its everyday operations, and also advances the individual religious practice of its members. A core mission of the Knights of Columbus is to "unite members in their Catholic identity and the practice of their Catholic faith." See Charter of the Knights of Columbus § 2. While the Knights of Columbus itself may not "pray, worship, [or] observe sacraments," *Conestoga Wood Specialties Corp.* v. *Sebelius*, 724 F.3d 377, 385 (3d Cir. 2013), it employs a full-time priest at its headquarters and offers daily Mass for its employees at an on-site chapel, and has a priest serve as chaplain to each of its thousands of councils. To promulgate the faith and Catholic teachings, the Knights of Columbus has established and operates the Blessed John Paul II Shrine in Washington, D.C., and sponsors the Pontifical John Paul II Institute for Studies on Marriage and Family at The Catholic University of America. It also provides charitable support to Catholic religious orders and charities, such as the Sisters of Life. Even while investing its assets, the Knights of Columbus practices religion, including by declining to invest in companies that profit from conduct inconsistent with Catholic values.

2. The government's principal argument for departing from the Dictionary Act's definition of person is that this is one of those rare cases in which the "context" of a word requires departure from the Dictionary Act's standard definition. In particular, the government's logic is that RFRA was intended to legislatively overturn *Smith*; pre-*Smith* free exercise jurisprudence thus provides the "context" within which to understand RFRA's use of "person"; and, as no pre-*Smith* case afforded a for-profit corporation relief from a facially-neutral law on the basis of religion, Congress could not have intended to extend protections under RFRA to corporations either. See Pet'r Br. at 13–17.

That argument tortures the Dictionary Act's use of "context" beyond recognition. Under the

Dictionary Act, "context" only requires abandonment of the Dictionary Act's definition of a word when "the text of the Act of Congress surrounding the word at issue" results in that definition being a "square peg" that does not fit into the statute's "round hole." *Rowland* v. *Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 199–200 (1993). In *United States* v. *Middleton*, 231 F.3d 1207 (9th Cir. 2000), for example, the Ninth Circuit disregarded the Dictionary Act and interpreted the undefined term "individuals" in 18 U.S.C. § 1030(e)(8)(a) to include artificial persons. *Id.* at 1211. Although "the Dictionary Act's definition of 'person' implies that the words 'corporation' and 'individuals' refers to different things," the Ninth Circuit concluded that, when viewed "in context," it was evident that "Congress used 'individuals' and 'person' in a non-technical manner" in the statute "without reference to the Dictionary Act." *Ibid.*

The Dictionary Act's definition of person is not a "square peg" within the "context" of RFRA. Congress's expressly stated purposes in enacting the law were only two-fold: "to restore the compelling interest test as set forth" in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(1), (2). Congress observed that "the compelling interest test . . . is a workable test for striking sensible balances between religious liberty and competing prior governmental interest"; that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise"; and that "governments should not substantially burden religious exercise without compelling justification." *Id.* § 2000(bb)(a)(2), (3), (5). There is nothing in that text, or in RFRA's operative provisions, suggesting that recognizing free exercise claims by corporations would be inconsistent with Congressional intent or the structure of RFRA. See *Korte* v. *Sebelius*, 735 F.3d 654, 674–76 (7th Cir. 2013); 13-354 Pet. App. 24a–32a.

RFRA's "context," if anything, suggests an intent to protect free exercise expansively, in a manner that an unnecessarily cramped reading of "person" would defeat. See *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." (emphasis added)). Religious endeavors often involve and sometimes require the combined action of many individuals. And the adoption of the corporate form may often be essential to the organization's ability to engage in that religious exercise: charitable missions requiring long-term continuity and oversight; schools providing religious instruction; even churches incorporated to secure their assets and to protect their members from liability. The individual members of the Knights of Columbus, for example, would not be able to promulgate the faith nearly as effectively individually as they do together as a group—few individuals can sponsor and operate a Shrine singlehandedly.

To be sure, as the government stresses, there were no pre-*Smith* cases ultimately holding in favor of a for-profit corporation on free exercise grounds. But there were no cases holding that for-profit corporations lack any free exercise rights either. Indeed, the plurality in *Gallagher* v. *Crown Kosher Super Mkt. of Mass., Inc.*, 366 U.S. 617 (1961) (plurality opinion), believed that the question remained open, and the other five Justices in that case—Brennan, Stewart, Frankfurter, Harlan, and Douglas—concluded that the kosher corporation at issue did possess free exercise rights. See *id.* at 641 (noting that Justices Brennan and Stewart dissent and "are of the opinion that the Massachusetts statute, as applied to the appellees in this case, prohibits the free exercise of religion"); *McGowan* v. *Maryland*, 366 U.S. 420, 512–22 (1961) (Frankfurter & Harlan, JJ., concurring); *id.* at 576–78 (Douglas, J., dissenting).

Even if the government is correct that the question remains open, while Congress's intent in enacting RFRA was to "*restore*" pre-*Smith* jurisprudence, there is no indication that Congress intended to *freeze* that jurisprudence, leaving questions previously unaddressed and unresolved open for all eternity—or, as the government proposes here, necessarily resolving such questions against the party claiming free exercise rights. The government's proposal to freeze pre-*Smith* jurisprudence for purposes of RFRA is entirely unworkable; under it, no matter whether this Court continues to refine free exercise jurisprudence for purposes of the First Amendment, as in recent cases such as *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012), such developments must be ignored for purposes of RFRA. Yet the government has identified no justification for ignoring such refinements when they are not inconsistent with Congress's purposes in enacting RFRA.

3. While the government ultimately seems to argue that no organization, other than a religious denomination, has any free exercise rights, see 13-354 Pet'r Br. at 13, 15–17, at times it casts its argument as involving a dichotomy between "non-profit" entities focused on religion and "for-profit" entities focused on profit. *E.g.*, *id.* at 19 ("For-profit corporations 'are different from religious non-profits in that they use labor to make a profit, rather than to perpetuate a religious values-based mission.'" (quoting *Gilardi* v. *U.S. Dep't of HHS*, 733 F.3d 1208, 1242 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part))). Such a rigid dichotomy has no basis in law or fact and should be rejected.

That an organization is classified as non-profit does not make its beliefs any more sincere, nor would a loss of such status somehow mean a loss of faith. See Mark L. Rienzi, *God & the Profits: Is There Religious Liberty for Moneymakers?*, 21 GEO. MASON L. REV. 59, 63 (2013) ("The fact that the organization urging the public to accept Jesus Christ as Lord and Savior also generates profits does not make the evangelization any less an exercise of religion."). To argue otherwise would elevate the form of a corporation for purposes of federal and state tax law over the substance of its beliefs. See Steven J. Willis, *Corporations, Taxes, & Religion: The Hobby Lobby & Conestoga Contraceptive Cases*, 65 S.C. L. REV. 1, 61–62 (2013) ("[T]he categories for-profit and not-for-profit are merely state law creations with labels only loosely related to financial or economic reality. Nothing in the typical state not-for-profit act requires not-for-profit entities to suffer losses, and nothing penalizes them for making profits. Thus, the label is one of convenience, at most, and not one of substance."). To qualify as a tax-exempt non-profit corporation under § 501(c)(3), for example, a faith-based organization must comply with myriad requirements unrelated to its religious views.

4. The government argues, in reliance on background principles of corporate law, that corporations and individuals are distinct, and the religious beliefs of individuals should not be imputed to the corporation which they own. See Pet'r Br. at 23–26. The Knights of Columbus agrees with Hobby Lobby, Mardel Christian, Conestoga Wood, and many lower courts that the government's position on this point is incorrect. See, *e.g.*, *Stormans, Inc.* v. *Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009) (relying on corporation's right "to assert the free exercise rights of its owners"); see also *Tyndale House Publishers, Inc.* v. *Sebelius*, 904 F. Supp. 2d 106, 116–17 (D.D.C. 2012) (allowing corporation to assert claims based on religious views of its owners and operators); 13-354 Pet. App. 38a ("[W]e cannot see why an individual operating for-profit retains Free Exercise protections but an individual who incorporates—even as the sole shareholder—does not, even though he engages in the same activities as before."); *Korte*, 735 F.3d at 682 n.17 (acknowledging free exercise rights under RFRA for closely-held corporations and stating that controlling shareholders of those corporations were "in a position to operate their businesses in a manner that conforms to their religious commitments").

Even conceding the point, it remains the case that a corporation can adopt a religious identity and exercise religion separate and apart from its owners. Although the government argued in the Tenth Circuit that "[f]or-profit corporate entities . . . do not—and cannot—legally claim a right to exercise or establish a 'corporate' religion under the First Amendment or the RFRA," Gov't C.A. Br. at 12, 22, No. 12-6294 (10th Cir. Mar. 15, 2013), the government offered no analysis of why this might be so. Nor could it, for a flat rule against corporate religion flies in the face of experience.

As an initial matter, closely-held and family-owned companies are not the only incorporated entities that practice religion. Catholic hospitals and universities, for example, often state their missions in terms of their religious obligations to perform acts of charity, to promulgate the faith, or to glorify God. *E.g., Mission Statement of Belmont Abbey College*, http://belmontabbeycollege.edu/about/mission-vision-2/ (last visited Jan. 27, 2014) ("Our mission is to educate students in the liberal arts and sciences so that in all things God may be glorified . . . . As a Benedictine institution, we find this glory especially revealed in the development of the whole person, guided by the liberal arts, as a responsible steward of the true, the beautiful, and the good."). Such institutions with a religious mission will frequently have some trustees, directors, and employees who do not necessarily share the religion advanced by the organization. So long as such persons support the *organizational* religious mission, however, that a substantial number—even a majority—of board members or professors at any given time happen to be members of different faiths should be irrelevant.

Even for-profit enterprises can express *corporate* goals and beliefs beyond the mere maximization of shareholder value. See *Theodora Holding Corp.* v. *Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969) (endorsing for-profit corporation's donations "of a charitable or educational nature"); *A. P. Smith Mfg. Co.* v. *Barlow*, 98 A.2d 581, 590 (N.J. 1953) (noting that corporations may aid "the public welfare and advance the interests of the plaintiff as a private corporation and as part of the community in which it operates"); see also *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 794–95, 794 n.34 (1978). There are, in fact, many examples of for-profit enterprises that are incorporated to further a religious aim or goal. See Rienzi, *supra*, at 74–75 (identifying kosher coffee shop in Brooklyn, New York—Rio Gas Station and Heimeshe Coffee Shop—and halal grocery store in Minneapolis, Minnesota—Afrik Grocery, Inc.—as examples of for-profit corporations that engage in religious exercise). As one example, the for-profit company Zondervan, publishers of the New International Version of the Bible and former owners of the for-profit Christian bookstore chain Family Christian Stores, Inc., was specifically established with the intention "to deliver Christian content and resources that exalt God and see humanity in its proper perspective in relation to God as revealed in the Bible." *Zondervan Mission, Values and Publishing Philosophy*, http://zondervan.com/about/mission (last visited Jan. 21, 2014).

Organizations of that nature, much like Catholic educational institutions or Catholic hospitals, have religious missions that are institutional, not keyed to any individual or group of individuals. With respect to such religious-affiliated and themed institutions, the owners are not the only stakeholders; in many cases, students, customers, employees, and others outside the ownership structure may have a substantial stake in the ability of the organization to facilitate and advance their practice of religion and religious aspirations. The government is therefore simply incorrect to necessarily equate *corporate* religious dedication with the religious devotion of a few controlling shareholders. While the religious beliefs of a corporation's owners can be relevant—and in some cases, such as a small, closely-held corporation, the best—evidence in a RFRA case, see *infra* Section II, it is not the case that free exercise rights of a corporation are always derivative of the personal religious beliefs of the corporation's owners.

II. There Are Demonstrable Guideposts To Evaluate Whether A Corporation Is Engaged In Sincere Religious Exercise.

The government has expressed concern that affording free exercise rights to for-profit corporations could lead to difficulty in evaluating the sincerity of an entity's religious exercise. See 13-354 Pet. App. 42a. Chief Judge Briscoe echoed those feelings in her dissenting opinion in the proceedings below:

> [T]he majority's holding threatens to entangle the government in the impermissible business of determining whether for-profit corporations are sufficiently 'religious' to be entitled to protection under RFRA from a vast array of federal legislation.

Id. at 129a (Briscoe, C.J., concurring in part and dissenting in part).

Such concern is unwarranted. There are readily-ascertainable evidentiary guideposts in the corporate setting that can be used, on a case-by-case basis, to determine the sincerity of a corporation's religious exercise.

To begin, a corporation can establish the sincerity of its religious exercise by offering testimony or affidavits from its owners. Courts, in fact, often prefer this type of evidence in conducting a sincerity analysis, finding that it best reflects the true motivations of the actor pursuing relief on the basis of religious belief. See *Patrick* v. *LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (stating that assessment of individual's sincerity "demands a full exposition of facts and the opportunity for the factfinder to observe the claimant's demeanor during direct and cross-examination"). This type of evidence is particularly relevant in the case of a closely-held corporation or a publicly-traded entity with a control block, as a court could evaluate the sincerity of the individuals who principally control the activities of the company. See Willis, *supra*, at 72 ("[O]ne can easily imagine a corporation with three or four closely related shareholders being operated—at least in the eyes of the owners—'for' religious purposes. Thus, the number of shareholders and how they are related is arguably among the most significant of factors."). Shareholder votes and shareholder-sponsored activities could also evidence the sincerity of the entity's religious exercise.

Closely-held corporations are not the only organizations that practice religion, however, and other types of corporations can establish the sincerity of their religious beliefs through other means. A corporation also can prove its sincerity by means of its charter, articles of incorporation, bylaws, or mission statement. Courts routinely look to those kinds of governance materials in other settings "to determine the purpose for which a corporation was created." See 1A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Corporations* § 139 (perm. ed. rev. vol. 2010); see also *Shaliehsabou* v. *Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 310 (4th Cir. 2004) (stating that evidence of religious affiliation included by-laws that defined corporation as religious and charitable and that "declare[d] that [corporation's] mission is to provide elder care to 'aged of the Jewish faith in accordance with the precepts of Jewish law and customs.'"); *Tyndale House Publishers, Inc.*, 904 F. Supp. 2d at 116 (finding corporate charter relevant to whether corporation maintains "faith-oriented mission"). That is precisely the approach the Tenth Circuit took here, pointing to the commitment in Hobby Lobby's written statement of purpose to "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles." 13-354 Pet. App. 8a. Based on that and other evidence, the government has raised no serious challenge to the sincerity of Hobby Lobby's religious beliefs.

Finally, a corporation may establish its sincere exercise of religion by pointing to the manner in which it conducts its day-to-day operations. See *Shaliehsabou*, 363 F.3d at 310–11 (describing how Jewish hospice "maintained a rabbi on its staff, employed mashgichim to ensure compliance with the Jewish dietary laws, and placed a mezuzah on every resident's doorpost"); see also Rienzi, *supra*, at 109–14. Such evidence could be found in the organization's employee manuals, handbooks, and contracts (*e.g.*, codes of conduct or work attire requirements), in the organization's hours of operation (*e.g.*, observation of the Sabbath or religious holidays), and in the clientele or customers to whom the organization markets its business (*e.g.*, a Christian book store or kosher deli). In the case of Hobby Lobby, for example, the Tenth Circuit appropriately considered the company's practices such as not doing business with alcohol distributors and its purchase of full-page newspaper advertisements communicating a religious message. See 13-354 Pet. App. 8a.

At bottom, affording free exercise rights to incorporated entities may indeed present certain challenges to courts in evaluating the sincerity of religious exercise. But those challenges are not insurmountable and definitive evidentiary guideposts exist to assist a court in this subjective analysis. Nor is there significant risk of a corporation—comprised often of many people with intimate knowledge of the true purpose for a given business activity—succeeding in falsely claiming religious exercise. In the judiciary's two decades of experience with RFRA, it has not faced a wave of insincere free exercise challenges by individuals. See *Moussazadeh* v. *Tex. Dep't of Crim. Justice*, 703 F.3d 781, 791 (5th Cir. 2012) ("the sincerity of a religious belief is not often challenged" and "is generally presumed or easily established"). There is no reason to think that acknowledging the free exercise rights of corporations will trigger a wave of insincere RFRA claims. And, even if there were such a risk, RFRA provides a safety valve to the government to enforce narrowly-tailored laws that further a compelling government interest—no matter the sincerity of a corporation's religious exercise.[4]

As one court aptly noted when conducting a sincerity analysis:

> [W]hile courts may be poorly equipped to determine what is religious, *they are seasoned appraisers of the 'motivations' of parties* and have a duty to determine whether what is professed to be religion is being asserted in good faith.

United States v. *Manneh*, 645 F. Supp. 2d 98, 112 (E.D.N.Y. 2008) (emphasis added) (rejecting RFRA claim where plaintiff seeking relief did not hold sincere religious belief). The task for a court is thus no different whether the "person" engaging in religious exercise is an individual or a corporation; only the breadth and type of evidence relevant to establishing sincerity will change. The government's concern is unfounded, and it provides no basis on which to strip corporations of their free exercise rights under RFRA.[5]

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[4] The Knights of Columbus fully supports the arguments by Hobby Lobby, Mardel Christian, and Conestoga Wood that the Mandate should not survive review under RFRA. The Knights of Columbus does not believe that there is a "compelling government interest" in facilitating access to contraception and abortifacients, and even if there was, requiring religiously-motivated employers to facilitate that access through employer-provided health plans is not the least restrictive means to serve it. Given the breadth of the government's authority to tax and spend, see *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 25 (1981), and its existing vast involvement in the provision of health care services, the government could just as easily address its interests through social welfare programs, the provision of tax credits, and so forth.

III. The Government's Position Would Have Profound Implications On The Future Of Free Exercise Jurisprudence.

The government's position in this case, while presented in the narrow context of the Mandate, would broadly undermine the future of free exercise jurisprudence if adopted by this Court.

When stripped of its veneer, the government's true position comes into focus. In effect, the government is advocating for unfettered discretion to ignore religious exercise of any form so long as it is regulating an incorporated entity that is not a church, synagogue, or other house of worship. Indeed, as it acknowledged in a related case, the government views the exemption and inadequate accommodation to the Mandate *for non-profits* not as necessary to comply with RFRA but as voluntary acts of kindness to faith-based organizations:

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[5] In her dissent, Chief Judge Briscoe further lamented that the majority opinion will "transcend the provision of coverage for contraception" and open "the floodgates to RFRA litigation challenging any number of federal statutes that govern corporate affairs." 13-354 Pet. App. 128a–29a. Chief Judge Briscoe noted, for instance, that "Catholic-owned corporations could deprive their employees of coverage for end-of-life hospice care and for medically necessary hysterectomies," and that "corporations owned by certain Muslims, Jews, or Hindus could refuse to provide coverage for medications or medical devices that contain porcine or bovine products." *Ibid.* Putting aside the fact that Chief Judge Briscoe repeatedly mischaracterizes Catholic teachings on certain medical treatments, the Knights of Columbus is aware of no such challenges to facially-neutral laws having arisen under RFRA or in any of the nearly two dozen states that have enacted their own version of RFRA. And, even if such challenges were to arise, they would again remain subject to strict-scrutiny review under RFRA and its compelling-interest safety valve for the government.

> When the contraceptive-coverage requirement was first established, in August 2011, certain non-profit religious organizations . . . objected on religious grounds to having to provide contraceptive coverage in the group health plans they offer to their employees. *Although, in the government's view, these organizations were mistaken to claim that an accommodation was required under the First Amendment or the Religious Freedom Restoration Act (RFRA), the defendant Departments decided to accommodate the concerns expressed by these organizations.*

See Gov't Br. at 1, *Roman Catholic Archdiocese of N.Y.* v. *Sebelius*, Case No. 1:12-cv-2542, Doc. No. 79 (E.D.N.Y. Sept. 11, 2013) (emphasis added).

The potential implications of the government's position are as startling as they are far-reaching. Without any showing of a compelling government interest or narrow tailoring, the government could issue regulations requiring group health plans to cover elective third-trimester abortions where such are legal. The government also could enact laws that force a kosher deli or other for-profit Jewish restaurant to ignore kosher dietary restrictions or force a for-profit Muslim restaurant to ignore halal dietary restrictions. See, *e.g.*, 13-354 Pet. App. 39a (noting "connection between the exercise of religion and the pursuit of profit" and questioning whether "an incorporated kosher butcher [would] really have no claim to challenge a regulation mandating non-kosher butchering practices"); *Korte*, 735 F.3d at 681 ("On the government's understanding of religious liberty, a Jewish restaurant operating for profit could be denied the right to observe Kosher dietary restrictions. That cannot be right."). Such rules would destroy the fabric and raison d'etre of those for-profit corporations, yet the corporations would have no avenue to object on free exercise grounds under RFRA.

The government's position that religious practices undertaken for years by businesses and other entities can be cast aside without legal recourse under RFRA finds no basis in the text of RFRA, in logic, or in experience. See, *e.g.*, *Korte*, 735 F.3d at 681 ("At bottom, the government's argument is premised on a far-too-narrow view of religious freedom: Religious exercise is protected in the home and the house of worship but not beyond. Religious people do not practice their faith in that compartmentalized way; free-exercise rights are not so circumscribed."). It certainly cannot be what Congress intended when it enacted RFRA, and therefore should be rejected by this Court.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals in *Hobby Lobby* and reverse the judgment of the court of appeals in *Conestoga Wood*.

Respectfully submitted.

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IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., ET AL.
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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CONESTOGA WOOD SPECIALTIES CORPORATION, ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF OF *AMICI CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., ET AL. IN SUPPORT OF THE GOVERNMENT

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INTERESTS OF *AMICI CURIAE*

Amici Curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), GLMA: Health Professionals Advancing LGBT Equality ("GLMA"), and Pride at Work—AFL CIO (collectively, "*Amici*") are among the nation's leading nonprofit advocacy organizations working to protect and advance the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people. *Amici* submit this brief in support of Secretary Sebelius in both cases.[1]

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization working for full recognition of the civil rights of LGBT people and people living with HIV through impact litigation, education and policy advocacy. *See, e.g., Lawrence v. Texas,* 539 U.S. 558 (2003) (Texas ban on same-sex adult intimacy was unconstitutional denial of liberty); *Taylor v. Rice,* 451 F.3d 898 (D.C. Cir. 2006) (affirming need for trial in challenge to U.S. Foreign Service's blanket exclusion of HIV-positive applicants).

Lambda Legal has participated in many cases involving assertions that neutral statutes, rules, or policies regulating employment or professional services infringed religious freedom. *See, e.g., Keeton v. Anderson-Wiley,* 664 F.3d 865 (11th Cir. 2011) (rejecting claim that counseling student's speech and religious exercise rights warranted exemption from university's requirement that she counsel lesbian and gay clients per usual standards); *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008) (rejecting claim that nondiscrimination statute infringed physician's speech and religious exercise rights). Lambda Legal also has challenged unequal employee compensation, including discriminatory restrictions on health insurance. *See, e.g.*, *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011).

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

GLMA is the largest and oldest association of LGBT and ally health professionals of all disciplines working to ensure equality in healthcare for LGBT patients and professionals, using the expertise of GLMA members in advocacy, professional education, patient education and referrals, and promotion of research. Founded in 1981 in part to advocate for policy and services to address what would become the HIV/AIDS epidemic, GLMA's mission has broadened to address the full range of health issues affecting LGBT people, including ensuring that healthcare providers are welcoming to LGBT individuals and their families, and are competent to address LGBT-specific health disparities.

Pride at Work is a nonprofit organization and a constituency group of the AFL-CIO (American Federation of Labor & Congress of Industrial Organizations). With a national headquarters and more than twenty state and local chapters, Pride at Work organizes mutual support between the Labor Movement and the LGBT community. Seeking full equality for LGBT workers, Pride at Work strives to make certain that the Labor Movement cherishes diversity, openness, safety, and dignity of each individual within its commitment to social and economic justice. In the spirit of the union movement's historic motto, "An Injury to One is An Injury to All," Pride at Work opposes all forms of discrimination on the job and in our unions based on sex, gender identity and expression, sexual orientation, race, national or ethnic origin, age, disability, religion or political views.

Amici thus have expertise concerning the legal infirmities of and likely harms inflicted by claims that religious objections should exempt for-profit, secular businesses from federal requirements concerning employer-provided health coverage. Such arguments undermine equality guarantees and other religiously neutral regulations of the commercial sphere to the detriment of our society generally and, in particular, the vulnerable constituencies *Amici* serve. Conversely, rejection of those arguments will affirm core principles essential for maintaining harmony and equal opportunity in the public marketplace of our diverse nation.

Amici have drawn upon their considerable expertise concerning the issues in this case in preparing this brief in support of, and to complement, the arguments of Secretary Sebelius.

SUMMARY OF THE ARGUMENT

Amici submit this brief to explain why Hobby Lobby Stores, Inc., Mardel, Inc., and Conestoga Wood Specialties Corporation (together, "the Companies") should not prevail on their claims under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"). The rule they challenge –

the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 300gg-13, a regulation requiring contraception (among other preventive services) to be included in employer-sponsored health coverage – does not substantially burden their religious exercise. *Amici* agree with the Secretary that the challenged regulation "serve[s] compelling interests in public health and gender equality" (Pet'rs' Br., Case No. 13-354, 15) – and, more specifically, the related individual interest in managing one's own reproductive functions and health. The Supreme Court has emphasized the compelling nature of this individual liberty interest, explaining that "our laws and traditions accord constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" because such matters, "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the Fourteenth Amendment." *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003), quoting *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992).

This brief addresses three interrelated points to underscore the important differences between commercial businesses and religious entities – essential differences that the Companies urge the Court to disregard – and to explain the harmful potential consequences of vesting commercial enterprises with religious rights as the Companies propose.

First, the Companies are three corporations that sell arts and crafts supplies, books, or doors and cabinetry for profit. They are not associations convened for religious or spiritual activities. (Pet'rs' Br., Case No. 13-354, p.8 ¶3; Pet'rs' Br., Case No. 13-356, p.4.) The corporate form chosen by each company's owners is for commercial enterprises that sell goods or services to the public to make money. Such corporate entities do not hold religious beliefs and do not engage in worship. A contrary conclusion would depart dramatically from established, fundamental distinctions between religious and commercial corporations reflected in our statutes and precedents. For example, unlike religious organizations, the Companies are prohibited from employment discrimination based on religion, and may not impose religious tenets upon employees.

Second, the religious exercise claims here must fail because the payment of money by a business for employee health insurance in compliance with a public health rule is not exercise of religion. Even if it were, the burden imposed by the regulation is not substantial. It is well-established that those choosing to enter commerce to make profit accept voluntarily the constraints on their commercial conduct imposed by laws regulating that business to protect others – even if an individual merchant believes that some conduct either required or protected by those regulations is religiously proscribed. Moreover, here, the corporations have only an indirect, attenuated connection to third party decisions with which the corporations' owners disagree on religious grounds, and the owners themselves do not have even an attenuated connection. Thus, even if the challenged regulation could incidentally burden religious rights of a for-profit, secular corporation (rights which do not exist), as a matter of law such burden could not be substantial.

Third, laws and regulations governing for-profit businesses often provide essential safeguards to prevent commercial activities from harming third parties. Here, the challenged regulation protects employees of large businesses like the Companies, who are entitled to their own beliefs about contraception, reproductive health, and related health decisions. The regulation ensures these employees access to insurance coverage and protects their private medical decisions without cost-shifting driven by their employers' personal religious commitments. This Court should reject the Companies' demands for exemption from rules that protect employees' ability to make for themselves "the most intimate and personal choices a person may make in a lifetime." *Casey*, 505 U.S. at 851. *See also Lawrence*, 539 U.S. at 578 (explaining that *Casey* confirmed that decisions concerning intimate adult relationships are a form of protected liberty for both married and unmarried persons, and those decisions are protected regardless of gender and sexual orientation).

It would work a radical, unfair shifting of burdens onto employees if secular, commercial enterprises were allowed to exclude particular medical care from the health plans provided to their employees via third parties based on the business owners' religious tenets. Of particular interest to *Amici* are laws protecting LGBT persons and those with HIV from discrimination in commercial contexts, including health care services. Claims for accommodation of secular employers' personal religious beliefs at the expense of their employees have been rejected consistently. Granting the Companies the exemption they seek would invite re-litigation of these questions and open the door to increased use of religion to deny LGBT persons, those with HIV, and other vulnerable minorities equal compensation, health care access, and other equitable treatment in commercial interactions. This Court should not depart now from settled law rejecting the exemption requested here.

Accordingly, *Amici* urge the Court to find that for-profit corporations do not have religious exercise rights. Alternatively, *Amici* submit that, at a minimum, requiring health plans to include contraception coverage within basic preventive care services does not substantially burden any such rights. Based on any or all of these grounds, the challenges to the contraception coverage rule should be rejected.

ARGUMENT

I. FOR-PROFIT CORPORATIONS DO NOT EXERCISE RELIGION.

Many people, including owners of for-profit corporations, look to their religious beliefs for guidance during their daily lives, including when making business decisions. When these cases began, no court had held that for-profit corporations can exercise religion. *Amici* believe the Third Circuit took the proper course when it considered and rejected the idea that such corporations have free exercise rights. *See Conestoga Wood Specialties Corp. v. Sec'y of Health and Human Servs.*, 724 F.3d 377 (3d Cir. 2013) (noting "a total absence of caselaw" "in which a for-profit, secular corporation was itself found to have free exercise rights"). The Circuit explained that "the law has long recognized the distinction between the owners of a corporation and the corporation itself"

(*Conestoga*, 724 F.3d. at 389), and that "the 'nature, history, and purpose' of the Free Exercise Clause [failed to] support the conclusion that for-profit, secular corporations are protected under this particular constitutional provision." *Id.* at 385.

True, a majority of the en banc Tenth Circuit concluded otherwise in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 2013 U.S. App. LEXIS 13316, 2013 WL 3216103 (10th Cir. 2013) (en banc). Respectfully, however, the Tenth Circuit majority framed the question incorrectly – asking "[w]hen did [these for-profit corporations] lose their Free Exercise rights?" 2013 U.S. App. LEXIS 13316, *51 n.12 – rather than whether the clause's nature, history, and purpose reveal that it protects such corporations in the first place. *Id.* (reversing district court's denial of injunction and remanding for consideration of harm to third parties and balance of equities).

By contrast, the Third Circuit appropriately focused on the purpose of the corporate form for enterprises created to pursue commerce and make profits, rather than to further religious or charitable goals. Today as much as ever, our multicultural society restrains for-profit employers from imposing religious constraints on employees, based, at least in part, on a shared respect for one another's right to hold different beliefs. By contrast, religious corporations often are accorded significant latitude, particularly in employment decisions, and often are permitted to behave differently from the ways our laws require people and corporations in commercial settings to interact.

For example, the religion clauses grant not-for-profit religious corporations unique authority to make employment decisions for positions deemed "ministerial," without regard to federal antidiscrimination laws. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S.Ct. 694, 710 (2012). *Hosanna-Tabor* expressly distinguishes the right to free exercise from freedom of association, explaining pointedly that "the text of the First Amendment itself . . . gives special solicitude [regarding free exercise] to the rights of religious organizations." *Id.* at 706.

That solicitude also exists in many statutes. For example, consider two court decisions involving health clubs, one operated by a not-for-profit religious organization; the other by a for-profit corporation. The religious organization was exempt from liability under Title VII for firing a janitor employed by its health club who did not conform to the organization's religious precepts. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337 (1987). By contrast, the for-profit health club was not exempt from liability under a state antidiscrimination law for refusing to hire and promote persons who did not conform to its owners' personal religious faith. *Minnesota ex rel. McClure v. Sports and Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985).

Indeed, it is beyond dispute that for-profit employers are not free to discriminate based on their owners' religious beliefs. *See, e.g.*, *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 804-13 (S.D. Ind. 2002) (rejecting religious exercise claims of for-profit employer charged with violating Title VII by discriminating against employees who did not conform to employer's religious beliefs); *State ex rel.*

Johnson v. Porter Farms, Inc., 382 N.W.2d 543, 548 (Minn. App. 1986) (rejecting free exercise claim by for-profit employer who fired employee for unmarried cohabitation in employer-provided housing).

Moreover, although the Free Exercise Clause has been understood to insulate a *religious* corporation that engaged in "shunning" someone, *Paul v. Watchtower Bible and Tract Soc'y of N.Y., Inc.*, 819 F.2d 875, 876 (9th Cir. 1987), a for-profit corporation would not enjoy similar insulation from liability for religious discrimination if supervisors "shunned" an employee – even if acting in furtherance of their owners' religious beliefs. Indeed, this Court has explained, in an employment-related case that did not involve Title VII, that the First Amendment does not permit an unequivocal preference for those whose conduct is motivated by religious belief; instead, consideration must also be accorded to the interests of others, whether or not those other interests are religious, to maintain the balance the Establishment Clause requires. *See, e.g., Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (statute violated Establishment Clause by requiring employers to accommodate Sabbath observers without allowing consideration of the religious and other interests of the employer and other employees). *See also Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (rejecting Establishment Clause challenge to statute because "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"). *See generally* Frederick Mark Gedicks and Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harvard Civil Rights-Civil Liberties L. Rev. __

(Spring 2014) (forthcoming), available at http://ssrn.com/abstract=2328516.

It is clear that the Companies could not condition their female employees' employment on their agreement either to use contraception or to refrain from doing so; nor could they pressure women toward either decision with wage subsidies or penalties. *Cf. Int'l Union v. Johnson Controls*, 499 U.S. 187, 198-200 (1991) (limiting women's employment opportunities based on their fertility when imposing no such limits on men was unlawful sex discrimination). As in *Johnson Controls*, here, too:

> It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice for the woman as hers to make.

Id. at 211.

Nor, under Title VII, could the Companies discharge or punish an employee for exercising her right to make pregnancy-related decisions – including whether to have an abortion. *See, e.g., Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008) (reversing summary judgment for employer because evidence sufficed to support finding that employee was discharged for terminating her pregnancy); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (affirming finding that employer violated Title VII because employee's contemplated abortion "was a motivating factor for her discharge").

That the Companies may not lawfully impose a "no contraceptives" rule on its female employees makes two things evident: 1) the absence of any substantial burden imposed by the regulation ensuring employees' equal access to the insurance necessary to make their own contraception choices; and 2) the degree of intrusion into employee privacy and procreative decision-making that these employers seek.

As these examples from the Title VII context demonstrate, exempting for-profit businesses from regulation based on their owners' religious convictions would flout the principles embodied in constitutional precedents and statutory protections that balance freedom of one's religion with protections for others' religions in the marketplace. Indeed, concerning many health, safety, and nondiscrimination laws that protect others, allowing for-profit, secular corporations to claim exemptions based on their owners' religious convictions would negate those laws entirely.

II. THE CONTRACEPTION COVERAGE REQUIREMENT DOES NOT SUBSTANTIALLY BURDEN THE RELIGIOUS EXERCISE OF THOSE CHOOSING TO SEEK PROFIT IN BUSINESSES REGULATED TO PROTECT OTHERS.

Neither the free exercise clause nor RFRA requires that owners of for-profit companies or the companies themselves be permitted to impose on others, such as employees, the religious practices and constraints that the owners voluntarily assume for themselves. Under RFRA, the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the least restrictive means to further a compelling government interest. 42 U.S.C. § 2000bb-1(a), (b). Even if the Companies could exercise religion, the contraception coverage requirement does not burden that exercise, let alone burden it substantially. As the Supreme Court explained more than thirty years ago, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982).

In free exercise challenges to commercial regulations governing employers, courts consistently have rejected even religious employers' claims that regulatory schemes protecting employees substantially burdened the employer's religious exercise. For example, in *Donovan v. Tony and Susan Alamo Found.*, 722 F.2d 397, 403 (8th Cir. 1983), *aff'd* 471 U.S. 290 (1985), the court concluded that "enforcement of wage and hour provisions" against religious non-profits that employed convicts and recovering addicts in commercial businesses to further their rehabilitation "cannot possibly have any direct impact on [the employers'] freedom to worship and evangelize as they please." *Id.* Explaining that "there comes a time when secular endeavor must be recognized as such, and passes over the line separating it from the sacred functions of religious worship," and this "metamorphosis or transmogrification occurs when a religious organization turns from the things of God to the things of Caesar," the court concluded that the employers' free exercise claim was "clearly without merit." *Id.* at 400, 403.

Similarly, in *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990), the court rejected a religious school's free exercise claim seeking exemption from minimum wage and equal pay requirements. The school argued that these requirements impaired its ability to determine matters of internal church governance "as well as those of faith and doctrine," including "its head-of-household practice," which "was based on a sincerely-held belief derived from the Bible," and which required payment of a salary supplement to male but not female teachers. *Id.* at 1397. The school's employees intervened to support the school, arguing that having their wages set by the government, rather than by church governors, would deprive them of blessings they would receive by allowing their Lord to supply their needs. *Id.* Nevertheless, the court concluded that "any burden [imposed by fair pay requirements] would be limited." *Id.* The "increased payroll expenses to conform to FLSA requirements is not the sort of burden that is determinative in a free exercise claim." *Id.* at 1397-98.

More recently, the D.C. Circuit rejected a free exercise claim seeking exemption from the ACA's provisions in their entirety. *Seven-Sky v. Holder*, 661 F.3d 1, 5 n.4, 9 (D.C. Cir. 2011) (affirming dismissal of RFRA claim because requiring purchase of health insurance contrary to belief that "insurance expresses skepticism in God's ability to provide" imposed only a de minimis burden on those religious beliefs), *abrogated on other grounds by Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012).

These cases upholding regulation of employers – including religious non-profits – are consistent with precedent in other commercial contexts finding that generally applicable rules governing marketplace conduct impose only minimal burdens, if any cognizable burden at all, on commercial participants' religious exercise. For example, courts repeatedly have rejected individuals' assertions that religious beliefs should exempt them from generally applicable constraints on professional conduct when offering health services. Indeed, rather than requiring accommodation, courts consistently have held that an individual's religious objection to such constraints renders the individual unqualified to perform the job. *See, e.g., Bruff v. North Miss. Health Servs., Inc.*, 244 F.3d 495, 497-98 (5th Cir. 2001) (Title VII did not require employer to accommodate counselor-employee's request to be excused from counseling patients on subjects conflicting with her religious beliefs; in contrast to typical religious accommodation requests, the employee's refusal to counsel patients about non-marital relationships meant "she would not perform some aspects of the position itself"); *Knight v. Conn. Dep't. of Pub. Health,* 275 F.3d 156, 164-65 (2d Cir. 2001) (denying free exercise claims of two public employees whose religious speech at work impeded their ability to do the job according to professional standards that protect patients); *Berry v. Dep't of Social Servs.,* 447 F.3d 642 (9th Cir. 2006) (county agency entitled to prohibit employee from discussing religion with clients); *Moore v. Metro. Human Serv. Dist.,* Slip Copy, 2010 U.S. Dist. LEXIS 107997, 2010 WL 3982312 (E.D. La. Oct. 8, 2010) (publicly-employed social worker not entitled to religious accommodation allowing her to engage in Christian counseling methods).

In a range of other commercial contexts, too, courts likewise have held that a decision to engage in for-profit activity necessarily accepts certain regulatory constraints, and that therefore any burden imposed by generally applicable marketplace regulations is insufficiently substantial to support a free exercise claim. *See, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.,* 493 U.S. 378, 389-91 (1990) (under strict scrutiny test relevant to RFRA claims, generally applicable sales tax did not impose "constitutionally significant" burden on ministry's sale of religious material because such a tax is "no different from other generally applicable laws and regulations – such as health and safety regulations – to which [the ministry] must adhere," and "is not a tax on the right to disseminate religious information, ideas, or beliefs, *per se*; rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California"); *Henderson v. Kennedy,* 253 F.3d 12 (D.C. Cir. 2001) (under RFRA, regulation banning T-shirt sales on National Mall did not substantially burden claimants' religious exercise, despite T-shirts' religious message); *Smith v. Fair Emp't and Hous. Comm'n,* 913 P.2d 909 (Cal. 1996) (under strict scrutiny, burden imposed by fair housing law on landlord with religious objection to unmarried tenants not substantial).

Moreover, the supposed burden alleged by the Companies is even more attenuated than the pay equity requirement in *Shenandoah Baptist Church,* the requirement to purchase health insurance despite a belief that insurance conveys lack of trust in God's will in *Seven-Sky,* or the requirement to counsel patients concerning relationships considered sinful in *Bruff.* Those requirements demanded that complainants directly engage in conduct inconsistent with their religious beliefs. Here, the contraception coverage requirement does not force the Companies or their owners to use contraception, or even to be involved at all in evaluating options and prices for separate contraception coverage.[2] Instead, the requirement allows the corporations' employees to make decisions for themselves about their own contraceptive use based on recommendations of their medical professionals and the various approved options. Accordingly, the burden consists of – at most – paying for a group plan that includes coverage for many services chosen by others for inclusion, which may or may not be used by employees or their family members, based on private decisions (and health needs) in which the employer will neither be involved nor aware. Neither the Companies nor their owners can claim burdens on religious exercise, much less substantial burdens, merely because the Companies comply with a generally applicable regulatory scheme that makes possible the independent choices of other people.

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[2] Indeed, as the Solicitor General explains, the ACA does not require the owners to purchase anything. Pet'rs' Br., Case No. 13-354, 26-28. For that reason, *Amici* believe the Third Circuit correctly held that the ACA "does not impose any requirement on [them] and, therefore, the contraception coverage rule does not violate their RFRA or their free exercise rights." *Conestoga,* 724 F.3d at 389. Not surprisingly, of the many cases challenging the contraception coverage rule, *Amici* are not aware of a single challenge by a natural person who personally employs more than 50 employees.

Courts have recognized this principle in other contexts. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (school voucher program did not violate Establishment Clause because parents' private choice to use a voucher broke the circuit between government and religion); *Agostini v. Felton*, 521 U.S. 203, 226 (1997) (no Establishment Clause violation where individual decision-making interrupts connection between government funding and religious recipient); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486-87 (1986) (accord). The same principle – that intervening decisions by an independent actor disconnect the source of funding from the conduct eventually undertaken with the funding – has been recognized in other First Amendment contexts as well. *See, e.g., Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (concluding that, when government funded legal services to facilitate private speech, not to promote government's message, any connection between the government and the resulting legal advocacy was indirect and incidental). Even more squarely on point, courts have affirmed dismissal of free exercise challenges by those who, based on religious beliefs, objected to use of tax or student fee dollars to help pay for broad health insurance programs that included abortion coverage. *See, e.g., Tarsney v. O'Keefe*, 225 F.3d 929, 932 (8th Cir. 2000) (rejecting challenge by taxpayers who objected on religious grounds to use of tax dollars to pay for Medicaid recipients' medically necessary abortions); *Goehring v. Brophy*, 94 F.3d 1294, 1297 (9th Cir. 1996) (rejecting public school students' RFRA and free exercise-based objections to university tuition fee used, in part, to subsidize school's health insurance program, which included abortion care), ***abrogated on other grounds by City of Boerne v. Flores***, 521 U.S. 507, 117 S.Ct. 2157 (1997).

The Companies also have argued that the contraception coverage requirement requires them to endorse and encourage conduct contrary to their religious views. This argument, too, fails as a matter of law. Courts repeatedly have rejected assertions that compliance with generally applicable rules or regulations constitutes any form of expression, let alone encouragement of regulated conduct. For example, in ***Rumsfeld v. Forum for Academic and Institutional Rights, Inc.***, 547 U.S. 47 (2006) (***"FAIR"***), the Court rejected a claim by law schools that the schools' compliance with a statutory mandate to facilitate military recruitment on campus would send a message of agreement with the military's recruitment policies. Compliance with that mandate was not expressive and sent no message at all, let alone a message "that law schools agree with any speech by recruiters." ***Id. at*** 65, (citing ***Pruneyard Shopping Ctr. v. Robins,*** 447 U.S. 74, 88 (1980), which upheld a state law requiring shopping center owners to allow expressive activities by others on their property, explaining that the views of those engaging in expressive activities were unlikely to be identified with the owner, who remained free to disassociate himself from those views and was "not ... being compelled to affirm [a] belief in any governmentally prescribed position or view"); ***see also Catholic Charities of Sacramento v. Superior Court (Sacramento),*** 85 P.3d 67, 89 (2004) ("[C]ompliance with a law regulating health care benefits is not speech. The law leaves Catholic Charities free to express its disapproval of prescription contraceptives and to encourage its employees not to use them. ... [S]imple obedience to a law ... cannot reasonably be seen as a statement of support for the law or its purpose").

Furthermore, the contraception coverage requirement, as a matter of logic as well as law, does not "promote" use of contraception over childbearing any more than coverage for chiropractic care "promotes" that treatment option over spinal surgery, pain medication, or physical therapy for back pain. Instead of endorsing or promoting any particular choice of treatment for particular health conditions, inclusion of coverage for multiple care options simply allows employees to pursue wellness with medical guidance based on individual needs, past experiences, and their own life goals.

Consequently, even if for-profit corporations were permitted to bring a religious exercise claim based on their owners' or shareholders' religious objections, or if owners were permitted to bring one to protest their companies' regulatory obligations, the burden on free exercise rights posed by the contraception coverage requirement is simply too slight to trigger RFRA's protection. Compliance by for-profit businesses with a complex regulatory scheme governing an employer's compensation to employees cannot be considered a burden on the employer's free exercise as a matter of law. Just as "[t]here is surely no constitutional right, under the religion clauses of the First Amendment, to pay substandard wages" due to an employer's sincerely-held religious beliefs about employee compensation, *see Donovan*, 722 F.3d at 402 n.21, there is no constitutional right, under the religion clauses, to line-item veto coverage for particular treatments out of comprehensive health insurance.

III. EXEMPTING FOR-PROFIT CORPORATIONS FROM THE CONTRACEPTION COVERAGE REQUIREMENT WOULD NEGATE SOUND, SETTLED PRECEDENTS REQUIRING COMMERCIAL ACTORS, EVEN IF RELIGIOUSLY MOTIVATED, TO RESPECT THIRD PARTIES' RIGHTS AND INTERESTS.

The Companies' argument, if accepted, would transform our society into one in which for-profit businesses generally could claim religious immunity from the full spectrum of generally applicable laws protecting people – including employees, consumers, and other members of the public. It is long settled that for-profit businesses cannot immunize themselves from laws protecting others from harm by asserting a religious motive for their conduct. *See, e.g., Estate of Thornton, supra,* 472 U.S. at 709; *Lee, supra,* 455 U.S. at 261. Thus, even when courts have found that a challenged regulation of commercial conduct *does* burden an individual's religious exercise, they nevertheless generally have upheld such regulations as serving governmental interests, including protection of those whose religious beliefs may differ from the challenger's, and who would be harmed if the challenger were exempted from the law. *See, e.g., Lee, supra,* 455 U.S. at 261.

Because *Lee* has striking parallels to the Companies' free exercise claims here, *Lee's* facts bear close examination. To begin with, though, note that the claimant in *Lee* had a stronger free exercise claim than the ones before the Court now because Mr. Lee was a self-employed farmer who also employed others, not a for-profit corporation. He asserted a free exercise exemption from responsibility to pay social security taxes for his employees because of his – and his employees' – religious beliefs that accepting social security benefits and paying social security taxes are sinful. This Court acknowledged a conflict between Mr. Lee's religious beliefs and his tax obligations, and that a statutory provision exempted him from the duty to pay such taxes for his own self-employment. *Id.* at 257. However, this Court determined that he nonetheless was required to pay social security taxes for his employees because "[g]ranting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees." *Id.* at 261.

This Court's conclusion in *Lee* is the governing rule. Indeed, courts have considered religious exercise claims in diverse contexts and consistently have rejected such claims where accommodating one person's religious belief could harm others. As the Second Circuit has emphasized, courts frequently "have held that the state's interest outweighs any First Amendment rights" where there is a "clear interest, either on the part of society as a whole or at least in relation to a third party, which would be substantially affected by permitting the individual to assert what he claimed to be his 'free exercise' rights." *Winters v. Miller*, 446 F.2d 65, 70 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971), *citing*

Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (violation of child labor laws); *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *People v. Handzik*, 102 N.E.2d 340 (Ill. 1951) (criminal prosecution of faith healers who practice medicine without a license); *People v. Pierson*, 68 N.E. 243 (N.Y. 1903) (serious illness of a child). *See also, e.g., Keeton v. Anderson-Wiley*, 664 F.3d 865, 880 (11th Cir. 2011) (college not required to allow counseling student religious accommodation that would "evade the curricular requirement that she not impose her moral values on clients"); *Spratt v. Kent Cnty.*, 621 F. Supp. 594, 600-02 (D.C. Mich. 1985) (public employer justified in firing social worker for inclusion of religious practices while counseling inmates); *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court (Benitez)*, 189 P.3d 959, 967 (Cal. 2008) (under strict scrutiny, no religious exemption from nondiscrimination law for physicians objecting to treating lesbian patients).

Title VII applies an approach consistent with the free exercise principle requiring avoidance of harm to others. Thus, although many workers' religious beliefs inform their conduct, it is settled that there are limits to workers' freedom to act on their beliefs to the detriment of coworkers and business associates. *See, e.g., Bodett v. Coxcom, Inc.*, 366 F.3d 736 (9th Cir. 2004) (supervisor wrongfully claimed a religious right to harass lesbian subordinate); *Bruff*, 244 F.3d at 497-98 (Title VII did not require employer to accommodate counselor-employee by excusing her from counseling patients concerning relationships to which she had religious objection);

Chalmers v. Tulon, 101 F.3d 1012, 1021 (4th Cir. 1996) (employee not entitled to send religiously motivated letters to co-workers criticizing their private lives).

Title VII likewise protects employees' religious liberty from burdens posed by an employer's insistence on conformity with a particular religious creed, and will not permit firing of an employee "simply because he did not hold the same religious beliefs as his supervisors." *Shapolia v. Los Alamos Nat'l. Lab.*, 992 F.2d 1033, 1037 (10th Cir. 1993). *See also, e.g., Noyes v. Kelly Servs.*, 488 F.3d 1163, 1166, 1168-69 (9th Cir. 2007) (evidence sufficient to proceed with plaintiffs claim that supervisor wrongfully denied her promotion because she was not part of his religious group); *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997) ("Venters need only show that her perceived religious shortcomings [her unwillingness to strive for salvation as Ives understood it, for example] played a motivating role in her discharge.").[3] Under this standard, Title VII protects employees against being fired or otherwise punished for divorcing, having an extramarital affair, or otherwise "failing" to adhere generally to specified religious precepts.[4]

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[3] Lower federal court decisions applying this principle are legion. *See, e.g., Panchoosingh v. General Labor Staffing Servs., Inc.*, No. 07-80818-CI, 2009 WL 961148, *6 (S.D. Fla. Apr. 8, 2009); *Tillery v. ATSI, Inc.*, 242 F. Supp. 2d 1051, 1062-63 (N.D. Ala. 2003), *aff'd without opinion*, 97 Fed. Appx. 906 (Table) (11th Cir. 2004) (unpublished); *Backus v. Mena Newspapers, Inc.*, 224 F. Supp. 2d 1228, 1233 (W.D. Ark. 2002); *Henegar v. Sears, Roebuck and Co.*, 965 F. Supp. 833, 837 (N.D. W.Va. 1997); *Yancey v. Nat'l Ctr. on Insts. and Alternatives*, 986 F. Supp. 945, 955 (D. Md. 1997); *Sarenpa v. Express Images Inc.*, Civ.04-1538(JRT/JSM), *3 (D. Minn. Dec. 1, 2005); *Kaminsky v. Saint Louis Univ. Sch. of Med.*, No. 4:05CV1112 CDP, 2006 WL 2376232, *5 (E.D. Mo. Aug. 16, 2006).

In the United States, differing religious beliefs about family life often have generated disputes not only in employment, but also in medical and other arenas. Prominent among them, in particular, have been problems arising when religious convictions prompt some to believe that others have sinned or should be kept apart, leading to discrimination in commercial settings. Although some forms of religiously motivated discrimination doubtless have receded, our history tells a recurring saga of successive generations asking anew whether our protections for religious liberty warrant exemptions from laws protecting others' liberty and right to participate equally in civic life. Our courts rightly and consistently have recognized that the answer to that question must remain the same: religious beliefs do not entitle any of us to exemptions from generally applicable laws protecting all of us.

Thus, for example, during the past century's struggles over racial integration, some Christian schools restricted admissions of African American applicants based on beliefs that "mixing of the races" would violate God's commands. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 580, 583 n.6 (1983). Some restaurant owners refused to serve African

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[4] *See Kaminsky*, 2006 WL 2376232, *5 (divorce); *Sarenpa v. Express Images Inc.*, 2005 WL 3299455 at *3 (extramarital affair); *Henegar*, 965 F. Supp. at 834 (living with a man while divorcing her husband); *Noyes*, 488 F.3d at 1166, 1168-69 (failure to adhere generally to supervisor's religious beliefs); *Venters*, 123 F.3d at 972 (same).

American customers citing religious objections to "integration of the races." *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944-45 (D.S.C. 1966), *rev'd* 377 F.2d 433 (4th Cir. 1967), *aff'd and modified on other grounds*, 390 U.S. 400 (1968). Religious tenets also were used to justify laws and policies against interracial relationships and marriage. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (in decision invalidating state interracial marriage ban, quoting trial judge's admonition that "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix."); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (firing of white clerk typist for friendship with black person was not protected exercise of religion despite church's religious objection to interracial friendships).

And as our society began coming to grips with the desire and need of women for equal treatment in the workplace, some who objected on religious grounds sought exemptions from employment non-discrimination laws as a free exercise right. Notwithstanding the longstanding religious traditions on which such claims often were premised, courts recognized that these religious views could not be accommodated in the workplace without vitiating the sex discrimination protections on which workers are entitled to depend. *See, e.g.*, *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (school violated antidiscrimination law by offering unequal health benefits to female employees); *Bollenbach v. Bd. of Educ.*, 659 F. Supp. 1450, 1473 (S.D.N.Y. 1987) (employer improperly refused to hire women bus drivers due to religious objection of Hasidic male student bus riders).

Similarly, after state and local governments enacted fair housing laws that included protections for unmarried couples, landlords unsuccessfully sought exemptions based on their belief that they would sin by providing residences in which tenants would commit the sin of fornication. *See, e.g.*, *Smith*, 913 P. 2d at 925 (rejecting religious exercise claim of landlord because housing law did not substantially burden religious exercise); *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994) (same).

Across generations, then, these questions have been asked and answered, echoing with reassuring consistency as courts have recognized the public's abiding interests in securing fair access and peaceful co-existence in the public marketplace. Today, these common interests are tested once against as LGBT people seek full participation in American life. There is growing understanding that sexual orientation and gender expression are personal characteristics bearing no relevance to one's ability to contribute to society, including one's ability to form a loving relationship and build a family together. *United States v. Windsor*, 133 S.Ct. 2675, 2694-96 (2013); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). And yet, there remain pervasive and fervent religious objections on the part of many people to interacting with LGBT people in commercial contexts, still inspiring widespread harassment and discrimination. *See, e.g.*, *Bodett*, 366 F.3d at 736; *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (anti-gay proselytizing intended to provoke coworkers); *Knight*, 275 F.3d at 156 (visiting nurse proselytizing to homebound AIDS patient); *Erdmann v. Tranquility, Inc.*, 155 F. Supp.2d 1152 (N.D. Cal. 2001) (supervisor harassment of gay subordinate with warnings he would "go to hell" and pressure to join workplace prayer services); *Hyman v. City of Louisville*, 132 F. Supp.2d 528, 539-540 (W.D. Ky. 2001) (physician refusal to employ gay people), *vacated on other grounds by* 53 Fed. Appx. 740 (6th Cir. 2002). As laws and company policies have begun to offer more protections against this discrimination, some who object on religious grounds are asking courts to change course and allow religious exemptions where they have not done so in past cases. For the most part, the past principle has held true and the needs of third parties have remained a constraint on religion-based conduct in commercial contexts. *See, e.g., Bodett*, 366 F.3d at 736 (rejecting religious accommodation claim); *Peterson*, 358 F.3d at 599 (same); *Knight*, 275 F.3d at 156 (same); *Erdmann*, 155 F. Supp.2d at 1152 (antigay harassment was unlawful discrimination); *Hyman*, 132 F.Supp.2d at 539-540 (rejecting physician's claim of religious exemption from nondiscrimination law); *North Coast Women's Care Med. Gp.*, 189 P.3d at 970 (same).

The exemption the Companies seek here would mark a sea change – not only in allowing business owners' religious views about family planning to burden decisions employees are entitled to make for themselves, but also in opening the door to similar denials of equal compensation, health care access, and other equitable treatment for LGBT people, persons with HIV, and anyone else whose family life or health need diverges from their employers' religious convictions. As this Court has recognized, our federal laws and traditions have "afford[ed] constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Lawrence,* 539 U.S. at 574, *citing Casey*, 505 U.S. at 851. The Court's explanation of the "respect the Constitution demands for the autonomy of the person in making these choices," *id.*, spotlights that the "person" whose autonomy is to be protected is the person herself – not the owner of the for-profit company that employs her.

Many employees, like many business owners, hold religious and other beliefs that guide their lives. Those beliefs remain with them when entering their shared place of business. As recognized in the decisions discussed above, permitting owners of for-profit companies to interject themselves into employees' home lives and decisions concerning fertility, birth control, and childbearing – which the Companies' arguments do – not only would encourage others to do the same, but would subvert compelling interests in autonomy, public health, and gender equity served by the rule the Companies resist. The Companies offer no limiting principle and, indeed, there is none. Religious critiques of contraception can as easily be leveled at sterilization, infertility care, and decisions between vaginal delivery and caesarian section. How does autonomy survive an employer's line-item veto of insurance coverage that pokes and prods personal decisions by shifting costs from health plan to worker?

Stepping back from the reproductive health context of these cases, imagine how our nation's workplace standards would be transformed were this

Court to embrace the approach the Companies request. Business owners with religious objections to blood transfusion could exempt that life-saving service from their employees' health coverage. They could selectively exclude coverage for "sinful" medications that control pain, alleviate depression, or manage HIV. Those who believe that all modern medical treatments interfere with Divine will could refuse coverage for all but faith healing.

Amici sound alarm bells here because discriminatory limitations on family health insurance and biased attitudes of health professionals – often rooted in religious views – already contribute to persistent health disparities affecting the constituencies they represent. The Institute of Medicine has published an authoritative overview of the public health research addressing these disparities, which repeatedly notes the adverse health consequences of prejudice. Inst. Of Med., *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (2011) ("IOM Report") (undertaken at the request of the National Institutes of Health), http://www.iom.edu/Reports/2011/The-Health-of-Lesbian-Gay-Bisexual-and-Transgender-People.aspx. For example, the IOM Report observes:

- Although LGBT people share with the rest of society the full range of health risks, they also face a profound and poorly understood set of additional health risks due largely to social stigma. *Id.* at 14.
- [I]t is clear that stigma has exerted an enormous and continuing influence on the

life and consequently the health status of LGBT individuals. *Id.* at 74-75.

- LGBT individuals face financial barriers, limitations on access to health insurance, insufficient provider knowledge, and negative provider attitudes that can be expected to have an effect on their access to health care. *Id.* [5]

The Companies' proposed elevation of religious rights to the detriment of others' needs would, in addition to its adverse effects for women's health access and equality, worsen circumstances for LGBT people and people living with HIV that already are challenging. Responding to the request of the Department of Health & Human Services, *Amicus* Lambda Legal provided examples based on its litigation and the results of the first national survey to examine barriers to care confronting LGBT people and those with HIV.[6] The survey results were shocking. Of the nearly 5,000 respondents, more than half reported that they had experienced at least one of the following types of discrimination at the hands of health care providers:

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[5] *See also* Dep't Health & Hum. Svcs., *Lesbian, Gay, Bisexual, and Transgender Health* (2010), http://www.healthypeople.gov/2020/topicsobjectives2020/overview.aspx?topicid=25; Substance Abuse and Mental Health Svcs. Admin., *Top Health Issues for LGBT Populations* (2012), http://store.samhsa.gov/product/Top-Health-Issues-for-LGBT-Populations/SMA12-4684; Agency for Healthcare Research and Quality, *National Healthcare Disparities Report* 241-256 (2012), http://www.ahrq.gov/research/findings/nhqrdr/nhdr12/nhdr12_prov.pdf; *see generally* GLMA, Healthy People 2010 Companion Document for Lesbian, Gay, Bisexual, and Transgender (LGBT) Health (2001), http://glma.org/_data/n_ 0001/resources/live/HealthyCompanionDoc3.pdf.

[6] Lambda Legal, *Response to HHS RFI Nos. 0945-AA02 & 0945-ZA01 Regarding Nondiscrimination in Certain Health Programs or Activities*, pp. 3, 31-34 (Sept. 30, 2013), http://lambda

- Refusals to touch them or use of excessive precautions;
- Harsh or abusive language;
- Physical roughness or abuse;
- Blame for their health status.[7]

Numerous respondents reported their reluctance to seek medical care after interacting with health professionals who freely had expressed religiously grounded bias against them. Examples included:

- Kara in Philadelphia, Pennsylvania, explained: "Since coming out, I have avoided seeing my primary physician because when she asked me my sexual history, I responded that I slept with women and that I was a lesbian. Her response was, 'Do you know that's against

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legal.org/in-court/legal-docs/ltr_hhs_20130930_discrimination-in-health-services, citing survey results published in Lambda Legal, *When Health Care Isn't Caring: Survey on Discrimination Against LGBT People and People Living with HIV* (2010), http://data.lambdalegal.org/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.

[7] *When Health Care Isn't Caring,* at 5, 9-10. Almost 56 percent of lesbian, gay, or bisexual respondents had at least one of these experiences; 70 percent of transgender and gender-nonconforming respondents had one or more of these experiences; and almost 63 percent of respondents with HIV experienced one or more of these types of discrimination. *Id.*

the Bible, against God?'" [8]

- Joe in Minneapolis, Minnesota, recalled: "I was 36 years old ... an out gay man, and ... depressed after the breakup of an eight-year relationship. The doctor ... told me that it was not medicine I needed but to leave my 'dirty lifestyle.' He recalled having put other patients in touch with ministers who could help gay men repent and heal from sin, and he even suggested that I simply needed to 'date the right woman' to get over my depression. The doctor even went so far as to suggest that his daughter might be a good fit for me."[9]

The stress deriving from social exclusion and stigma can lead to serious mental health problems, including depression, anxiety, substance use disorders, and suicide attempts. Ilan Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual*

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[8] Lambda Legal, *People Speak Out*, p.1, http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-insert_lgbt-people-and-people-living-with-hiv-speak-out.pdf.

[9] *Id.* at 2. Other surveys of LGBT people's experiences report similar findings. *See, e.g.*, National Senior Citizens Law Center, *LGBT Older Adults in Long-Term Care Facilities*, pp. 4, 11 (2011) ("More than half felt that staff would abuse or neglect an LGBT elder and other residents. ... Several respondents also reported being 'prayed over' or being told that they would 'go to hell' for their sexual orientation or gender identity. ... As one respondent described it, 'Insisting on praying for me feels like harassment. ... It took a lot of work to get staff to stop asking me about a wife ... I have been in my same-gender relationship for over 30 years.'"), http://www.nsclc.org/wp-content/uploads/2011/07/LGBT-Stories-from-the-Field.pdf.

Issues and Research Evidence, Psychological Bulletin, Vol. 129, No. 5, 674-97 (2003); Vickie Mays & Susan Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 19 Am. J. Pub. Health 1869-76 (2001).

Anti-LGBT bias often takes a physical toll as well. *See, e.g.*, David J. Lick, *et al.*, *Minority Stress and Physical Health Among Sexual Minorities*, 8 Perspectives on Psych. Science 521 (2013) (physical and mental health disparities are related to minority stress that follows exposure to stigma); Centers for Disease Control and Prevention, *HIV Among African Americans* (2013), http://www.cdc.gov/hiv/risk/racialethnic/aa/facts/index.html; Laura M. Bogart, *et al.*, *Perceived Discrimination and Physical Health Among HIV-Positive Black and Latino Men Who Have Sex With Men*, 17[4] AIDS & Behavior 1431 (May 2013) (stress of discrimination affects health of racial and sexual minorities, especially those with HIV; chronic stressors increase vulnerability to illness), http://www.ecu.edu/cs-dhs/healthdisparities/upload/PerceivedDiscrimination.pdf; Susan Cochran, *et al.*, *Cancer-Related Risk Indicators and Preventive Screening Behaviors Among Lesbians and Bisexual Women*, 91 Am. J. Pub. Hlth., No. 4, 592, 596 (April 2001); Kate O'Hanlan, *Lesbian Health and Homophobia: Perspectives for the Treating Obstetrician/ Gynecologist*, 18 Current Probs. Obs. & Gyn. 93, 136 (1995) (same).

The cases before this Court concern access to medical care, but the principle the Companies offer is not necessarily confined to employer-provided health insurance or medical services. The notion that a commercial business sins when it complies with rules that decline to condemn the "sinful" independent conduct of its employees could apply just as well to the non-benefits portion of employee compensation – wages. Logically, a next contention could be that religious liberty vindicates an employer's insistence that its workers refrain from using condoms or consuming pork or liquor purchases with their salaries. That is the principle advanced in this case. It is neither legally nor practically tenable within our religiously pluralistic, secular society.

Some might find these examples implausible. But for those hoping that nondiscrimination protections soon will reduce wage disparities, job loss, and unequal employment benefits based on sexual orientation or gender identity,[10] the Companies' quest for religious exemptions for commercial activity poses a potentially devastating threat with distressing historical echoes. *See generally* David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption from Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. Rev. 1176, 1221 (1994) (desired exemptions "would undermine the egalitarian public order that such laws seek to establish, creating precisely the access and dignitary harms that the Supreme Court held to be the legitimate concern of antidiscrimination laws.").

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[10] *See generally* Jennifer Pizer, *et al.*, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 Loy. L.A.L. Rev. 715 (2012); Randy Albelda, *et al.*, *Poverty in the Lesbian, Gay, and Bisexual Community* (March 2009), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf.

CONCLUSION

Accepting the arguments of Hobby Lobby Stores, Inc., Mardel, Inc., and Conestoga Wood Specialties Corp. would unsettle, if not eviscerate, well-reasoned doctrine developed over time based on our Constitution and laws. This settled approach permits and encourages a flourishing coexistence of the diverse religious, secular, and other belief systems that animate our nation. The proposed alternate would transform our equal opportunity marketplace into segregated dominions within which each business owner with religious convictions "becomes a law unto himself," *Employment Division v. Smith*, 494 U.S. 872, 879 (1990).

Religious freedom is a core American value and burdens on it can make for hard cases. But these are not among those hard cases, given the lack of burden on religious practice and the compelling interests served by the Affordable Care Act's insistence that large commercial enterprises provide comprehensive health insurance to all of their employees.

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AMICUS
CURIAE
BRIEF

Nos. 13-354, 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS,
Secretary of Health and Human Services, *et al.*,
Petitioners,
v.
HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,
v.
KATHLEEN SEBELIUS,
Secretary of Health and Human Services, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF *AMICUS CURIAE* LIBERTY INSTITUTE IN SUPPORT OF RESPONDENTS HOBBY LOBBY STORES, INC., *ET AL.* AND PETITIONERS CONESTOGA WOOD SPECIALTIES CORP., *ET AL.*

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae Liberty Institute is a non-profit, public interest law firm dedicated to the preservation of America's religious liberty. Liberty Institute provides pro bono legal advice and representation to churches, religious schools, ministries, and faith-based businesses that desire to operate autonomously, without governmental intrusion into their religious practices.

The outcome of this case and its determination of the extent to which for-profit and non-profit corporations may assert rights under the Religion Clauses of the First Amendment and under the Religious Freedom Restoration Act will determine whether faith-based organizations, both for-profit and non-profit, that Liberty Institute advises may operate without fear of governmental control and oversight of their religious exercise.

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[1] Pursuant to this Court's Rule 37, letters of consent from all parties for the filing of this brief either have been submitted to the Clerk or are attached hereto. *Amicus* states that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *Amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

For nearly 200 years, corporations have been treated as persons able to assert rights under the Constitution and statutory law. These rights have frequently included First Amendment rights such as the freedom of speech and freedom of religion and have been asserted by both for-profit and non-profit corporations.

In both cases currently before the Court, however, the government is asserting that for-profit corporations cannot share in the rights guaranteed by the Religion Clauses of the First Amendment and the Religious Freedom Restoration Act. This assertion ignores the texts of the First Amendment and the Religious Freedom Restoration Act and establishes an unconstitutional hierarchy in which non-profit faith-based organizations are given preferential treatment over for-profit faith-based organizations. Such a blanket determination by the government of the "orthodox" form a faith-based organization must take violates the Establishment Clause, improperly manipulates faith-based organizations into structuring themselves in a particular manner that the state approves and forces many into choosing between their religious liberty rights and their free speech rights.

ARGUMENT

I. Corporations have First Amendment rights.

A. Corporations have long availed themselves of protections for individual rights, including religious liberty rights.

In 1830, Justice Story stated that "[t]he great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body." *Providence Bank v. Billings,* 29 U.S. 514, 562 (1830); *see also Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."). As the fundamental purpose of the corporation is to grant "the character and properties of individuality"—personhood—upon a collective, it is not surprising that in the almost 200 years since Justice Story's statement, individual rights have frequently and with little question been bestowed upon corporations.

Individual religious rights are no different in their application to corporations. In *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah,* 508 U.S. 520 (1993), this Court acknowledged without controversy that an incorporated church can assert claims under the Free Exercise Clause against a governmental entity that is burdening the free exercise of that church. Indeed, despite a corporation's want of sentience, it would be unimaginable to assert that a church cannot exercise religion. This Court again acknowledged that corporations are entitled to the free exercise of religion in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006), wherein a church was permitted to challenge a federal statute under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"). In 2012, this Court acknowledged that both the Free Exercise Clause and the Establishment Clause protect churches and not just individuals in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC,* 132 S. Ct. 694 (2012) (holding that the ministerial exception prohibits governmental regulation of hiring or firing of ministers). Again, the application of these rights to a corporate entity's religious exercise was not controversial.

More generally, in *Citizens United v. FEC,* 558 U.S. 310, 342 (2010), this Court listed over twenty Supreme Court cases in which First Amendment protections have been extended to corporations.[2] These cases were in addition to *Citizens United* itself, which reiterated that corporations have First Amendment rights. In each, the protections of the corporate form coexisted with the corporation's assertion of First Amendment rights without conflict and with little regard for the sentience of the corporate entity.

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[2] The non-exhaustive list includes *First Nat'l Bank v. Bellotti,* 435 U.S. 765 (1978); *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85 (1977); *Time, Inc. v. Firestone,* 424 U.S. 448 (1976); *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *New York Times Co. v. United States,* 403 U.S. 713 (1971) (per curiam); *Time, Inc. v. Hill,* 385 U.S. 374 (1967); *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Kingsley International Pictures Corp. v. Regents of University of New York,* 360 U.S. 684 (1959); *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952); *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180 (1997); *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727 (1996); *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622 (1994); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board,* 502 U.S. 105 (1991); *Sable Communications of California, Inc. v. FCC,* 492 U.S. 115 (1989); *Florida Star v. B.J.F.,* 491 U.S. 524 (1989);

In *Roberts v. U.S. Jaycees,* 468 U.S. 609 (1984), this Court, in affirming the right to associate, even warned that individual free speech and religious liberty rights cannot be fully protected unless corresponding "group" rights are also guaranteed:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in

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Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986); *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829 (1978); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974); and *Greenbelt Cooperative Publishing Association, Inc. v. Bresler,* 398 U.S. 6 (1970).

> pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts, 468 U.S. at 622 (internal cites omitted). Implicit in this warning is the idea that the group organized for religious activity actually be free to engage in religious activity. Unlike the "purely personal" right against self-incrimination refused to corporations in *First Nat'l Bank v. Bellotti,* 435 U.S. 765 (1978), an individual's right to the free exercise of religion is not protected unless faith-based corporations are also entitled to the free exercise of religion. If the government could tell a faith-based corporation, such as a church, that it does not have the right to the free exercise of religion, then the associational right would be meaningless.

Consequently, it is clear that First Amendment rights, including rights derived from the Religion Clauses, can be and are asserted by corporations.

B. "For-profit" status does not abridge First Amendment protections.

This Court has repeatedly granted First Amendment protections to for-profit corporations under the Free Speech Clause, and has gone so far as to warn of dire First Amendment consequences should such protections be denied on the basis of financial considerations. In *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), this Court held that the First Amendment's free speech protections extend to paid-for advertisements placed in a for-profit newspaper. As this Court said,

> That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. *Smith v. California,* 361 U.S. 147, 150; *cf. Bantam Books, Inc., v. Sullivan,* 372 U.S. 58, 64 n. 6. Any other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press. Cf. *Lovell v. Griffin,* 303 U.S. 444, 452; *Schneider v. State,* 308 U.S. 147, 164. The effect would be to shackle the First Amendment in its attempt to secure "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States,* 326 U.S. 1, 20.

New York Times Co., 376 U.S. at 266; *see also United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803 (2000) (holding that the First Amendment protects a corporation's for-profit distribution of pornography); *cf. Citizens United,* 558 U.S. at 365 ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.").

Restricting corporate assertion of First Amendment rights to non-profit entities ignores the text and intention of the First Amendment and, in the free speech context, would permit non-profit advocacy groups like Citizens United to speak while denying for-profit media the same right merely because they seek monetary gain. A similar restriction in the religious liberty context would yield similar inequalities by granting non-profit ministries rights that are denied to ministries that operate for-profit because of religious belief or for any other reason, such as to encourage investment in the furtherance of their mission. And if the First Amendment protects a for-profit corporation's right to distribute pornography, surely it protects a for-profit corporation's right to exercise religion.

C. The "for-profit / non-profit" distinction cannot be used constitutionally to discriminate in the application of the Religion Clauses of the First Amendment.

i. The structure of the First Amendment prohibits the "for-profit / non-profit" distinction.

The First Amendment makes no structural distinction between those entities protected by the Religion Clauses and the Free Speech Clause. Indeed, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press..." places the clauses on equal footing in that each clause limits Congress (and now, via the Fourteenth Amendment, other governmental entities) but makes no reference to the beneficiary of its protection. U.S. Const. amend. I. As this Court noted in *Bellotti,* 435 U.S. at 776, "[t]he First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the challenged law] abridges expression that the First Amendment was meant to protect." The very structure of the First Amendment belies any argument that both for-profit and non-profit corporations may enjoy the protection of "Congress shall make no law ... abridging the freedom of speech, or of the press," but only *non-profit* corporations may enjoy the protection of "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." *Id.*

Granting the protections of the Free Speech Clause to both for-profit and non-profit corporations while denying the protections of the Religion Clauses to for-profit corporations is an arbitrary and capricious distinction that cannot be grounded in reason or the text of the First Amendment.

ii. Applying the "for-profit / non-profit" distinction would violate the Establishment Clause.

In keeping with its incongruity with the First Amendment generally, the government's "for-profit / non-profit" distinction is a blatant violation of the Establishment Clause.

Under the ecclesiastical abstention doctrine defined by this Court in *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in North America,* 344 U.S. 94, 116 (1952), the First Amendment's restraint on civil authority acknowledges "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." As Justice Brennan asserted, churches must be free to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 341 (1987) (Brennan, J., concurring) (*quoting* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981)).

Under a "for-profit / non-profit" distinction, however, faith-based organizations, including churches and ministries, are not free to "define their own doctrines" or "run their own institutions" "free from state interference." Instead, the proposed "for-profit / non-profit" rule forces faith-based organizations to either elect non-profit status or surrender their rights under the Religion Clauses. Faith-based organizations that choose to be "for-profit" so they can speak to a wider array of issues, influence legislation, and endorse candidates without the speech limitations of 501(c)(3) status will have to choose between their free speech rights or their religious liberty rights. Other faith-based organizations that may believe "non-profit" status is wrong or immoral will be forced to choose between sacrificing their religious beliefs and sacrificing their religious liberties.[3] That is a Hobson's choice the Establishment Clause does not tolerate and was designed to prevent.

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[3] *See, e.g.*, Dave Hodges, *No 501-C-3 Church Can Be a Church of God,* The Common Sense Show, (January 2, 2014), http://thecommonsenseshow.com/2014/01/02/no-501-c-3-church-can-be-a-church-of-god/; Christopher J.E. Johnson, *501c3: The Devil's Church,* Creation Liberty Evangelism, (Aug. 13, 2012), http://www.creationliberty.com/articles/501c3.php; Kevin A. Lehmann, *The Hypocritical 501c3 Babylonian Church System and*

Because the "for-profit / non-profit" distinction is grounded solely in the tax code, the government may modify the requirements or limitations of non-profit status at any time to manipulate and control faith-based organizations. The threat of revoking an organization's non-profit status would then mean the threat of revoking the organization's religious free exercise rights—a much greater threat and a much more effective form of control. Ultimately, granting free exercise rights to non-profit corporations while denying free exercise rights to for-profit corporations would give the government a tool to deny religious constitutional protections to any organization by an amendment to the tax code, rendering the protections illusory.

Additionally, as Judge O'Scannlain's concurring opinion in *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011), noted in considering whether Title VII applies to non-church ministries,

> interpreting the statute such that it requires an organization to be a "church" to qualify for the exemption would discriminate against religious institutions which "are organized for a religious purpose and have sincerely held religious tenets, but are not houses of worship." ... It would also raise the specter of constitutionally impermissible discrimination between

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its Unholy Alliance with the Federal Government, Secularism, and America's Greatest Enemies, CatchKevin.com, http://catchkevin.com/babylonian-church-system/ (accessed Jan. 22, 2014).

> institutions on the basis of the "pervasiveness or intensity" of their religious beliefs.

Spencer, 633 F.3d at 728-29 (O'Scannlain, J., concurring) (internal cites and quotes omitted); *see also Colorado Christian University v. Weaver,* 534 F.3d 1245, 1259 (10th Cir. 2008) (refusing to discriminate between "types" of religious institutions). Analogously, the government's proposed "for-profit / non-profit" rule would discriminate against faith-based organizations that "are organized for a religious purpose and have sincerely held religious tenets, but are not" tax exempt.[4] Such a distinction is even more insubstantial than the distinction between church and para-church ministries at issue in *Spencer* and would lead to discrimination even among corporations that are all clearly churches.

II. RFRA follows the Free Exercise Clause in determining its applicability.

The stated purpose of the Religious Freedom Restoration Act is to "restore the compelling interest test as set forth in *Sherbert v. Verner,* 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). In other words, where the Court's pre-*Employment Division v. Smith*

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[4] As Judge Kleinfeld noted in his concurring opinion in *Spencer,* "'[f]or profit' and 'nonprofit' have nothing to do with making money. As the CEO of National Geographic said, '[n]onprofit means non-taxable—it doesn't mean you don't make a profit.'" *Spencer,* 633 F.3d at 746 (Kleinfeld, J., concurring).

Free Exercise Clause analysis applies, so does RFRA. As the post-*Employment Division* analysis is narrower than the pre-*Employment Division* analysis, the Court's willingness to allow corporations to assert the Free Exercise Clause indicates that a corporation likewise may properly assert RFRA.

The government argues that RFRA incorporates limitations on its applicability to non-profit corporations from Title VII and the Americans with Disabilities Act, which exempt a "religious corporation, association, educational institution, or society." 42 U.S.C. § 2000e-1(a); *id.* § 12113(d)(1). This argument fails, however, because RFRA, clear in its broad application, "applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993." 42 U.S.C. § 2000bb-3. RFRA protects "any exercise of religion," 42 U.S.C. § 2000cc-5(7), by any "person," *id.* § 2000bb-1(a), under one legal standard: strict scrutiny. *Id.* § 2000bb-1(b). *See* Douglas Laycock, *The Religious Freedom Restoration Act,* 1993 B.Y.U. L. Rev. 221, 235 (1993) ("Like the Free Exercise Clause itself, RFRA is universal in its scope. RFRA singles out no claims for special advantage or disadvantage."). As the Tenth Circuit noted, "[i]f the statutory language is clear, [the] analysis ends and [the court] must apply [the statute's] plain meaning." *Thomas v. Metro. Life Ins. Co.,* 631 F.3d 1153, 1161 (10th Cir. 2011).

Additionally, adopting the government's "for-profit / non-profit" analysis for a corporation's right to assert RFRA would pose the same Establishment Clause problems set forth in Section I(C)(ii), *supra*.

CONCLUSION

For the foregoing reasons, the Court should hold that both for-profit and non-profit corporations are entitled to assert both the Religion Clauses of the First Amendment as well as the Religious Freedom Restoration Act in opposing regulations enacted pursuant to the Patient Protection and Affordable Care Act, should reverse the judgment of the Third Circuit, and should affirm the judgment of the Tenth Circuit.

Respectfully submitted,

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v.
Hobby Lobby Stores, Inc., et al.,
Respondents

Conestoga Wood Specialties Corp., et. al.,
Petitioners
v.
Kathleen Sebelius, et al., Respondents

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

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Brief of Liberty University and Liberty Counsel as Amici Curiae in Support of Hobby Lobby and Conestoga, et al.

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INTEREST OF AMICI CURIAE[1]

Amicus Liberty University, Inc., represented by Amicus Liberty Counsel, filed the first private party lawsuit challenging provisions of the Patient Protection and Affordable Care Act (the "Act") on the day it was enacted. Amici's challenge was the most comprehensive challenge to both the Employer and Individual mandates and other provisions in the Act that exceed Congress' enumerated powers and constitutional and statutory protections of free exercise of religion.

Because of the comprehensive scope of their challenge to the Act, Amici have developed a significant body of information on the detrimental effects that various provisions in the Act have on foundational constitutional and statutory rights, particularly on free exercise rights of employers. The regulations at issue in this case exemplify the conflict between free exercise rights and government regulation.

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners and Respondents Kathleen Sebelius and Conestoga Wood Specialties have filed consents to the filing of Amicus Briefs on behalf of either party or no party. Respondent Hobby Lobby has consented to the filing of this Amicus Brief and its consent is submitted simultaneously with this Brief.

Amici have a unique perspective on and direct stake in the outcome of this Court's determination of the question of whether the Preventive Care Mandate violates free exercise under the Religious Freedom Restoration Act (RFRA). Amici believe that the information they provide in this brief is of critical importance to this Court's resolution of the conflict between religious freedom and insurance regulation, and will aid the Court in reaching a reasoned decision.

Based upon the foregoing, Amici respectfully submit this Brief for the Court's consideration.

SUMMARY OF ARGUMENT

At issue is this case is a conflict between the fundamental right to free exercise of religion upon which this country was founded and intrusive governmental regulation. Ignoring the free exercise rights protected by the First Amendment to the United States Constitution and the re-affirmation of those rights in the Religious Freedom Restoration Act (RFRA), the

Administration has enacted regulations that compel employers to choose between their sincerely held religious beliefs and continued viability of their organizations. Employers such as Hobby Lobby, Conestoga Wood and Amicus Liberty University, which operate their businesses and organizations in accordance with religious principles that prohibit facilitating the termination of unborn life are being told by their government that they must either abandon their principles and provide free abortion-inducing drugs and devices, under the guise of women's "preventive care" to their employees or pay multi-million dollar fines and face civil liability for violation of ERISA and other federal laws.

Unlike the requirements of ERISA and other laws regulating employee benefit programs, the mandate imposed under the Patient Protection and Affordable Care Act (the "Act") does not permit employers to discontinue offering health insurance coverage and thereby avoid the mandate and the penalties. Consequently, unlike any other federal regulatory program, the Act imposes a perpetual Hobson's choice of either violating sincerely held religious beliefs or paying multi-million fines. The only escape for employers is to go out of business, thereby denying their employees not only health insurance benefits, but also their jobs. Because of the punitive nature of the fines, even employers who do not want to go out of business will be forced out unless they compromise their religious beliefs.

Subjecting employers to such extortion is antithetical to both the First Amendment and to the free exercise protections that Congress re-affirmed in RFRA. Those protections are incorporated into the Act and therefore require that the regulations imposed by the Administration respect the religious freedoms of those subject to the comprehensive law. Congress had also previously rejected attempts to impose contraception mandates with no religious exemptions, further buttressing Congress' commitment to protecting religious freedom. The Administration exceeded its authority when it ignored Congress' direction and enacted a perpetual mandate that forces employers to either abandon religious principles or shutter their businesses.

This Court should take the opportunity afforded by this case to protect religious liberty and invalidate the Preventive Care Mandate.

ARGUMENT

I. THE PREVENTIVE CARE MANDATE TRAMPLES UPON EMPLOYERS' FREE EXERCISE RIGHTS.

When the Administration[2] enacted regulations defining "women's preventive care" to include all FDA approved "contraceptives"– including abortion inducing drugs and devices– provided at no cost to beneficiaries,[3] it placed the Act on a collision course with foundational free exercise rights. As one commentator concluded, "[e]mployers' freedom to conduct their business in harmony with their religious beliefs is trampled upon by the contraceptive mandate."[4] The freedom to conduct business in harmony with free exercise rights is embodied not only in the First Amendment to the United States Constitution, but also in Congress' reaffirmation of the primacy of free exercise rights through enactment of the Religious Freedom Restoration Act ("RFRA"). Congress expressly enacted RFRA to diligently protect foundational free exercise rights in response to what Congress viewed as a diminution of protection in ***Employment Division, Department of Human Resources of Oregon v. Smith***, 494 U.S. 872 (1990). *See Gonzales v. O Centro Espírita Beneficente União do Vegetal (UDV)*, 546 U.S. 418, 424 (2006) (describing the genesis of RFRA as a response to *Smith*).

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[2] Amici will use the term "the Administration" to refer to the various administrative agencies that have participated in drafting the regulations at issue in this case.

[3] Amici will refer to the regulations incorporating coverage for contraceptives and abortifacients into the definition of women's preventive care under the Act as the "Preventive Care Mandate."

[4] Emily Pitt Mattingly, *"Hobby-Lobby"-ing For Religious Freedom: Crafting The Religious Employer Exemption To The PPACA*, 102 KY. L.J. 183, 185 (2014).

When it enacted RFRA, Congress explicitly stated that it was restoring the stringent protection accorded to religious freedom under the compelling interest test utilized in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) but overturned in *Smith*. 42 U.S.C. §2000bb(b). In particular, Congress found that the *Sherbert* and *Yoder* tests struck the proper balance between the free exercise of religion enshrined "as an unalienable right" in the First Amendment and "competing prior governmental interests." 42 U.S.C. §2000bb(a). Congress specifically contemplated that there would and should be religious exceptions made to generally applicable laws. *Gonzales*, 546 U.S. at 434.

The standard Congress established in RFRA provides that government cannot substantially burden religious exercise, even if the burden results from a rule of general applicability, unless the government can "demonstrat[e] that application of the burden *to the person*–(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* at 424. (citing 42 U.S.C. §§2000bb-1(a)-(b)) (emphasis added). RFRA imposes a more demanding strict scrutiny review than does the First Amendment under *Smith* in that it "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'–the particular claimant whose sincere exercise of religion is being substantially burdened. *Id.* at 430-431.

The core religious beliefs affected by the Preventive Care Mandate, the crippling, multi-faceted penalties imposed upon those who fail to comply with the mandate and the Hobson's choice that the mandate imposes upon employers far exceed the threshold for a substantial burden upon religious free exercise. The number of (non-religious) exemptions to the Preventive Care Mandate demonstrates that it cannot meet the exacting compelling interest standard required under RFRA. Finally, the myriad of alternatives available to meet the Administration's purported interests without burdening employers' free exercise rights means that the Preventive Care Mandate is not the least restrictive means of furthering the government's purported interest in "preventive care." Those factors require a finding that the Preventive Care Mandate must be stricken as an impermissible infringement of foundational free exercise rights.

A. Compelling Employers To Choose Between Their Religious Beliefs Or Crippling Governmental Sanctions Imposes A Substantial Burden On Employers' Free Exercise Rights.

Family-owned businesses such as Hobby Lobby and Conestoga Wood and nonprofit institutions such as Liberty University that have built their organizations on the same fundamental religious principles upon which the country was founded are being forced to choose between honoring those foundational beliefs and paying crippling governmental sanctions or disavowing their sincerely held religious beliefs in order to avoid ruinous penalties. Such penalizing of the exercise of religious beliefs is precisely why Congress acted quickly to enact RFRA after a perceived diminution of protection in *Smith*, 494 U.S. at 883-890. *See* 42 U.S.C. §2000bb (discussing *Smith* as the motivating factor for RFRA).

When it enacted RFRA, Congress specifically pointed to this Court's decisions in *Sherbert* and *Yoder* as the analytical models for governmental regulations that affect religious exercise. 42 U.S.C. §2000bb(b)(1). In fact, Congress said that RFRA was enacted to "guarantee" that the tests utilized in *Sherbert* and *Yoder* were applied to free exercise challenges. *Id.* In *Sherbert*, this Court found that denying unemployment benefits to someone who was fired for refusing to work on her Sabbath (Saturday) impermissibly burdened free exercise even though the burden was indirect and involved only a governmental benefit, not a right. 374 U.S. at 404.

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. See also, Thomas v. Review Bd., 450 U.S. 707, 718 (1981) (finding, based upon *Sherbert*, an impermissible burden on free exercise when an employee was put to a choice between fidelity to religious belief or cessation of work).

This Court rejected a similar Hobson's choice that compulsory secondary education imposed upon Old Order Amish parents in *Yoder*, 406 U.S. 205, 218.

> [C]ompulsory school attendance to age 16 for Amish children carries with it a very real threat of undermining the Amish community and religious practice as they exist today; they must either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant religion.

Id. This is "precisely the kind of objective danger to the free exercise of religion that the First Amendment" and Congress re-affirmation of First Amendment principles in RFRA was designed to prevent. *Id.*

In *Gonzales*, this Court applied RFRA to find that the government's attempted criminal prosecution of a religious sect for importation and use of *hoasca*, which contains a controlled substance, substantially burdened the sect's free exercise rights. 546 U.S. at 428. The sect's sincerely held religious beliefs provided that *hoasca* tea was to be part of their communion service. *Id.*

The compulsory nature of the Act's insurance requirements, substantiality of the rights affected and ruinous nature of governmental sanctions imposed by the Preventive Care Mandate, taken together, create a threat to religious free exercise that exceeds the burdens found impermissible in *Sherbert*, *Yoder* and *Gonzales*.

1. The Compelled Purchase Of A Government-Defined Insurance Product That Mandates Access To Abortifacients Is An Unprecedented Over-reach Into Employers' Business Operations.

This Court's conclusion regarding the Act's individual insurance mandate, *i.e.*, that the federal government "does not have the power to order people to buy health insurance," *NFIB v. Sebelius*, 132 S.Ct. 2566, 2601 (2012) is equally applicable to the employer insurance mandate, and illustrates the extent of the burden placed upon employers' sincerely held religious beliefs. The mandate to purchase government-defined health insurance, including the Preventive Care Mandate, is an unprecedented intrusion into employers' business operations.[5]

The government has long regulated employers' voluntary provision of employee benefits, including health insurance, but it has *never* compelled employers to purchase health insurance, let alone government-defined coverage, for their employees.[6] Employee benefit regulations such as ERISA and COBRA only apply if employers have voluntarily agreed to provide employee benefits. "In contrast to the obligatory, nationwide Social Security program, '[n]othing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan.'" *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) (citing *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996)). Under both ERISA[7] and COBRA,[8] employers retained their freedom to choose whether to offer employee health insurance benefits and whether they should discontinue benefits so that the regulations would no longer apply.

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[5] *See* Dayna Bowen Matthew, *Controlling the Reverse Agency Costs of Employment-Based Health Insurance: Of Markets, Courts, and A Regulatory Quagmire*, 31 WAKE FOREST L. REV. 1037, 1042 (1996) (describing how employer-provided health insurance had not been mandated by the government).

[6] *Id.*

[7] 29 U.S.C. §§ 1001-1461 (1982).

[8] Public L. No. 99-272, § 10001 (1986), 100 Stat. 82.

That freedom has been taken away by the Act. Employers no longer have the freedom to determine what is best for their employees and their businesses with regard to employee benefits. Instead, employers must either: (1) provide a government-defined health insurance plan that includes, *inter alia*, free abortifacients under the Preventive Care Mandate,[9] or (2) pay debilitating penalties.[10] 26 U.S.C. §4980H. Unlike ERISA and COBRA, the Act mandates that employers provide health insurance to their employees. *Id.* More importantly, under the Act, employers cannot discontinue health insurance coverage so as to avoid violating their religious beliefs or incurring debilitating penalties. *Id.*

Employers will always be subject to the mandate, either through providing the required coverage or being penalized excessively for failing to do so. *Id.* Consequently, the Act imposes a perpetual burden upon employers that can only be relieved by going out of business entirely.

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[9] *See discussion at Section IA2, below.*

[10] *See discussion at Section IA3, below.*

2. *The Preventive Care Mandate Threatens Employers' Core Religious Beliefs.*

As was true with the compulsory education law in *Yoder*, the effect of the Preventive Care Mandate on employers' practice of their religion "is not only severe, but inescapable," for the law affirmatively compels them, under threat of governmental sanction, "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218. As was true for the Amish parents in *Yoder*, religion for the employers "is not simply a matter of theocratic belief," but "pervades and determines virtually their entire way of life…." *Id.* at 216.

> The conclusion is inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the

> Amish faith, both as to the parent
> and the child.

Id. at 218. Similarly here, forcing employers to facilitate access to "emergency contraceptives" which have abortifacient properties substantially interferes with the religious tenets which permeate their business operations, or, in Liberty University's case, its faith-based educational community. (*See Hobby Lobby* JA 126-127; *Conestoga Wood* Pet. App. 10g-11g, Appendix at 100). These tenets provide that taking an innocent human life is an intrinsic evil and sin against God for which all believers are held accountable. (*See Conestoga Wood* Pet. App. 10g). Accordingly, the employers' sincerely held religious beliefs provide that it is immoral for them to facilitate or otherwise support the taking of a human life, including the termination of a pre-born baby through abortion, which includes prevention of the implantation of a human embryo into her mother's uterus after fertilization. (*See Conestoga Wood* Pet. App. 23g). Consequently, the employers' religious beliefs forbid them from participating in, providing access to, paying for, training others to engage in, or otherwise supporting abortion-causing drugs and devices. (*Hobby Lobby* JA 127).

The Preventive Care Mandate contravenes these religious tenets by requiring that employer-based health insurance policies must include, *inter alia*, "the full range of Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." 45 CFR §147.130. FDA-approved "contraception" includes so-called "emergency contraception," Levonorgestrel, also known as "Plan B" or the "morning after pill," and Ulipristal acetate, also known as "Ella" or the "week after" pill,[11] both of which often act as abortifacients by terminating the life of a pre-born child.[12] The FDA guide to "contraceptives" states that "Plan B" and "Ella" prevent "attachment (implantation) [of the embryo] to the womb (uterus)."[13] During hearings regarding FDA approval for Ulipristal, medical professionals presented evidence that "Ulipristal acetate is an abortifacient of the same type as mifepristone ("RU-486") and that its approval as an emergency contraceptive raises serious health and ethical issues."[14]

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[11] FDA Office of Women's Health Birth Control Guide, available at http://www.fda.gov/birthcontrol (last visited January 21, 2014).

[12] American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG"), Comment to Docket No. FDA–2010–N–0001Advisory Committee for Reproductive Health Drugs; Notice of Meeting Ulipristal acetate tablets, (NDA) 22–474, Laboratoire HRA Pharma. (June 2, 2010), available at http://www.aaplog.org/wp-content/uploads/2010/06/AAPLOG-Ulipristal-Comments_2010.pdf (last visited January 21, 2014).

> There is no doubt that Ulipristal acts as an abortifacient because the drug blocks progesterone receptors at three critical areas. These blocking capabilities form the basis of its embryocidal abortifacient mechanism. That mechanism is identical to the action of RU-486 in early pregnancy.[15]

Recent scientific evidence has demonstrated that "Plan B" does not work as a "contraceptive" by preventing ovulation, "as its sole or dominant mechanism."[16] Instead, scientific studies conducted between 2001 and

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[13] FDA Birth Control Guide at 16-17.

[14] AAPLOG Comments.

[15] *Id.*

[16] Rebecca Peck, MD, and Rev. Juan R. Vélez, MD, *The Postovulatory Mechanism of Action of Plan B A Review of the Scientific Literature,* THE NATIONAL CATHOLIC BIOETHICS QUARTERLY 40 (Winter 2013).

2013 provide compelling evidence that "Plan B" acts primarily as an abortifacient.[17] As one recent study stated:

> It is possible that Plan B may delay ovulation when given before or at the beginning of the fertile period, when the chance of pregnancy is slim to none, and *therefore, it is not "needed" to prevent pregnancy*. When given after intercourse in the fertile period and before the LH peak that triggers ovulation, Plan B fails to act as a contraceptive 80-92% of the time; it acts instead as an abortifacient, eliminating all embryos likely to have been conceived. When given on the day of ovulation or later to prevent pregnancy from intercourse during the fertile period, it almost always fails to prevent established pregnancies.[18]

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[17] *Id.*

[18] Susan Wills, JD, LLM, *New Studies Show All Emergency Contraceptives Can Cause Early Abortion,* ON POINT, THE CHARLOTTE LOZIER INSTITUTE 8 (January 2014) *www.lozierinstitute.org/emergencycontraceptives* (last visited January 21, 2014) (emphasis added).

Consequently, requiring that employers provide Plan B, Ella and other abortion-inducing drugs and devices, including IUDs, at no cost to employees does nothing to advance the Administration's purported purpose of providing "contraceptives" as "preventive care" for women. Instead, it creates a mechanism in which employers are compelled to provide access to chemical abortions, which in the case of employers such as Hobby Lobby, Conestoga Wood and Liberty University, requires that they violate the very religious beliefs upon which they base their lives and organizations and participate in a gravely evil act.

In addition, requiring that employers provide no-cost coverage for drugs and devices which act primarily as abortifacients instead of contraceptives violates the Act's prohibitions against compelled payments for abortions. The Act provides that no health plan shall be required to include "abortion" as an essential health benefit. 42 U.S.C. §18023(b)(1). In addition, immediately after signing the Act, on March 24, 2010, President Obama signed an Executive Order that reiterated that "abortion coverage" would not be required under the Act.[19] President Obama said that the Act "maintains current Hyde Amendment restrictions governing abortion policy and extends those restrictions to the newly created health insurance exchanges."[20] President Obama said that "longstanding Federal laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8), remain intact and new protections prohibit discrimination against health care facilities and health care providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions."[21] The Administration's subsequent adoption of the Preventive Care Mandate contravenes the claim that the conscience rights of employers such as Hobby Lobby, Conestoga Wood and Liberty University will be protected. In fact, the Preventive Care Mandate impermissibly burdens religious exercise in violation of RFRA. *Thomas,* 450 U.S. at 717-18.

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[19] Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (March 24, 2010).

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his

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[20] *Id.*

[21] *Id.*

> beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Id. Here, the burden involves much more than merely being denied a government benefit. It is an imposition of punishment, as is apparent in the multiple levels of penalties imposed upon employers like Hobby Lobby, Conestoga Wood and Liberty University which cannot comply with the Preventive Care Mandate and compromise the sincerely held religious beliefs that permeate their very existence.

3. The Multiple Levels Of Penalties And Sanctions Create An Unconscionable Burden For Employers.

Employers such as Hobby Lobby, Conestoga Wood and Liberty University which cannot compromise their sincerely held religious beliefs by facilitating chemical abortions face punitive penalties that will quickly jeopardize their continued existence. The Act imposes two levels of penalties upon employers, one for employers that do not offer "minimum essential coverage"–which the Administration has determined must include access to chemical abortions–and one for employers that offer coverage that the

Administration determines does not meet "affordability" standards. 26 U.S.C. §4980H(a),(b). In addition, the Act's requirements were incorporated into ERISA, which imposes other punitive sanctions upon employers who refuse to compromise their religious beliefs by facilitating access to chemical abortions.

The penalties directly imposed in the Act not only punish employers that fail to provide insurance, but also employers that provide coverage that the government deems is not "affordable." 26 U.S.C. §4980H. An employer that fails to provide health insurance for its employees will be penalized at the rate of $2,000 per year per "full-time" employee (less 30). 26 U.S.C. §4980H(c)(4). "Full-time" is defined as 30 hours per week. *Id.* In addition, employees working fewer than 30 hours per week are aggregated and their time divided by 120 to create "full-time equivalent employees" for each month. 26 U.S.C. §4980H(c)(2)(E). This penalty will apply to an employer that provides health insurance, if it does not comply with the "minimum essential coverage" requirements, which include the Preventive Care Mandate. 26 U.S.C. §4980H(a),(b). Consequently if an employer such as Liberty University, Hobby Lobby or Conestoga Wood continued to provide health insurance but refused to provide coverage for abortifacients, in keeping with its religious beliefs, it would still face the $2,000 per employee per year penalty. Hobby Lobby would be facing an annual penalty of $26 million based upon its 13,000 full-time employees. (*Hobby Lobby* JA 126). Conestoga Wood would face an annual penalty of $1.9 million based upon its 950 employees. (*Conestoga Wood* Pet. App. 11g, 21g). In each case, the employers would essentially be paying ransom in order to maintain their freedom to operate their businesses or organizations in accordance with their sincerely held religious beliefs.

Furthermore, even employers that provide health insurance that meets the "minimum essential coverage requirements" will still face penalties of $3,000 per applicable employer per year if the Administration determines the health care plan is "unaffordable." 26 U.S.C. §4980H(b). A plan is deemed unaffordable if the employee's portion of the premium is more than 9.5 percent of the employee's household income and the employee seeks a tax credit or subsidy. *Id.*

The Act's requirements for employer-provided health insurance were incorporated into ERISA, which subjects employers to further penalties and civil liability. 29 U.S.C. §1185d. 29 U.S.C. §1132; 26 U.S.C. §4980D. ERISA penalties start at $100 per *day* and increase to $2,500 per *day* if an employer has been notified of a "deficiency," *e.g.*, failing to provide no-cost coverage for abortifacients, and fails to correct it. 29 U.S.C. §1132. If the deficiency in coverage is found to be more than "de minimis," then the penalty can increase from $2,500 to $15,000 *per day*. *Id.* An employer's on-going refusal to provide free contraceptives and abortion drugs and devices which conflict with its sincerely held religious beliefs would fall in this category. Consequently, employers such as Hobby Lobby, Conestoga Wood and Liberty University would be subject to fines of $15,000 *per day* if they refuse to violate their sincerely held religious beliefs. HHS, the Department of Labor and employees can also bring civil suits against employers for violation of insurance requirements under ERISA, subjecting employers who refuse to violate their religious beliefs to further liability. 29 U.S.C. §1132.

Like a bandit on the highway demanding "your money or your life," the Administration is placing a gun to the head of employers that operate businesses and organizations upon religious principles. These employers are being told to choose between their sincerely held religious beliefs and the continued viability of their organizations. Instead of protecting the religious free exercise rights as directed by Congress, the Administration is sacrificing those rights under the guise of offering "preventive care" for women. This trampling of the fundamental free exercise rights upon which this country was founded should not be permitted.

B. The Administration Utterly Fails To Satisfy Its Burden To Prove That The Preventive Care Mandate Is Justified By A Compelling State Interest

The Administration claims that the Preventive Care Mandate furthers compelling state interests in public health and "assuring that women have equal access to recommended health-care services." (Brief for Petitioners, *Sebelius v. Hobby Lobby*, Case No. 13-354, at pp. 46-49). Close examination of the requirements of the mandate and penalties for non-compliance tell a different story. "It would seem that HHS has a greater interest in punishing religiously based opposition to contraception and abortion than it has in increasing access to contraceptives. And that punitive interest is not legitimate, much less compelling, under RFRA."[22]

Public health studies and the Administration's own statements belie the claim that there is a compelling interest in increasing women's access to contraceptives. A Guttmacher Institute "fact sheet" on contraceptive use in the United States reports that "[n]ine in 10 employer-based insurance plans cover a full range of prescription contraceptives."[23,24] In addition, HHS Secretary Kathleen Sebelius has stated that even when employers do not offer coverage of contraceptive services to their employees, "contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support."[25] Combined with the "the countless pharmacies and doctors who dispense contraceptives," "it

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[22] Edward Whelan, *The HHS Contraception Mandate vs. The Religious Freedom Restoration Act*, 87 NOTRE DAME L. REV. 2179, 2188 (2012).

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[23] *Id.* at 2186-2187; Guttmacher Institute, *Fact Sheet Contraceptive Use in the United States* (August 2013), available at http://www.guttmacher.org/pubs/fb_contr_use.html#23 (last visited January 22, 2014).

[24] Hobby Lobby, Conestoga Wood and Liberty University all provide coverage for contraceptives that do not act as abortifacients, thus further undercutting the idea that there is a problem with access to contraceptives. (*See Hobby Lobby* JA 140; *Conestoga Wood* Appx. 100).

[25] *Id.* at 2187, citing *Statement By Health and Human Services Secretary Kathleen Sebelius* (Jan. 20, 2012) available at http://www.hhs.gov/news/press/2012pres/01/20120120a.html (last visited January 22, 2014).

cannot be seriously maintained that there is a general problem of lack of access to contraceptives."[26]

> In this context, it is difficult to see how the government has a "compelling" interest in marginally increasing access to contraceptives by requiring employers to provide coverage of them in their health-insurance plans. [27]

The–at best–marginal increase in access to contraceptives that might be realized from the Preventive Care Mandate does not constitute a compelling interest that can justify the substantial burden upon employers' religious free exercise rights. As this Court said in the context of a law restricting free speech, "Even if the sale of violent video games to minors could be deterred further by increasing regulation, the government does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 1, 16 n.9 (2011). Similarly here, even if access to contraceptives could be increased through a governmental mandate, the Administration does not have a compelling interest in effecting a marginal increase in coverage at the expense of employers' religious liberty.

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[26] *Id.*

[27] *Id.*

In addition, any marginal increase in access to contraceptives cannot be compelling in light of the fact that many employers have, for purely secular reasons, been exempted from the Preventive Care Mandate. "[A] law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993). Congress created exemptions for small employers and grandfathered health plans. 26 U.S.C. § 4980H(c)(2) (exempting from health care provision requirement employers of less than 50 full-time employees); 42 U.S.C. §18011 (grandfathering of existing health care plans).

At the time the Act became effective, HHS projected that employer-based health insurance covering about 98 million Americans would be exempt from the Preventive Care Mandate and other mandates in the Act under the grandfathering provision.[28] Excluding these 98 million people, as well as the millions who work for employers of less than 50 people from the Preventive Care Mandate undercuts the Administration's claim that it has a compelling interest in mandating that employer-based health insurance must provide free abortifacients even over the objections of those with sincerely held religious beliefs against providing such coverage. *See Lukumi Babalu Aye*, 508 U.S. at 547.

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[28] Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act 75 Fed. Reg. 41,732 (July 19, 2010).

Likewise, the Administration cannot meet its burden of demonstrating that application to these objecting employers furthers its compelling state interest. As this Court said in *Gonzales,* RFRA's heightened compelling interest standard requires that the Administration demonstrate that the compelling interest test is satisfied through application of the challenged law "to the person," *i.e.*, the particular claimant whose sincere exercise of religion is being substantially burdened. 546 U.S. at 430-431. The Administration cannot exempt millions of Americans who work for small employers and whose employers' plans are "grandfathered" from the Preventive Care Mandate and then argue that it is necessary that employers whose religious beliefs proscribe facilitating access to abortifacients be subject to it.

Furthermore, the Administration's creation of a "religious employer" exemption and non-profit employer "accommodation" itself demonstrates that there is no compelling interest in excluding employers with religious objections to abortifacients from the mandate. 76 Fed.Reg. 46,626 (August 3, 2011); 78 Fed. Reg. 39,873-39,878 (July 2, 2013). As was true with the exemption for sacramental use of illegal drugs for Native American religious adherents and the government's claim that it could not exempt similar use by the O Centro Espirita Church, the Administration's creation of a partial exemption for certain religious employers and accommodation for non-profits belies any claim that there is a compelling interest in denying exemptions for other employers with sincerely held religious beliefs proscribing the facilitation of access to abortifacients, such as Hobby Lobby, Conestoga Wood and Liberty University. *See Gonzales,* 546 U.S. at 436-37.

As the Colorado District Court said in granting a preliminary injunction against the Preventive Care Mandate, "[t]he government has exempted over 190 million health plan participants and beneficiaries from the preventive care coverage mandate; this massive exemption completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs." *Newland v. Sebelius,* 881 F. Supp. 2d 1287, 1297-98 (D. Colo. 2012).

C. Compelling Employers To Violate Their Religious Beliefs And Provide Free Abortifacients Is Not The Least Restrictive Means Of Meeting The Administration's Stated Interest.

The Administration's piecemeal "religious employer" exemption to the Preventive Care Mandate also demonstrates that the mandate is not the least restrictive means for accomplishing a compelling interest. *Sherbert*, 374 U.S. at 407. To show that the mandate is the "least restrictive means" available, the Administration must "demonstrate that no alternative forms of regulation would [serve its interest] without infringing First Amendment rights." *Id.* If the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983).

That is precisely what the Administration has done in enacting the Preventive Care Mandate. The very act of drafting a narrow "religious employer" exemption and then an additional "accommodation" demonstrates that there was and is a less drastic way to provide the kind of "preventive coverage" the Administration claims is necessary. Even if "preventive care" were a compelling government interest (which it is not), there are a number of alternative means for providing the coverage without trampling upon employers' free exercise rights. The government could increase access to contraceptives by directly compensating the providers for the services.[29]

> In other words, an individual would receive the services from a provider for free, and the government would compensate the provider. This means would clearly be less restrictive of the religious liberty of the objecting employer, as the employer would not be required to sponsor an insurance plan that subsidizes services that he has religious objections to. [30]

The Administration has numerous other means of increasing access to "contraceptives" that are less restrictive of religious liberty than is the Preventive Care Mandate, including directly providing the products, mandating that providers make the products available, and tax credits, deductions or other financial support for contraceptive purchasers.[31] Notably, the government already provides "contraceptive" coverage to more than nine million women,[32] demonstrating that this alternative is reasonable and viable. The Administration received substantial evidence, including more than 400,000 comments, that the Preventive Care Mandate substantially burdens religious free exercise and the "religious employer" exemption and non-profit employer "accommodation" did not address the burden.[33]

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[29] *See* Whelan, *Contraception Mandate vs. RFRA*, at 2186.

[30] *Id.*

Nevertheless, and in spite of the myriad of alternatives available to meet the purported need, the Administration chose to retain the mandate, including the compelled purchase of abortion-inducing drugs and devices, without further exemptions. As one commentator said, this suggests that, rather than trying to further a compelling interest, the Administration is taking sides against religious adherents.[34]

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[31] *Id.*

[32] Jonathan T. Tan, *Nonprofit Organizations, For-Profit Corporations, And The HHS Mandate: Why The Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301, 1368 (2013) (citing *Facts on Publicly Funded Contraceptive Services in the United States*, Guttmacher Institute (May 2012)).

[33] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,871 (July 2, 2013). *See* discussion of the exemption and "accommodation" *infra*.

> Instead of focusing on the wellbeing of all insureds, the mandate arguably adopts a position that prefers the particular interests of a subset of the public–women who want contraceptive and sterilization coverage–over the interests of others–men and women who have religious and conscientious objections to all or part of such coverage.[35]

Taking sides against people of faith is antithetical both to the express prohibitions of the First Amendment and to Congress' expressed intent to guarantee that religious free exercise rights are rigorously protected. 42 U.S.C. §2000bb. The Administration disregarded Congress' clear direction when it enacted the Preventive Care Mandate without appropriate recognition of the pre-eminent rights of employers such as Hobby Lobby, Conestoga Wood and Liberty University to operate their organizations in keeping with their sincerely held religious beliefs.

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[34] Edward A. Morse, *Lifting The Fog: Navigating Penalties In The Affordable Care Act*, 46 CREIGHTON L. REV. 207, 246-247 (2013).

[35] *Id.*

II. THE ADMINISTRATION IS ATTEMPTING TO REPEAL RFRA BY EXECUTIVE FIAT.

By directing that employers provide free abortifacient drugs and devices to their employees in perpetuity or pay crippling multi-million dollar fines, the Administration has circumvented Congress and attempted to effectively repeal RFRA by executive decree. The text of the Act, its legislative history and Congress' prior rejection of similar expansive contraception mandates demonstrate that the Preventive Care Mandate exceeds the authority that Congress granted to the Administration to implement the Act.

Congress did not alter the principles enunciated in RFRA when it adopted the Act in 2010. To the contrary, Congress explicitly included protections for religious conscience in the Act. For example, it included two "religious" exemptions to the requirement that all individuals acquire and maintain minimum essential health insurance coverage. 26 U.S.C. §5000A(d)(2).[36] In addition, *inter alia*, Congress provided protection of an "elder's right to practice his or her religion through reliance on prayer alone for healing." 42 U.S.C. §1397j-1(b). Consequently, Congress affirmed that religious free exercise rights must still be respected in the new comprehensive governmental health insurance regulations. RFRA's protections can only be repealed or superseded through explicit language. 42 U.S.C. §2000bb-3(b). Congress provided no such explicit language in the Act, so it is beyond dispute that the Act and its implementing regulations must comport with RFRA.

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[36] Amici do not concede that the "religious" exemptions in 26 U.S.C. §5000A are adequate, but are citing the exemptions as examples of

When it enacted the Act in 2010, Congress left the details of what services would be part of required "minimum essential coverage" to the discretion of HHS. 42 U.S.C. §18022(b). The Act provided that "women's preventive care" should be included in the minimum coverage requirement, but did not delineate what products or services constituted that preventive care, and in particular, did not provide that contraceptives or abortifacients should be included. *Id.* Notably, Congress twice had an opportunity to adopt statutorily what the Administration has done with the Preventive Care Mandate, *i.e.,* mandate that insurance policies provide free "contraceptives"

Congress' intent to continue to provide religious exemptions in keeping with RFRA.

with no exemptions for religious objectors.[37] On both occasions, however, the legislation was rejected, indicating that Congress did not view mandating free "contraceptive" care regardless of religious objections as a legislative priority. Congress again sent that message when it did not specify that free contraceptives and abortifacients be included in women's "preventive care" in the Act.

Consequently, when Congress delegated to the Administration the task of promulgating regulations to define "minimum essential coverage," including "women's preventive care," it did so in the context of having previously rejected mandated contraception coverage, omitting contraception coverage from the general definition of "minimum essential coverage" and continuing its commitment to protecting religious free exercise under RFRA. The Administration was obligated to exercise its discretion within those parameters. *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

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[37] Equity in Prescription Insurance and Contraceptive Coverage Act of 2007, H.R. 2412, 110th Cong. §§ 3-4 (1st Sess. 2007), S. 3068, 110th Cong. (2d Sess. 2008); Putting Prevention First Act of 2004, H.R. 4192, 108th Cong. §§ 301-04 (2d Sess. 2004), S. 2336, 108th Cong. (2d Sess. 2004).

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Id. Contravening this limitation on its authority, the Administration has set about making new law and creating regulations wholly out of harmony with RFRA.

Within weeks after the Act was signed into law, the Administration issued regulations providing that "women's preventive care" must include, at no cost, the "full range" of FDA-approved "contraceptives," including the abortifacients the FDA labels as "emergency contraception" and IUDs which have also been shown to induce abortions. 75 Fed. Reg. 41,728 (July 19, 2010). Even though Congress had retained RFRA protections in the Act, the Administration did not provide for any religious conscience exemptions from the mandated coverage for "contraceptives" and abortifacients. *Id.* Only after receiving comments from those whose religious beliefs proscribe providing or facilitating access to abortifacients did the Administration agree to *consider* exemptions or accommodation for such beliefs. 76 Fed. Reg. 46, 623 (August 3, 2011).[38]

In response to the evidence that the regulations violated religious free exercise, the Administration merely said that it would be "appropriate" to "take into account the effect on the religious beliefs of certain religious employers if coverage of contraceptive services were required in the group health plans in which employees in certain religious positions participate." *Id.* at 46,623. The Administration further limited its consideration of free exercise rights by specifying that it would only consider providing "for a religious accommodation that respects the unique relationship between a *house of worship* and its employees in ministerial positions." *Id.* (emphasis added). Therefore, the Administration acquiesced only to consider exempting houses of worship and their ministers from the Preventive Care Mandate. *Id.* at 46,626. The Administration's response contravened Congress' direction that RFRA's protections be applied "in *all cases* where free exercise of religion is substantially burdened," 42 U.S.C. §2000bb(b) (emphasis added).

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[38] *See e.g.*, Letter from General Counsel, U.S. Conference of Catholic Bishops to Centers for Medicare & Medicaid Services, U.S. Department of Health and Human Services (August 31, 2011), stating that the proposal violates the First Amendment and RFRA, available at http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf (last visited on January 23, 2014).

Faith-based organizations informed the Administration that the initial response failed to adequately protect the rights guaranteed under the First Amendment and RFRA.[39] However, the Administration insisted that its "approach is consistent with the First

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[39] See e.g., Letter from Richard Land, President, The Ethics and Religious Liberty Commission of the Southern Baptist Convention to Centers for Medicare & Medicaid Services, U.S. Department of Health and Human Services (September 30, 2011), available at http://www.regulations.gov/#!documentDetail; D=HHS-OS-2011-0023-77408 (last visited January 23, 2014). Letter from Collegium Aesculapium Foundation, Inc. to Centers for Medicare & Medicaid Services Department of Health and Human Services (September 28, 2011), available at http://www.regulations.gov/#!documentDetail; D=HHS-OS-2011-0023-60660 (last visited January 23, 2014).

Amendment and Religious Freedom Restoration Act."[40]

> The Supreme Court has held that the First Amendment right to free exercise of religion is not violated by a law that is not specifically targeted at religiously motivated conduct and that applies equally to conduct without regard to whether it is religiously motivated—a so-called neutral law of general applicability. The contraceptive coverage requirement is generally applicable and designed to serve the compelling public health and gender equity goals described above, and is in no way specially targeted at religion or religious practices. Likewise, this approach complies with the Religious Freedom Restoration Act, which generally requires a federal law to not substantially burden religious exercise, or, if it does substantially burden religious exercise, to be the

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[40] *Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services under the Patient Protection and Affordable Care Act*, 77 Fed. Reg. 8,725, 8,729 (February 15, 2012).

> least restrictive means to further a compelling government interest.[41]

Although the Administration represented that its approach was consistent with the Constitution and federal law, Secretary Sebelius testified that HHS did not consult the Department of Justice on the matter of the constitutionality of the rule before making that representation.[42]

After representing that its approach complied with the Constitution and RFRA, the Administration announced that it would postpone implementation of the Preventive Care Mandate through a narrowly defined one-year "temporary enforcement safe harbor" for non-profit organizations that had religious objections to contraceptives and abortifacients but did not fall within the narrow "religious employer," *i.e.,* houses of worship, exemption. 77 Fed. Reg. 8,728. The Administration represented that it would use the intervening year to develop alternative accommodations for theses objecting organizations. *Id.* at 8,728. However, at the same time, President Obama emphasized that free contraceptives and abortifacients would have to be provided to women, regardless of where they work, signaling that the Administration was not going to exempt employers such as Hobby Lobby, Conestoga Wood and Liberty University from having to facilitate access to the abortifacients that violate their sincerely held religious beliefs.[43]

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[41] *Id.*

[42] See The Fiscal Year 2013: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Commerce, 112th Cong. (2012) (statement of Kathleen Sebelius, Secretary, Department of Health and Human Services), available at http://energycommerce.house.gov/hearing/fy-2013-hhs-budgetvideo (comments at 1:37 in the video testimony).

On February 1, 2013, the Administration issued a Notice of Proposed Rulemaking ("NPRM") to address the accommodation referenced in the February 15, 2012 regulation. 78 Fed. Reg. 8,456 (February 6, 2013). The NPRM proposed to modify the "religious employer" exemption to make an exemption available to "a non-profit church, integrated auxiliary, convention or association of churches or a religious order." *Id.* at 8,474. The Administration still insisted that there would be no exemptions for for-profit employers such as Hobby Lobby and Conestoga Wood or non-profit employers such as Liberty University which operate their organizations in accordance with sincerely held religious beliefs that proscribe facilitating access to abortifacient drugs and devices. *Id.*

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[43] Remarks of the President on Preventive Care, February 10, 2012, available at http://www.whitehouse.gov/the-press-office/2012/02/10/remarks-president-preventive-care (last visited January 23, 2014).

Under the proposal, non-profit organizations would not have to *directly* pay for the objectionable products but would still be facilitating access to abortifacients. *Id.* at 8,475. The Administration proposed that organizations that utilize insurance carriers would notify the carrier that it objects to paying for certain contraceptive or abortifacient coverage and the carrier would then provide free contraceptives or abortifacients through a separate insurance policy. *Id.* According to the proposal, the issuer of the separate policy could not directly or indirectly charge a fee or premium to the non-profit organization for the objectionable contraceptive or abortifacient services. *Id.* The NPRM proposed that the cost of the separate contraceptive/abortifacient policy would be paid for through reductions in the fees the insurer would pay to government insurance exchanges. *Id.*

The Administration did not offer a proposal for self-insured organizations, such as Liberty University, regarding how a separate contraceptive/abortifacient insurance policy would be funded without charging the objecting organization. *Id.* at 8,474. The Administration said that the person receiving the abortifacient drugs and devices was not to be charged, and the self-insured employer was not to be charged without indicating how the cost would be covered. *Id.* at 8,463-8,464. The Administration admitted, however, that self-insured organizations are the only funding source for insurance coverage so that there is no way for those organizations to avoid paying for abortifacients. *Id.* at 8,463-8,464.

After the NPRM was issued, the United States Conference of Catholic Bishops reiterated that the gaps in the funding mechanism meant that objecting employers would have to be involved in paying for or facilitating for payment of contraceptives/abortifacients in violation of their sincerely held religious beliefs.

> [I]t appears that the government would require all employees in our "accommodated" ministries to have the illicit coverage—they may not opt out, nor even opt out for their children—under a separate policy. In part because of gaps in the proposed regulations, it is still unclear how directly these separate policies would be funded by objecting ministries, and what precise role those ministries would have in arranging for these separate policies. Thus, there

> remains the possibility that ministries may yet be forced to fund and facilitate such morally illicit activities.[44]

The Bishops' comments were among more than 400,000 submitted in response to the NPRM. 78 Fed. Reg. 39,871 (July 2, 2013).

Despite statements from affected employers that the narrow religious employer exemption does not address the substantial burden placed upon employers' free exercise rights, the Administration refused to expand the exemption to conform to Congress' direction that protection is to be offered in all cases where free exercise of religion is substantially burdened. The final regulations announced in July 2013 retain the extremely narrow definition of religious employer to include only houses of worship and their integrated auxiliaries. 78 Fed. Reg. at 39,874. The Administration expressly acknowledged its preference for expanding free access to contraceptives and abortifacients over respecting the sincerely held religious beliefs of employers. *Id.*

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[44] Statement of Cardinal Timothy Dolan, *United States Conference of Catholic Bishops, HHS Proposal Falls Short In Meeting Church Concerns; Bishops Look Forward To Addressing Issues With Administration* (February 7, 2013), available at http://www.usccb.org/news/2013/13-037.cfm (last visited January 23, 2014).

> The Departments believe that the simplified and clarified definition of religious employer continues to respect the religious interests of houses of worship and their integrated auxiliaries in a way that does not undermine the governmental interests furthered by the contraceptive coverage requirement. Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan.

Id. In other words, according to the Administration, the critical consideration is not the religious beliefs of the employers which Congress has explicitly protected, but whether employees want free contraceptives and abortifacients. *Id.*

In keeping with that philosophy, the Administration continued to provide only what it termed an "accommodation" for non-profit organizations that object to providing or facilitating access to contraceptives and/or abortifacients. *Id.* at 39,874-39,878. Under the "accommodation," the non-profit organizations notify third-party insurers that they object to providing the contraceptive and/or abortifacient coverage, and the third-party insurer then pays for the abortifacients/contraceptives provided to employees. *Id.* The Administration states that insurers are not to directly or indirectly charge the objecting employers for the abortifacients and contraceptives that are provided at no cost to the employees. *Id.* The Administration did not explain how the costs of the contraceptives and abortifacients would be covered. *Id.* Instead, the Administration insisted that providing the contraceptives and abortifacients would be "cost neutral" because the insurer would realize savings from not having to pay for pregnancies and related claims. *Id.* The Administration also suggested that insurers might spread the cost over the insurers' risk pool. *Id.*

As for self-insured objecting non-profit organizations, the Administration said that third part administrators utilized by those organizations would serve the same role as do third party insurers. *Id.* at 39,789-39,880. Because no comments were submitted by self-insured organizations without third party administrators, the Administration assumed that no such organizations exist and made no provision for them. *Id.* at 39,880-39,881. The Administration said that if such organizations exist and prove their existence to the Administration, then the Administration will not enforce the Preventive Care Mandate against the organization until it devises a plan to ensure that free contraceptives and abortifacients can be provided. *Id.* The Administration continued to refuse to extend either an exemption or accommodation to for-profit organizations, such as Hobby Lobby and Conestoga Wood. *Id.* at 39,875.

The Administration has acted contrary to Congress' clear direction that religious free exercise rights must continue to be respected in the Act. Instead of providing the religious conscience exemptions required under RFRA and included elsewhere in the Act, the Administration has gone to great lengths to ensure that a perceived right to access to free abortifacients is not hampered by employers' sincerely held religious beliefs. In turning the purposes of RFRA on its head, the Administration has usurped its role as regulator. Instead of implementing the Act in accordance with Congress' directions, the Administration has endeavored to create new law, effectively repeal RFRA and establish a new "right" to receive free contraceptives and abortifacients. The Administration has failed to "carry into effect the will of Congress as expressed by the statute" by enacting the Preventive Care Mandate. *Manhattan General Equip.*, 297 U.S. at 134. Consequently, the Preventive Care Mandate is "a nullity" and should be overturned. *Id.*

CONCLUSION

The Preventive Care Mandate violates RFRA by imposing upon employers a perpetual mandate to supply free abortifacient drugs and devices or pay multi-million penalties that will drive them out of business. The Administration has exceeded its authority in enacting regulations that contradict Congress' clear direction and purport to create new law.

For these reasons, this Court should invalidate the Preventive Care Mandate.

January 28, 2014.

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AMICUS
CURIAE
BRIEF

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Petitioners,
v.
HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF LIBERTY, LIFE , AND LAW FOUNDATION, THOMAS MORE SOCIETY, AND CHRISTIAN FAMILY COALTION AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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INTEREST OF *AMICI CURIAE*[1]

Liberty, Life and Law Foundation, the Thomas More Society, and Christian Family Coalition, as *amici curiae*, respectfully urge this Court to reverse the decision of the Third Circuit and affirm the decision of the Tenth Circuit.

Liberty, Life, and Law Foundation ("LLLF") is a North Carolina nonprofit corporation established to defend religious liberty, sanctity of human life, liberty of conscience, family values, and other moral principles. LLLF is gravely concerned about the growing hostility to religious expression in America and the related threats to liberty and conscience. LLLF's counsel, Deborah J. Dewart, is the author of a book, *Death of a Christian Nation*, and many *amicus curiae* briefs in this Court and the federal circuits. LLLF has filed amicus briefs in several cases across the nation challenging the constitutionality of federal regulations implementing the Patient Protection and Affordable Care Act of 2010 (the "Act" or "ACA"), compelling certain employers to provide health insurance coverage for FDA-approved contraceptives. *See* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) ("the Mandate").

The Thomas More Society ("TMS") is a not-for-profit, national public interest law firm founded in 1997 that seeks to restore respect in law for life, marriage, and religious liberty. TMS provides *pro bono* legal services in many different types of cases, including protecting the First Amendment religious liberty rights of corporations, organizations, and individuals from involvement with or facilitation of abortion, abortion-causing drugs, contraception, or sterilization. As explained more fully herein, the Thomas More Society and its fellow amici urge this Court to protect the religious liberty of employers who seek to keep their faith when doing business—particularly in cases where, as here, the government can show no compelling reason that might justify forcing individuals to violate their sincerely held religious convictions.

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[1] The parties have consented to the filing of this brief. *Amici curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

Christian Family Coalition ("CFC") is a Florida organization established to empower families at the grassroots level and give them a voice in government. CFC informs and educates citizens about candidates and pending legislation, trains Christian leaders, and defends the legal rights of Christians. CFC is concerned about the Mandate's threat to the legal right to operate a business according to conscience and faith.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment has never been confined within the walls of a church, as if it were a wild animal needing to be caged. On the contrary, the Constitution broadly guarantees religious liberty to individuals, like the owners of Conestoga Wood Specialties and Hobby Lobby, who participate in public life and conduct business according to their moral, ethical, and religious convictions.

But now, the Mandate imposes crippling penalties on these entrepreneurs unless they provide employee health insurance that covers contraception, sterilization, and related educational/counseling services, in violation of the owners' religious faith. This Mandate is a frontal assault on liberties Americans have treasured for over 200 years—liberties no person should ever be required to sacrifice as a condition for owning a business.

Some supporters of the Mandate reframe the issue in terms of discrimination against women,[2] arguing that the Mandate is necessary to achieve gender equality in the workplace and that failure to comply constitutes "discrimination" against women. That rabbit trail diverts attention from the heart of this case: liberty of conscience, religious freedom, and integrity.

ARGUMENT

I. OPERATING A PRIVATE BUSINESS IN ACCORDANCE WITH CONSCIENCE IS NOT THE INVIDIOUS, IRRATIONAL, ARBITRARY DISCRIMINATION PROHIBITED BY THE CONSTITUTION.

The owners of Conestoga and Hobby Lobby are individuals who wish to conduct their businesses with integrity, setting company policies consistent with conscience, moral values, and religious faith. Not everyone shares those same values, but cutting conscience out of the commercial sphere is a frightening prospect for customers, employees, and business owners. It is hardly "discrimination" to decline to advance a politically charged agenda, particularly since no person has a right to *free* contraceptive services funded by an unwilling private employer.

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[2] The American Civil Liberties Union has made such arguments in amicus briefs in many of the HHS Mandate cases.

A. Respect For Individual Conscience Is Deeply Rooted In American History.

The American legal system has traditionally respected conscience, as illustrated by the statutory and judicially crafted exemptions granting relief from the moral dilemma created by mandatory military service. One case, acknowledging man's "duty to a moral power higher than the State," quotes Harlan Fiske Stone (later Chief Justice):

> "...both morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process." Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

United States v. Seeger, 380 U.S. 163, 170 (1965). It is hazardous for any government to systematically crush the conscience of its citizens. But that is exactly what the Mandate does, breeding a nation of business owners who lack *conscience*—citizens who must set aside conscience, values, and religion just to remain in business. The sheer number of pending lawsuits testifies to the gravity of the matter.[3]

Many state constitutions link free exercise to "liberty of conscience." One Minnesota court ruled in favor of a religious deli owner who refused to deliver food to an abortion clinic, observing that: "Deeply rooted in the constitutional law of Minnesota is the fundamental right of every citizen to enjoy 'freedom of conscience.'" *Rasmussen v. Glass*, 498 N.W.2d 508, 515 (Minn. Ct. App. 1993). Although "freedom of conscience" is even broader than "free exercise of religion," the First Amendment explicitly protects religion. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1491 (1990).

Liberty of conscience underlies the Establishment Clause and the unique taxpayer standing rules developed in *Flast v. Cohen*, 392 U.S. 83 (1968):

> [T]he Framers' generation worried that conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed.

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[3] There are 91 pending cases, per "HHS Mandate Information Central." See http://www.becketfund.org/hhsinformationcentral/ (last visited 01/23/14).

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1446-1447 (2011), quoting Feldman, *Intellectual Origins of the Establishment Clause*, 77 N. Y. U. L. Rev. 346, 351 (2002). An equivalent principle is true here: The Mandate requires business owners to violate conscience and religious faith by financing activities they believe to be immoral. This is as much a frontal assault on conscience as the Establishment Clause evil of compelling citizens to support religious beliefs they do not hold.

B. Courts Have Long Respected The Conscience Rights Of Both Patients And Health Care Professionals.

There is a long history of respect for the conscience and moral autonomy of both patients and health care professionals. Women may have a legal right to contraception and abortion, but "to demand of a physician that she act in a manner she deems to be morally unpalatable not only compromises the physician's ethical integrity, but is also likely to have a corrosive effect upon the dedication and zeal with which she ministers to patients." J. David Bleich, *The Physician as a Conscientious Objector*, 30 Fordham Urb. L. J. 245 (2002). The conscience and integrity of a private employer is entitled to respect. Instead, the Mandate has a corrosive impact on American society by compelling people of faith to facilitate and/or finance services they consider immoral.

After abortion became legal, Congress acted swiftly to preserve the conscience rights of professionals who object to participating in abortions. When Senator Church introduced the "Church Amendment" (42 U.S.C. § 300a-7(c)) for that purpose, he explained that:

"Nothing is more fundamental to our national birthright than freedom of religion." 119 Cong. Rec. 9595 (1973). Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 627-628 (2006). Almost every state has also enacted conscience clause legislation. Courtney Miller, Note: *Reflections on Protecting Conscience for Health Care Providers: A Call for More Inclusive Statutory Protection in Light of Constitutional Considerations*, 15 S. Cal. Rev. L. & Social Justice 327, 331 (2006).

C. Like Many Successful Free Exercise Cases, This Case Involves *Conscientious Objectors*—Not Civil Disobedience.

Prior to *Emp't Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), many winning cases involve conscientious objectors—believers seeking freedom from state compulsion to commit an act against conscience. *Girouard v. United States,* 328 U.S. 61 (1946) (military combat); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Sabbath work); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) ("*Barnette*") (flag salute); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (high school education). Many losing cases involve "civil disobedience" claimants seeking to engage in illegal conduct, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor). *Lessons From Pharaoh*, 39 Creighton L. Rev. at 564. *Smith* repeatedly emphasized the *criminal* conduct at issue. *Smith,* 494 U.S. at 874, 878, 887, 891-892, 897-899, 901-906, 909, 911-912, 916, 921.

Conscientious objector claims are "very close to the core of religious liberty." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 565, 611, 615-616. Religious entrepreneurs should never have to choose between allegiance to the state and faithfulness to God when their beliefs can be accommodated without sacrificing public peace or safety.

This Court's decision has broad ramifications for others burdened by legal directives to act against conscience. It is difficult to pinpoint the myriad of situations where legal mandates may invade conscience. In light of the high value that courts, legislatures, and state constitutions have historically assigned to conscience and religious liberty, it is incumbent upon this Court to protect private employers who decline to finance or facilitate morally objectionable medical services.

II. AN EMPLOYER'S REFUSAL TO FINANCE OR FACILITATE CONTRACEPTION IS NOT THE INVIDIOUS, IRRATIONAL, ARBITRARY DISCRIMINATION PROHIBITED BY THE CONSTITUTION.

Modern anti-discrimination principles have expanded over the years, increasing the potential to encroach on religious liberty. Commentators have observed the legal quagmire in the context of statutory protections:

> This conflict between the statutory rights of individuals against private acts of discrimination and the near universally-recognized right of free exercise of religion places a complex legal question involving

> competing societal values squarely before the courts.

Jack S. Vaitayanonta, Note: *In State Legislatures We Trust? The "Compelling Interest" Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 Colum. L. Rev. 886, 887 (2001). *See also* Harlan Loeb and David Rosenberg, *Fundamental Rights in Conflict: The Price of a Maturing Democracy*, 77 N.D. L. Rev. 27, 29 (2001); David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223 (2003) (urging resolution in favor of First Amendment liberties).

Conestoga and Hobby Lobby challenge only a fraction of the required "comprehensive package." *Tyndale House Publ'rs, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 127 n. 17 (D.D.C. November 16, 2012). "The government does not articulate why accommodating such a limited request fundamentally frustrates its goals." *Hobby Lobby v. Sebelius,* 2013 U.S. App. LEXIS 13316, *77 (10th Cir. 2013). Most services unique to women are not morally objectionable—childbirth, prenatal care, mammograms, pap smears, breast or cervical cancer treatments.[4] Conestoga and Hobby Lobby employees, like their counterparts in the recent *Gilardi* case, will continue to receive valuable health care benefits:

> The Gilardis' employees will still receive an array of services such as well-woman visits,

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[4] Although these services are not part of the Mandate, religious employers' willingness to provide them indicates they are not engaged in discrimination against women.

> gestational-diabetes screenings, HPV testing, counseling for sexually-transmitted infections, support for breastfeeding, and counseling for interpersonal and domestic violence. *See Women's Preventive Services Guidelines*, HEALTH RES. & SERVS. ADMIN., http://www.hrsa.gov/womensguidelines/.

Gilardi v. United States HHS, 733 F.3d 1208, 1224 (D.C.C. 2013). The owners here carve out only those services they cannot in good conscience facilitate or finance. Seen against the backdrop of common law principles and the First Amendment, their conduct is not unlawful discrimination against female employees.

A. Anti-Discrimination Provisions Have Expanded To Cover More Places And Protect More Groups—Complicating The Legal Analysis And Triggering Collisions With The First Amendment.

Antidiscrimination policies have ancient roots. The Massachusetts law at issue in *Hurley* grew out of the common law principle that innkeepers and others in public service could not refuse service to a customer without good reason. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 571 (1995). But the Massachusetts legislature broadened the scope, adding more protected categories and more places subject to the law. *Id.* at 571-572. The same trend was apparent in *Dale*. The traditional "places" moved beyond inns and trains to commercial entities and even membership associations—increasing the potential for collision with First Amendment rights. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000). Protection also expanded, adding criteria such as prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology. *Id.* at 656 n. 2.

Similarly, the statutory predecessor to California's Unruh Act (Cal. Civ. Code § 51), enacted in 1897 to codify common law doctrines, originally encompassed "inns, restaurants, hotels, eating-houses, barber-shops, bath-houses, theaters, skating-rinks, and all other places of public accommodation or amusement." Stats. 1897, ch. 108, p. 137, § 1, cited in *In re Cox*, 474 P.2d 992, 996 (Cal. 1970). The Act expanded over the years to cover more places and people. Public conveyances were added by amendment in 1919 (Stats. 1919, ch. 210, p. 309, § 1), and in 1923 the legislature added places serving ice cream or soft drinks (Stats. 1923, ch. 235, p. 485, § 1). Case law also fueled the expansion: *Orloff v. Los Angeles Turf Club*, 227 P.2d 449 (Cal. 1951) (race track could not expel man of immoral character); *Stoumen v. Reilly*, 234 P.2d 969 (Cal. 1951) (homosexuals may obtain food and drink at a public restaurant). What the Act clearly forbids is the "irrational, arbitrary, or unreasonable discrimination" prohibited by the Equal Protection Clause. *In re Cox*, 474 P.2d at 999. Discrimination is "arbitrary" where an entire class of persons is excluded without justification. *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115 (Cal. 1982). But it is hardly "arbitrary" to avoid promoting a cause. *Hurley*, 515 U.S. 557 (parade organizers did not exclude any individuals, but could not be compelled to grant access to an organization promoting a cause they did not support). When Unruh Act amendments were considered in 1974, the Legislative Counsel cautioned that "a construction of the act that would prohibit discrimination on any of the grounds enumerated therein *whether or not such action was arbitrary* would lead to *absurd results.*" *Isbister v. Boys Club of Santa Cruz*, 707 P.2d 212, 222 (Cal. 1985) (emphasis added).

This Court has rightly upheld civil rights legislation intended to eradicate America's long history of racial discrimination. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). But as protection expands to more places and people, so does the potential to employ anti-discrimination principles to suppress traditional viewpoints and impose social change on unwilling participants. Religious liberty is particularly susceptible to infringement:

> With respect to the great post-modern concerns of sexuality, race, and gender, the advocates of social change are anything but indifferent toward the teachings of traditional religion—and since they are not indifferent they are not tolerant.

Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 187 (1993). Political power can be used to squeeze religious views out of public debate about controversial social issues. *Id.* at 188.

The clash between anti-discrimination principles and the First Amendment is particularly volatile when a morally controversial practice is protected and religious persons or groups are swept within the ambit of the law. Government has no right to legislate a particular view of sexual morality and compel religious institutions and individuals to facilitate it. Religious voices have shaped views of sexual morality for centuries. These views about right and wrong are deeply personal moral and ethical convictions that shape the way people of faith live their daily lives, both privately and in public.

The clash between non-discrimination rights and religious liberty "places a complex legal question involving competing societal values squarely before the courts." *In State Legislatures We Trust?*, 101 Colum. L. Rev. at 887. When the D.C. Circuit addressed the question "of imposing official orthodoxy on controversial issues of religious, moral, ethical and philosophical importance, upon an entity whose role is to inquire into such matters" it concluded that "[t]he First Amendment not only ensures that questions on difficult social topics will be asked, it also *forbids government from dictating the answers*." *Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 24 (D.C. 1987) (emphasis added). Non-discrimination rights, whether created by statute or derived from equal protection principles, may conflict with core rights to religious liberty. *Fundamental Rights in Conflict*, 77 N.D. L. Rev. at 27, 29.

The growing conflict between religion and nondiscrimination principles emerges in many contexts. *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. at 224-225. Employers may find themselves in a conundrum—protecting one group of employees while alienating another. Solutions are difficult to craft, particularly in the wake of expanding privacy rights. But even if private sexual conduct is legally protected from government intrusion, that protection does not trump the First Amendment rights of those who cannot conscientiously endorse it—*let alone finance or facilitate it*.

B. Many Decisions Necessitate Selection Criteria.

Discrimination may or may not be invidious—and thus rightly prohibited—depending on the context and identity of the person or group that discriminates.

Everyone experiences discrimination. Employers "discriminate" when they select employees from a pool of applicants. Students experience "discrimination"—admissions, honor rolls, sports teams, or activities requiring a certain grade point average. *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 871 (2d Cir. 1996). Where selection criteria are truly irrelevant, it may be wise to enact protection. But it is impossible to eradicate all discrimination.

C. Where "Discrimination" Is Integrally Related To The Exercise Of A Core Constitutional Right, It Is Not Arbitrary, Irrational, Or Unreasonable.

Action motivated by conscience and/or religious conviction is not the arbitrary, irrational, or unreasonable discrimination the Constitution prohibits.

The law may proscribe the refusal to conduct business with an entire group based on personal animosity or stereotypes. But the First Amendment demands that courts seriously consider religious motivation. In the unemployment cases, this Court warned that "to consider a religiously motivated resignation to be 'without good cause' tends to exhibit hostility, not neutrality, towards religion." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 142 (1987); *Thomas v. Review Bd. of Ind. Emp't*, 450 U.S. 707, 708 (1981). Similarly, this Court would exhibit hostility toward religion by equating an employer's religious objections to the Mandate with unlawful "discrimination."

Motivation is a key factor. A person who deliberately refuses medical treatment, desiring to die, commits suicide. But a person who wants to live, yet refuses treatment based on religious convictions, does not. Gerard V. Bradley, *Beguiled: Free Exercise Exemptions And The Siren Song of Liberalism*, 20 Hofstra L. Rev. 245, 263-264 (1991). Killing another person in self-defense is justifiable homicide. But the same act—premeditated with malice aforethought—is first degree murder. The former carries no legal penalties, while the latter warrants severe consequences.

Cutting through the fog demands examination of the circumstances. Anti-discrimination laws rightly protect against refusing a customer on the basis of a truly irrelevant personal characteristic. But in some circumstances, religious faith may be a valid defense to a state law discrimination charge, e.g., *Rasmussen v. Glass,* 498 N.W.2d at 510-511 (deli owner's refusal to deliver food to an abortion clinic was *not* unlawful discrimination under applicable state law, because he opposed their practice of performing abortions). Similarly, en employer does not "discriminate" by refusing to finance an employee's off-duty activity—even the exercise of a constitutional right.

The employee is still free to engage in that activity, but has no right to coerced funding by an employer.

D. A Narrowly Crafted Exemption Would Not Constitute The Arbitrary, Unreasonable Discrimination The Constitution Rightly Prohibits.

This case involves no allegations that either Conestoga or Hobby Lobby discriminates against women in hiring, compensation, or other policies. But they cannot comply with the Mandate without sacrificing allegiance to their owners' core convictions. General anti-discrimination principles should not be applied so expansively as to eviscerate First Amendment rights. The Mandate extends far beyond the "meal at the inn" promised by common law and encroaches on a private employer's right to conduct business without a mandate to violate conscience. When this Court rejected a 400-member dining club's facial challenge to a state anti-discrimination law, it recognized that the state could not prohibit the exclusion of members whose views conflicted with positions advocated by an expressive association. What the club could not do is use characteristics like race and sex as "shorthand measures" in place of legitimate membership criteria. *New York State Club Ass'n, Inc. v. City of New York,* 487 U.S. 1, 13 (1988). The employers in this case use no "shorthand" to discriminate against women—rather, they object to funding a narrow range of morally objectionable services.

E. Contraception Is A Gender-Neutral Term.

When the Eighth Circuit considered gender discrimination for purposes of Title VII, as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), the Court concluded that contraception is gender-neutral. Title VII generally precludes employment decisions based on an employee's gender. *In re Union Pac. R.R. Emp't Practices Litig.*,479 F.3d 936, 944 (8th Cir. 2007). But where "an employer's action is not based on a sex classification, it is not a sex-based violation of Title VII. *See Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997)." *Id.* Moreover, contraception, like infertility, is "not a gender-specific term." *Id.* at 942; *see Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996) ("because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers...[it] is gender-neutral"). An employer's refusal to include contraception in its employee health insurance plan is based solely on the owners' conscientious objections—not the sex of any employee.

III. THE RIGHT TO ACCESS CONTRACEPTION DOES NOT JUSTIFY COERCED FUNDING BY UNWILLING PRIVATE EMPLOYERS.

The First Amendment protects against government coercion to endorse or subsidize a cause. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Barnette*, 319 U.S. 624. The government has no power to force a *speaker* to support or oppose a particular viewpoint. *Hurley*, 515 U.S. at 575. Religious liberty collapses when secular ideologies employ the strong arm of the state to advance their causes, promoting tolerance and respect for some while ruthlessly suppressing others. *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 186-188.

The Mandate grates against the Constitution, essentially banning people of faith from full participation in society. It is tantamount to a statement that "no religious believers who refuse to [finance or facilitate contraception] may be included in this part of our social life." *Lessons From Pharaoh*, 39 Creighton L. Rev. at 573. The Mandate's crippling financial penalties will force employers like Conestoga and Hobby Lobby to shut down.

Even though courts have acknowledged constitutional rights to contraception and abortion, there is no corollary right to compel unwilling private employers to finance their exercise. In the companion case to *Roe v. Wade*, 410 U.S. 113 (1973), this Court left intact Georgia's statutory protections for health care workers who object to participating in abortions. *Doe v. Bolton*, 410 U.S. 179, 205 (1973) (quoting Ga. Crim. Code § 26-1202(e) (1968)). The Mandate compels a private employer to become a "de facto accomplice" to a morally objectionable agenda. Women may have a legal right to contraception or abortion, but they have no accompanying right to draft their employers as unwilling accomplices who must pay for it. In this "clash of autonomies," private employers are entitled to equal protection of their "right to choose." *Reflections on Protecting Conscience for Health Care Providers*, 15 S. Cal. Rev. L. & Social Justice at 340-341, 344.

A. Abortion Is A Highly Controversial, Divisive Issue.

Even if this case were truly about gender discrimination—rather than conscientious objection to a narrow range of services—the contentious nature of abortion is one factor that distinguishes this case from *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (tax-exempt status denied to racially discriminatory school). The activities of a charitable organization must not be "contrary to settled public policy." *Id.* at 585. There is a well-settled, "firm national policy to prohibit racial segregation and discrimination in public education." *Id.* at 593. That policy justified denial of charitable status to a racially discriminatory institution. There is no comparable established policy favoring abortion rights—instead, there is intense division and passionate emotion as the debate rages on.

This Court must protect the rights of *all* citizens. Americans on both sides of the abortion/contraception debate are equally entitled to constitutional protection for their respective positions. The government itself may adopt a position, but it falls off the constitutional cliff when it extracts financial support from private employers—compelling them to finance morally objectionable services. The reproductive rights recognized in recent decades do not trump the inalienable First Amendment rights of citizens who cannot in good conscience support abortion (and/or contraception)—let alone finance it for others. Abortion is too controversial to justify this severe intrusion on the fundamental rights of opponents.

Many deeply religious people view abortion as fundamentally wrong. Concerned citizens across the country have enacted state laws to regulate it—informed consent, parental notice, waiting periods, and other statutory limitations. The resulting legal challenges are legion. But the very fact that such restrictions have been proposed and passed is evidence that Americans are profoundly troubled and deeply divided.

B. Religious Freedom Is Our *First* Liberty—It Should Not Be Dismantled To Coerce Private Funding Of Abortion Rights.

The right to access contraception/abortion does not trump the time-honored religious liberty expressly protected by the First Amendment. On the contrary, such rights have been plucked out of obscure corners of the Constitution—and there is deep disagreement over their continued viability.

America was founded by people who risked their lives to escape religious tyranny and observe their faith free from government intrusion. Congress has ranked religious freedom "among the most treasured birthrights of every American." Sen. Rep. No. 103-111, 1st Sess., p. 4 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News, at pp. 1893-1894. This Court expressed it eloquently in ruling that an alien could not be denied citizenship because of his religious objections to bearing arms:

> The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in

> the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle.

Girouard v. United States, 328 U.S. at 68. We dare not sacrifice priceless American freedoms through misguided—or even well-intentioned—government efforts to broaden access to contraception. Pro-life advocates have not forfeited their right to conduct business according to their convictions and conscience.

C. No Person Has A Constitutional Right To *Free* Access Contraception. Accommodation Of A Private Employer's Conscience Poses No Threat To Any Employee's Legal Rights.

An employer does not impose its religion on employees merely by declining to finance contraception or abortion-producing drugs—or any other constitutional right. No private party is obligated to facilitate or fund another party's rights—free speech does not encompass a corollary right to compel someone else to pay for the printing or airtime. Employees are free to use contraception, just as they were before the ACA was passed. What they cannot do is compel their employers to finance it. An employer pays for an employee's time and services. It does not monitor—let alone endorse—every purchase the *employee* decides to make. The Mandate tramples basic liberties by requiring the *employer* to maintain an insurance plan and pay premiums that ensure *free* access to morally objectionable drugs and services.

Even the government is not obligated to finance contraception or abortion. On the contrary, the state may prefer childbirth and allocate scarce resources accordingly. *Harris v. McRae,* 448 U.S. 297, 315 (1980); *Rust v. Sullivan*, 500 U.S. 173, 201 (1991). The government has "no affirmative duty to 'commit any resources to facilitating abortions.'" *Id.*, quoting *Webster v. Reprod. Health Servs.,* 492 U.S. 490, 511 (1989). *See also Bowen v. Kendrick,* 487 U.S. 589, 596-597 (1988) (the Adolescent Family Life Act restricts funding to "programs or projects which do not provide abortions or abortion counseling or referral"). The government's sole obligation is not to impose "undue interference" on abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). Accommodation of a private employer's conscience imposes no burden on any *employee's* rights—but the Mandate does impose "undue interference" on the *employer's* constitutional rights.

The Mandate guts the First Amendment, brazenly exhibiting the "callous indifference" to religion never intended by the Constitution. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), citing *Zorach v. Clauson,* 343 U.S. 306, 314 (1952). The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Id.* The Constitution bars any public official from prescribing orthodoxy in religion. *Barnette*, 319 U.S. at 642. Private individuals and organizations have an affirmative right to oppose abortion and decline to fund it, free of government intrusion. The government cannot impose a particular view of sexual morality on private businesses—and even religious institutions—and coerce them to facilitate or finance it.

Some advocates argue that courts must balance conflicting interests and not necessarily accommodate religion where the rights of third parties are detrimentally affected. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 93-94 (Cal. 2004) (insurance plans required to include contraception); *Catholic Charities of Diocese of Albany v. Seri*, 859 N.E.2d 459, 461 (N.Y. 2006) (same). Some earlier free exercise cases did not implicate third party rights, so it was unnecessary to balance rights. *Sherbert v. Verner*, 374 U.S. 398 (and other unemployment cases); *Wisconsin v. Yoder*, 406 U.S. 205 (parental rights to educate children). In other cases, courts have denied religious exemptions where accommodation would endanger minor children and/or community health. *Reynolds v. United States*, 98 U.S. 145 (1878) (polygamy); *Prince v. Massachusetts*, 321 U.S. 158 (child labor); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Walker v. Superior Court,* 763 P.2d 852 (Cal. 1988) (medical treatment for child). In these cases, the restriction on religious liberty was narrow and the religious conduct "invariably posed some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 374 U.S. at 403. In other cases, courts have balanced conflicting rights. Sometimes the nature and extent of infringement on the relevant rights is a key factor in the outcome. The Jaycees and Rotary lost free association claims because they could not show that admitting female members would actually hinder their organizational expression. *Roberts v. United States Jaycees*, 468 U.S. 609, 624

(1984); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

More recently, First Amendment rights to free association have trumped statutory anti-discrimination rights. *Hurley*, 515 U.S. 557; *Boy Scouts of Am. v. Dale*, 530 U.S. 640. This Court cannot brush aside Plaintiffs' conscientious objections to the Mandate without flouting these precedents. Protection of reproductive rights does not justify compelling employers to disregard their deepest convictions when operating a business or ministry—risking financial ruin or professional displacement. That is particularly true in the absence of any employee's right to access free contraception.

D. Other Cases Limiting Religious Freedom In The Commercial Sphere Left The Objector With A Viable Choice. The HHS Mandate Does Not.

Cases involving comparable legal mandates provide some avenue of escape:

- Religious charities required to include contraception in their prescription drug plan could simply discontinue drug coverage—*without* financial penalties.
    - ○ *Catholic Charities of Sacramento*, 85 P.3d at 76 ("[T]he WCEA implicitly permits any employer to avoid covering contraceptives by not offering coverage for prescription drugs.);
    - ○ *Catholic Charities of Diocese of Albany*, 859 N.E.2d at 468 ("WHWA does not literally *compel* them to purchase contraceptive

coverage for their employees, in violation of their religious beliefs; it only requires that policies that provide prescription drug coverage include coverage for contraceptives.")

- The Ninth Circuit suggested that a religious school could discontinue its employee health insurance program altogether in order to comply with its religious conviction that only male employees should be offered this benefit. *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).

- A religious school offering supplemental pay to heads of household could discontinue the program and maintain lower salaries for all employees. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990).

- A religious school could continue to operate, but without the benefits of tax-exempt status. *Bob Jones Univ. v. United States*, 461 U.S. at 603-604 ("Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.")

- Students who object to using mandatory registration fees for student health insurance covering abortion could presumably enroll in another institution. *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996); *Erzinger v. Regents of Univ. of Cal.*, 137 Cal. App. 3d 389 (Cal. Ct. App. 1982).

These "solutions" are counter-productive, harming numerous third parties and restricting access to goods and services. Elimination of medical insurances harms *all* employees, including the women who desired contraceptive coverage in the *Catholic Charities* cases and the female employees in *Fremont Christian School*.

But these alternatives—undesirable as they are—pale in comparison to the draconian HHS Mandate, which leaves larger employers with virtually no escape hatch. Employers may avoid the Mandate only by cutting the work force and discontinuing insurance programs altogether—resulting in a loss of jobs and benefits—contrary to the primary purpose of the Affordable Care Act. The Mandate will ultimately restrict access to goods and services and stall economic growth by forcing conscientious employers to restrict the size of their operations or shut down altogether.

IV. THE GOVERNMENT DISCRIMINATES AGAINST EMPLOYERS WHO HOLD CONSCIENTIOUS OBJECTIONS TO CONTRACEPTION.

There *is* discrimination lurking in the shadows of these cases—not discrimination against *women*, but the government's blatant discrimination against religious business owners. The Mandate's onerous financial penalties threaten the livelihood of employers who cannot in good conscience comply. But "[n]o person can be punished for entertaining or professing religious beliefs or disbeliefs...." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947). A citizen may not be excluded from a profession by unconstitutional criteria. *Baird v. State Bar of Arizona*, 401 U.S. 1, 6-7 (1971) (attorney); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967) (professor). ***This is itself a form of discrimination***. It is equally unconstitutional to jeopardize a citizen's livelihood, regardless of the business form—sole proprietorship, partnership, or corporation. This Court has a "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Establishment Clause demands government neutrality so that each religious creed may "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. at 313. The Framers intentionally protected "the integrity of individual conscience in religious matters." *McCreary County, KY v. ACLU*, 545 U.S. 844, 876 (2005).

A. Believers Do Not Forfeit Their Constitutional Rights When They Enter The Commercial Sphere.

The Mandate discriminates against people of faith by effectively squeezing them out of full participation in civic life. *Lessons From Pharaoh*, 39 Creighton L. Rev. at 561-563. Religion does not end where daily business begins. If religion is shoved to the private fringes of life, constitutional guarantees ring hollow. *"God is Dead and We have Killed Him!"*, 1993 BYU L. Rev. at 176. Moreover, morality necessarily intersects the public realm—customers expect businesses to operate with honesty and integrity.

B. Free Exercise Cases Commonly Arise In The Context Of Commercial Activity.

The state actively regulates commerce but has minimal control over the internal affairs of religious entities. Conflicts between religion and regulation typically occur in commercial settings:

- *Braunfeld v. Brown,* 366 U.S. 599 (1961) (Sunday closing);
- *Sherbert v. Verner,* 374 U.S. 398 (and other unemployment cases);
- *United States v. Lee*, 455 U.S. 252 (1982) (Amish business);
- *Roberts v. United States Jaycees*, 468 U.S. 609 (commercial association);
- *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985);
- *State ex rel. McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 853 (Minn. 1985) (hiring);
- *Rasmussen v. Glass,* 498 N.W.2d 508 (food delivery);
- *Swanner v. Anchorage Equal Rights Comm'n,* 874 P.2d 274 (Alaska 1994) (housing);
- *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (same);
- *Catholic Charities of Sacramento*, 85 P.3d at 93.

Some claimants succeeded (*Sherbert, Rasmussen, Desilets*), while others did not (*Braunfeld, Lee, Roberts, Alamo Found., McClure, Swanner, Catholic Charities*). The "commercial" factor does not dictate the outcome.

But with the advent of the draconian HHS Mandate to facilitate free access to contraception and abortion-inducing drugs, even the church sanctuary provides no safe haven from the strong arm of the state.

United States v. Lee is often cited to oppose religious exemptions in the commercial sphere. *Catholic Charities of Sacramento,* 85 P.3d at 93. But *Lee* does not hold that believers forfeit their constitutional rights in the business world. Note the context of the often cited language:

> Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but *every* person cannot be shielded from *all* the burdens incident to exercising *every* aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

United States v. Lee, 455 U.S. at 261 (emphasis added). Religious freedom is more limited in the commercial realm—but not abrogated altogether.

V. OTHER FACTORS ARE RESPONSIBLE FOR THE PROGRESS OF GENDER EQUALITY OVER THE PAST SEVERAL DECADES.

The government asserts vague interests in "gender equality" and "public health" which the Tenth Circuit did not find compelling, describing them as "broadly formulated interests justifying the general applicability of government mandates." *Hobby Lobby*, 2013 U.S. App. LEXIS 13316 at *74, citing *O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 431 (2006).

As one commentator observed two decades ago:

> [I]t is an offensive and sexist notion that women must deny what makes them unique as women

> (their ability to conceive and bear children), in order to be treated "equally" with (or by) men. Genuine equality between the sexes will be reached on that day when women can affirm what makes them unique as women and still be treated fairly by the law and society.

Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court*, 13 St. Louis U. Pub. L. Rev. 15, 46 (1993); *see also* David Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 Marquette L. Rev. 975, 1001-13 (Summer 1992).

Never before—in the four decades since *Roe v. Wade* or even the two decades since *Planned Parenthood v. Casey*—have women had a legal right to force their private employers to pay for contraception or incur financial penalties that threaten their very existence. Yet women have made extraordinary progress in their ability to secure equal rights and participate fully in American society. That progress in "gender equality" is attributable to a variety of factors unrelated to the ability to access contraception or abortion:

> Virtually all progress in women's legal, social and employment rights over the past 30 years has come about through federal or state legislation and judicial interpretation wholly unrelated to and not derived from Roe v. Wade.

Paige C. Cunningham & Clarke D. Forsythe, *Is Abortion the "First Right" for Women?: Some Consequences of Legal Abortion*, in Abortion, Medicine and the Law 154 (J. Butler & D. Walbert eds., 4th ed. 1992). Such progress began decades ago, before the controversial Mandate was on the horizon. Legislation protects women against unlawful discrimination in employment and other contexts:

- Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000 et seq., as amended by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, and the Pregnancy Discrimination in Employment Act amendments of 1978, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)) (discrimination in public and private employment);
- 5 U.S.C. § 201 (mandating anti-discrimination policy in federal employment);
- 5 U.S.C. § 2302(b)(1) (anti-discrimination in personnel policies);
- Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d), as amended by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d) (1988) (mandating equal pay);
- Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) (forbidding discrimination on account of pregnancy in granting unemployment compensation benefits);
- 20 U.S.C. § 1221e(a) (mandating anti-discrimination policy in educational institutions receiving federal funds), *id.*, § 1681 et seq. (discrimination in education).

See Linton, *Planned Parenthood v. Casey: The Flight From Reason*, 13 St. Louis U. Pub. L. Rev. at 44 n. 130 (listing these and other statutes). Many states have constitutional and statutory provisions protecting women against discrimination. *Id.* at 45 n. 131. These protections facilitate access to higher education, better jobs, and a woman's choice to become pregnant and bear a child without sacrificing her career. It is disingenuous for the government to assert that easy access to employer-funded contraception is necessary—or even desirable—to combat discrimination against female employees.

VI. IRONICALLY, THE MANDATE WEAKENS CONSTITUTIONAL PROTECTION FOR EVERYONE—INCLUDING THOSE WHO ADVOCATE IMPOSING IT ON UNWILLING PRIVATE EMPLOYERS.

The right to freely access contraception and abortion is a relatively recent judicial development. Advocates accomplished this dramatic social and political transformation by exercising their rights to free speech, press, association, and the political process generally. The status of various minority groups has improved dramatically because the Constitution guarantees free expression and facilitates the advocacy of new ideas. *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. at 232. But no group can demand for itself what it would deny to others—otherwise, the constitutional foundation will crumble and all Americans will suffer. Overly aggressive assertion of particular rights can erode protection for other liberties. Here, the Mandate directly attacks the freedom of employers who object to contraception and/or abortifacients. The rights of women to access reproductive services do not trump the rights of everyone else, particularly since no person has a right to coerced funding from either public or private sources.

This Court needs to preserve the constitutional liberties guaranteed to *all* citizens. Americans who want to expand their own civil rights must grant equal respect to opponents—not crush them with debilitating legal penalties:

> The price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish.

United States v. Ballard, 322 U.S. 78, 95 (1944).

> If Americans are going to preserve their civil liberties...they will need to develop thicker skin. One price of living in a free society is toleration of those who intentionally or unintentionally offend others. The current trend, however, is to give offended parties a legal remedy, as long as the offense can be construed as "discrimination." ... Preserving liberalism, and the civil liberties that go with it, requires a certain level of virtue by the citizenry. Among those necessary virtues is tolerance of those who intentionally or unintentionally offend, and sometimes, when civil liberties are implicated, who blatantly discriminate. A society that undercuts civil liberties in pursuit of the "equality" offered by a statutory right to be free from all slights will ultimately end up with neither equality nor civil liberties.

Defending the First Amendment From Antidiscrimination, 82 N.C. L. Rev. at 245.

This principle cuts across all viewpoints and all constitutional rights. The First Amendment protects a broad spectrum of expression, popular or not. In fact, the increasing popularity of an idea makes it all the more essential to protect dissenting voices. *Boy Scouts of Am. v. Dale*, 530 U.S. at 660. Censorship spells death for a free society. "Once used to stifle the thoughts that we hate...it can stifle the ideas we love." *Gay Alliance of Students v. Matthews*, 544 F.2d 162, 167-168 (4th Cir. 1976). Justice Black said it well in a case about the Communist Party, which advocated some of the most dangerous ideas of the twentieth century:

> "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish." *Communist Party v. SACB,* 367 U.S. 1, 137 (dissenting opinion) (1961).

Healy v. James, 408 U.S. 169, 187-188 (1972). *Healy* is about association rights—not reproductive rights. But upholding the Mandate will not ultimately advance the cause of any group seeking enhanced constitutional protection. On the contrary, the liberty of all Americans will suffer irreparable harm if a judicially manufactured right to coerced *funding* of reproductive rights is allowed to stifle rights of religion and conscience. Non-discrimination principles should never be applied in a discriminatory, unequal manner that squelches the First Amendment rights of others.

CONCLUSION

This Court should reverse the Third Circuit in Conestoga and affirm the Tenth Circuit in Hobby Lobby.

Respectfully submitted,

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KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,

v.

KATHLEEN SEBELIUS, ET AL.,
Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE TENTH AND THIRD CIRCUITS, RESPECTIVELY

Brief of *Amici Curiae* Massachusetts Citizens for Life, Inc., Massachusetts Family Institute, Inc., National Lawyers Association, Inc. and Pro-Life Legal Defense Fund, Inc. In Support of Non-Government Parties

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INTEREST OF *AMICI CURIAE*[1]

Massachusetts Citizens for Life, Inc. (MCFL), is a not-for-profit corporation organized under the laws of the Commonwealth of Massachusetts that is dedicated to furthering the protection of human life from conception until natural death. As such, MCFL is opposed to government regulations, like the one at issue here, which would mandate the provision of abortifacient drugs.

Massachusetts Family Institute, Inc. (MFI), is a not-for-profit research and education corporation organized under the laws of the Commonwealth of Massachusetts that is dedicated to strengthening the family and restoring moral principles to the public policy and cultural arenas. MFI is concerned about the ability of government to coerce people of conscience into cooperation with abortion.

The National Lawyers Association, Inc. (NLA), is a national bar organization incorporated as a not-for-profit under the laws of the State of Missouri. The NLA is dedicated to the principle that the Founding Fathers of the government of the United States of America established a governmental structure for the Nation consisting of the Declaration of Independence and the Constitution; that the Constitution is to be interpreted in the light of the principles and transcendent truths set forth in the Declaration of Independence; and that the legal community has a special responsibility to preserve and protect that structure. The NLA deems the Government's actions under the HHS mandate as an unconstitutional interference with the First Amendment rights of the citizens of this Country, both individually and as employers.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Hobby Lobby's letter evidencing such consent has been filed with the Clerk of the Court, and all other parties have granted blanket consents. Further, pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did such counsel or party make a monetary contribution to the preparation or submission of this brief. Only *amici curiae* made such a monetary contribution.

The Pro-Life Legal Defense Fund, Inc. (PLLDF), is a Massachusetts not-for-profit corporation, which provides *pro bono* legal services for the protection of human life. As such, PLLDF opposes government coercive practices, like the HHS abortifacient mandate.

SUMMARY OF THE ARGUMENT

Our argument is from history: In the American legal tradition the English colonies that would become the United States of America used corporate charters, companies, compacts and contractual agreements for religious purposes and to guarantee the free exercise of religion. These legal arrangements were civil and lay or secular in character. Although historical analogy is necessarily imprecise, the best of our legal heritage favors constitutional or at least statutory recognition of religious freedom exercised by non-ecclesiastical corporations and associative entities.

ARGUMENT

The Anglo-American legal tradition, as developed during the colonial period, contains many examples where secular legal institutions and arrangements were employed to accomplish religious purposes, specifically to safeguard minority religious beliefs and practices. Before the First Amendment revolutionized world history by guaranteeing government separation from religious establishments, and the free exercise of religion, those who were in dissent from the established Anglican Church were able to use existing civil and secular legal entities to create a space to practice their religion in accord with the dictates of their consciences.

I. The English Background of Religious Freedom Through Church Corporations Shows the Importance of Both Religious Freedom and the Corporate Form for Its Exercise.

In the first chapter of Magna Carta, the 1215 charter of the rights of Englishmen, King John proclaimed that "we ... [i]n the first place have granted to God and by this our present Charter have confirmed, for us and our heirs in perpetuity, that the English church shall be free [*quod Anglicana ecclesia libera sit*], and shall have its rights undiminished and its liberties unimpaired."[2] This "meant, of course, free under the papacy from control by kings or barons."[3] The English legal historian Frederic William Maitland called the Magna Carta "the nearest approach to an irrepealable 'fundamental statute' that England has ever had."[4] Consequently, at the beginning of English constitutionalism in the Middle Ages, there is a resounding affirmation of religious freedom as important and inviolable, much like that in the First Amendment of our own Constitution's Bill of Rights.

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[2] JAMES CLARKE HOLT, MAGNA CARTA 448-49 (2d ed. Cambridge Univ. Press 1992).

This was the first and foundational cornerstone of religious freedom of the Church from government control. It included, for example, the matter of election or choice of church personnel.[5] Of course, it was not religious freedom of the individual, or just any religious group, as we would understand it.

Indeed, one characteristic of this primordial freedom of rights and liberties is that the Church itself, its various parish churches and monasteries, as well as the universities of Oxford and Cambridge, were all considered corporations in the Middle Ages. As Maitland writes, "Now the idea of the Church as the mystical body of Christ has had an important influence on the growth of the law of corporations; it did much towards fashioning for us the anthropomorphic picture of the many members in one body."[6] The very word corporation is from the Latin *corpus*, meaning "body." Legal personhood of what William Blackstone would call "artificial persons" like corporations followed. Maitland titles his section on the subject "Corporations and Churches," which in the first edition he titled "Fictitious Persons."[7]

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[3] HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 263 (Harvard University Press 1983).

[4] 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, HISTORY OF ENGLISH LAW 173 (Lawyers Literary Club 1959). Interestingly, he notes that "The vague large promise that the church of England shall be free is destined to arouse hopes that have been dormant and can not be fulfilled." *Id.* at 172. However true that was in the English context, the promise was destined to be fulfilled in America.

[5] "[F]reedom of elections, which is thought to be of the greatest necessity and importance to the English church." Magna Carta, c. 1. HOLT, *supra* note 2, at 448-49. *See Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 565 U.S. ___, 132 S.Ct. 694, 710 (2012) ("The church must be free to choose those who will guide it on its way.")

William Blackstone, writing in the years just before the United States declared independence from England, concludes his first volume on legal persons with a chapter on corporations. He distinguishes between ecclesiastical and lay corporations:

> Ecclesiastical corporations are where the members that compose it are entirely spiritual persons; such as bishops ... These are erected for the furtherance of religion, and the perpetuating the rights of the church. Lay corporations are of two sorts, *civil* and *eleemosynary*. The civil are such as are erected for a variety of temporal purposes.[8]

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[6] 1 POLLOCK & MAITLAND, *supra* note 4, at 495.

[7] *Id.* at 486-511, 486 note 1.

[8] WILLIAM BLACKSTONE, 1 COMMENTARIES *458.

Royal colonies like Virginia and New York, where Anglicanism was the established religion, were not receptive to religious dissidents like the Quakers, Baptists, Catholics, Puritans or others. The situation in charter or proprietary colonies like Pennsylvania, Rhode Island, Maryland, and even Massachusetts, was different. There minority religious practices, other than those of the established Anglican Church, could find a home relatively free from government supervision and control. This occurred in part because these colonies were run by lay and civil companies or corporations, and not by direct royal government through the established ecclesiastical corporations of the Anglican Church.

In Massachusetts Bay Colony, the Puritans were in control, and their notion of religious freedom was limited to Puritanism. In the Plymouth Colony, thirty-five of the settler Pilgrims, who arrived in 1620 "were Puritan Nonconformists, dissenters whose Calvinist beliefs made them no longer prepared to submit to the episcopal governance and Romish teachings (as they saw it) of the established Church of England."[9]

II. Plymouth and the Mayflower Compact Were An Auspicious Beginning for Religious Freedom in the New World.

The Pilgrims came to America in search of religious freedom. They were accompanied by sixty-six non-Puritans.[10] "Before they landed, it was essential that they all sign a formal and binding agreement of some sort. Over the course of the next day, they hammered out what has come to be known as the Mayflower Compact."[11]

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[9] PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 29 (1997).

[10] *Id.*

In 1802, John Quincy Adams explained the Compact's significance at Plymouth: "This is perhaps the only instance in human history of that positive, original social compact, which speculative philosophers have imagined as the only legitimate source of government. Here was a unanimous and personal assent by all individuals of the community, to the association by which they became a nation."[12]

As Paul Johnson explains,

> What was remarkable about this particular contract was that it was not between a servant and a master, or a people and a king, but between a group of like-minded individuals and each other, with God as a witness and symbolic co-signatory. It was as though this small community, in going to America together, pledged themselves to create a different kind of collective personality, living a new life across the Atlantic.[13]

Therefore, the original contract under which the Pilgrims chose to operate was a civil, secular legal document, even if the underlying purpose was unquestionably religious.

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[11] NATHANIEL PHILBRICK, MAYFLOWER: A STORY OF COURAGE, COMMUNITY, AND WAR 40 (2006).

[12] *Id.* at 352.

[13] JOHNSON, *supra* note 9, at 30.

III. Roger Williams's Charter for Rhode Island and Providence Plantations Protected Religious Freedom in a Path-Breaking Way.

Roger Williams, the founder of the Rhode Island and Providence Plantations colony, was exiled from the Massachusetts Bay Colony for his religious dissent. Because of his own experience of religious persecution in Massachusetts, he was in favor of a broad understanding of religious freedom. On March 24, 1644, Parliament issued a charter for the four towns there, recognizing his Instrument of Government, which, after listing "various laws and penalties for specific transgressions ... added: 'And otherwise than this, what is herein forbidden, all men may walk as their consciences persuade them, every one in the name of his God.'"[14]

After the restoration of the monarch in England, Roger Williams received a charter from Charles II confirming the privileges granted in 1644. The charter said:

> No person within the said colony, at any time hereafter, shall be in any wise molested, punished, disquieted or called in question, for any difference in opinion in matters of religion, and who do not actually disturb the civil peace of our said colony; but that all ... may from time to time, and at all times

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[14] JOHNSON, *supra* note 9, at 49.

> hereafter, freely and fully have and enjoy his and their own judgments and consciences in matters of religious concernments.[15]

As Paul Johnson observes, "The creation of Rhode Island was thus a critical turning-point in the evolution of America. It not only introduced the principles of complete religious freedom and the separation of church and state, it also inaugurated the practice of religious competition."[16]

The colonial charter was the legal instrument that allowed for more extensive religious freedom in Rhode Island than elsewhere in the British Empire.

On March 13, 1658, the General Assembly reinforced the validity of the charter.[17] The General Assembly reminded the United Colonies that

> "freedom of different consciences, to be protected from inforcements was the principle ground of our Charter, both with respect to our humble sute for it, as also to the true intent of the Honourable and renowned parlement of England in grantinge of the same unto us; which freedom we still prize as the greatest hapines that men can posess in

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[15] *Id.* at 49-50.

[16] *Id.* at 50.

[17] JOHN M. BARRY, ROGER WILLIAMS AND THE CREATION OF THE AMERICAN SOUL: CHURCH, STATE, AND THE BIRTH OF LIBERTY 377 (Penguin Group 2012) (quoting General Assembly to Massachusetts, March 13, 1658, in JOHN RUSSELL BARTLETT, 1 RECORDS OF THE COLONY OF RHODE ISLAND 478 (Providence 1856-65)).

> this world." It could not allow "infringement of that chiefe principle in our charter concerning freedom of consciences."[18]

IV. William Penn and the Quakers Guaranteed Religious Freedom in Pennsylvania.

William Penn obtained what is now called Pennsylvania in compensation for a debt owed by King Charles II of England to his father, Sir Admiral William Penn.[19] Penn and his fellow Quakers strongly believed in religious freedom, and included religious toleration clauses in Pennsylvania's earliest governmental documents, the *Frames of Government*. The first Frame dates from 1682, and notably acknowledged religious tolerance in the following passage:

> That all persons living in this province, who confess and acknowledge the one Almighty and eternal God, to be the Creator, Upholder and Ruler of the world; and that hold themselves obliged in conscience to live peaceably and justly in civil society, shall, in no ways, be molested or prejudiced for their religious persuasion, or practice, in matters of faith and worship, nor shall they be compelled, at any time, to

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[18] *Id.*

[19] Historical Society of Pennsylvania, *Penn Family Papers*, http://www2.hsp.org/collections/manuscripts/p/Penn0485A.html (last visited Jan. 27, 2014).

> frequent or maintain any religious worship, place or ministry whatever.[20]

Similar language was included in a subsequent Frame of Government (1701), which was used as the *de facto* constitution for Pennsylvania for the next seventy-five years.[21] During the following decades, religious minorities such as the Huguenots, Mennonites, Amish, Catholics, Lutherans, and Jews practiced their religions openly in Pennsylvania.

V. The Calverts Sought to Guarantee Religious Freedom in Maryland.

Charles I granted the proprietary royal charter for Maryland to Cecil Calvert, Second Lord Baltimore, a Catholic.[22] The wording in the charter was vague and because of that the colony was classified as a palatinate.[23] This allowed Lord

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[20] *Art. XXXV of the Laws Agreed Upon in England in 1682 that accompanied the Frame of Government of Pennsylvania, in* THE SACRED RIGHTS OF CONSCIENCE 118 (Daniel L. Dreisbach & Mark David Hall eds., 2009).

[21] American Philosophical Society, *William Penn Charter of Privileges for the Province of Pennsylvania, 1701*, http://www.amphilsoc.org/exhibits/treasures/charter.htm (last visited Jan 27, 2014).

[22] Albert J. Martinez, Jr., *The Palatinate Clause of the Maryland Charter, 1632-1776: From Independent Jurisdiction to Independence*, 50 AM J. LEGAL HIST. 305, 309 (2008-2010); John Hartsock & Gordon Marsden, *America's First Experiment in Toleration*, 43 HISTORY TODAY, Jan. 1993, *available at* http://www.historytoday.com/john-hartsock/americas-first-experiment-toleration.

[23] Hartsock & Marsden, *supra* note 22. A palatinate state is defined as "a medieval form of political entity semi-autonomous from the crown." *Id.*

Baltimore sufficient authority to govern the colony independent of the crown.[24] With this freedom Lord Baltimore sought to establish freedom of religion in the colony. The aim was to establish a safe haven for fellow Catholics who were being persecuted by the crown. However, it soon became obvious that Catholics would be in the minority because there were not enough Catholics willing to immigrate to the New World.[25]

Once the colony was established and settlers began living in Maryland, Lord Baltimore established a policy of religious freedom. He tried to ensure that Catholics, including his brother the governor, were silent on matters pertaining to the Protestant religion.[26] The colony welcomed people of other religions besides Catholics and Anglicans, and soon Puritans, Quakers, Anabaptists, and Presbyterians began flocking to the colony.[27] This religious tolerance would continue, and in 1649 the Maryland Assembly codified religious tolerance in the *Act Concerning Religion.*[28] The Act guaranteed the freedom of worship and prohibited religious epithets by issuing harsh punishments to offending individuals.[29]

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[24] *Id.*

[25] Martinez, *supra* note 22, at 309.

[26] Hartsock & Marsden, *supra* note 22.

[27] *Id.*

[28] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1425 (1990); Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1564 (1989).

[29] Hartsock & Marsden, *supra* note 22.

VI. The Contrasting Experience in Virginia Occasioned the Expansive Views on Religious Freedom of Washington, Jefferson and Madison.

Virginia had been a royal colony since the revocation of its corporate charter in 1624, allowing the English crown to establish the Anglican Church. As a result, dissenting religions were persecuted. In contrast with the proprietary and charter colonies, where their independent corporate status allowed for greater degrees of religious freedom, direct royal government, and the resulting established church, caused Virginians of varying religious persuasions to express serious reservations about the lack of religious freedom and to adopt views more in keeping with a liberal polity.

Significantly, these Virginians, most notably James Madison and George Washington played important roles at the constitutional convention in Philadelphia in 1787. Their views, along with those of Thomas Jefferson, did much to shape our tradition of separation of church and state with a generous allowance for religious freedom and the rights of conscience.

In his 1785 "Memorial and Remonstrance against Religious Assessments," James Madison wrote,

> A just Government instituted to secure and perpetuate [public liberty] needs [an established Clergy] not. Such a government will best be supported by protecting every Citizen in the enjoyment of his Religion with the same

> equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.[30]

In 1789, when the new United States Constitution went into effect, George Washington wrote to the Annual Meeting of Quakers in September:

> I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.[31]

Thomas Jefferson, as this Court noted in *Everson v. Board of Education of Ewing Township,*[32] wrote the famous Virginia Bill for Religious Liberty, enacted in 1786, which decreed that "no man ... shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief." This Court said "that the provisions of the First Amendment ... had the same objective and were intended to provide the same protection against governmental intrusion as the Virginia statute."[33]

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[30] JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* VINCENT PHILLIP MUNOZ, RELIGIOUS LIBERTY AND THE AMERICAN SUPREME COURT: THE ESSENTIAL CASES AND DOCUMENTS 584-85 (2013).

[31] GEORGE WASHINGTON, LETTER TO THE ANNUAL MEETING OF QUAKERS (1789), *reprinted in* MUNOZ, *supra* note 30, at 601.

[32] *Everson v. Board of Education*, 330 U.S. 1, 12 (1947).

VII. Alexis de Tocqueville's *Democracy in America* Celebrated the American Tradition of Acting in Common to Pursue Commercial as Well as Religious Ends.

Alexis de Tocqueville insisted that "the respect for individual rights is essential to democracy's preservation of liberty and human dignity."[34] Tocqueville believed that an individual's right to associate with others was essential to democracy.[35] Specifically, he stated:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them. I am therefore led to conclude that the right of association is almost as inalienable as the right of personal liberty.[36]

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[33] *Id.* at 13 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Watson v. Jones*, 13 Wall. 679 (1871); *Davis v. Beason*, 133 U.S. 333, 342 (1890)).

[34] DELBA WINTHROP, INTERPRETING TOCQUEVILLE'S DEMOCRACY IN AMERICA 394 (Ken Masugi ed., 1991).

[35] *Id.* at 401.

[36] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 203 (P. Bradley ed., 1954).

He famously celebrated the freedom of association in America, a phenomenon of the private sector which mediates between the individual and the state. Corporations serve a similar function:

> Americans of all ages, all stations of life, and all types of disposition are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types--religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give us fetes, found seminaries, build churches, distribute books and send missionaries to antipodes. Hospitals, prisons, and schools take shape in that way. Finally, if they want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form an association. In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.[37]

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[37] *Id.* at 242.

VIII. The Massachusetts Bay Colony Produced a Mixed Legacy of Religious Freedom: Religious Freedom for Me but Not for Thee.

The Massachusetts Bay Colony was founded by the Massachusetts Bay Company. King Charles I granted the Company a charter in 1629 to establish the Massachusetts Bay Colony. The Company was a "group of merchants, gentry, and clergy" that sought to establish a colony along the New England coast.[38] Most of the members of this company were of the Puritan faith.[39] Underlying the granting was the knowledge that the Puritans were a direct challenge to the governmental system of England; they were growing in numbers and possessed wealth and rank.[40]

For the Puritans the venture was a religious one and not economic, as they finally had the opportunity to purify the church.[41] "The Puritan Revolution was conceived to be a restoration of the ancient liberties of Englishmen as laid down in Magna Carta and other medieval statutes and judicial decisions prior to the usurpation of supreme power over church and state by the Tudor-Stuart monarchy more than a century earlier."[42]

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[38] RICHARD S. DUNN, PURITAN AND YANKEES: THE WINTHROP DYNASTY OF NEW ENGLAND 1630-1717 6 (1962).

[39] EDMUND S. MORGAN, THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP 46 (1958).

[40] *E.g.*, DUNN, *supra* note 38, at 11.

[41] MORGAN, *supra* note 39, at 45.

[42] HAROLD J. BERMAN, LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 206 (Harvard University Press 2003).

The most interesting aspect is that they used a secular legal structure, the business company, to serve their religious freedom. In other words, their dissenting religious practices found shelter in institutions of civil, not religious, law. King Charles I's general policy left the colonization up to the company who received the charter.[43] The Massachusetts Bay Company charter followed this policy by giving the stockholders the power of ownership and government over the designated area.[44] Due to the ambiguity of the charter, the Massachusetts Bay Company was able to move its whole operation to the New World.[45]

England's toleration for the Puritan settlers soon began to diminish. The Archbishop of Canterbury, William Laud, opposed anything having to do with the Puritans.[46] As reports of the Massachusetts Bay Colony becoming separatists flowed into England, Archbishop Laud took it upon himself to attempt to revoke the charter.[47] Around this time the Massachusetts Bay Colony began to exercise its own intolerance. While not every person with opposing views was persecuted, those who were zealous and preached the opposing views were exiled or executed.[48] The intolerance towards others with opposing religious views continued despite repeated pleas from English Puritans calling for the colonists to be more tolerant.[49] In fact, around 1646-47 a group petitioned the reformed Parliament to step in to force the Massachusetts Bay Colony to be more tolerant of other religions, as England had become.[50] Despite the many pleas from England to become tolerant of other religions, the Puritans of Massachusetts continued their persecution. This trend continued until the royal charter was officially revoked in 1685.[51]

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[43] DUNN, *supra* note 38, at 27.

[44] MORGAN, *supra* note 39, at 45.

[45] *Id.* at 46. The royal charters were supposed to state where the company would hold its meetings. London was usually the location, but the Massachusetts Bay Company's charter was silent on this matter, allowing the company to move everything to the New World. *Id.*

[46] DUNN, *supra* note 38, at 30.

[47] *Id.* at 30-31 (detailing Bishop Laud's Commission for Regulating Plantations).

Around this same time King James II ascended to the crown, and the Anglican Church began to take hold of power in the colony. This would continue until the colonists revolted against the throne in what has been called the Glorious Revolution. In 1691 King William and Queen Mary granted a new charter to the Massachusetts Bay Colony. Unlike the 1629 charter, this put the colony under the power of the throne and subjected them to all English laws including the freedom of worship.[52]

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[48] *Id.* at 19-20 (discussing the exiling of Anne Hutchinson, John Wheelwright, Roger Williams, and Mary Dyer).

[49] *Id.* at 50 (discussing Sir Henry Vane's letter to John Winthrop urging the colonists to co-exist with other religions like the English Independents were doing).

[50] *Id.* at 50-51.

[51] *Id.* at 224-25.

[52] JERALD FINNEY, GOD BETRAYED, SEPARATION OF CHURCH AND STATE: THE BIBLICAL PRINCIPLES AND THE AMERICAN APPLICATION 230 (2008).

Religious freedom is not merely the right to believe whatever anyone wants to believe. Belief is in the mind, safe from even the most repressive government power. Religious freedom is the right to put religious beliefs into practice. That includes the right to spend money to support religious beliefs, as well as the right to refrain from spending money to support the religious beliefs of others. That makes the colonial experience in Massachusetts particularly instructive for the case presently before the court.

The Province of Massachusetts Bay was founded by Puritans intent on creating a just, even utopian, society. Throughout much of the 17th century dissenters were subject to serious sanctions, including heavy fines, if they did not attend the local Congregational church services on Sunday. Taxes were imposed on all inhabitants of a town for the support of the local Congregational church, whether certain individuals followed the church's teachings or not.

Restrictions on religious freedom in Massachusetts eased after the original charter was revoked and replaced with a royal charter that in theory guaranteed religious freedom. In spite of this, the colonial legislature in 1692 approved a law mandating that each town use general taxation to provide for an "able, learned orthodox minister" of the Congregational church.[53] In 1728, the legislature granted an exemption from taxes to support local Congregational ministers to Baptists and Quakers, but they had to get a special certificate denoting their status from their town clerks.[54] The member of a minority religion in his home town "was required by law to support one church and by his conscience to support another."[55] As late as the early 1800s, some residents of Massachusetts who did not attend the Congregational church were seeing a portion of their local property taxes being spent to support the Congregational minister. (Massachusetts did not formally disestablish churches until 1833.)

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[53] John D. Cushing, *Notes on Disestablishment in Massachusetts, 1780-1833,* 26 WM. & MARY Q. 169 (1969).

Seen by the lights of today's cultural and legal standards in the United States, these burdens on dissenters from the established church of colonial Massachusetts seem onerous, even absurd. But the federal government's recent attempts to force all citizens of the country to pay for health insurance that covers the cost of birth control that can induce abortion is not substantially different. Recently, the federal government has begrudgingly carved out an exemption for certain religious institutions—who have gotten a sort of 21st century version of the special certificates once given to Baptists and Quakers in colonial Massachusetts. Only certain types of religious organizations qualify for the regulatory exemption, and that by government license. But the members of secular corporations who hold the same moral beliefs and have the same scruples of conscience have so far gotten no such relief.

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[54] *Id.* at 171-72.

[55] *Id.* at 171.

CONCLUSION

In keeping with the best of our legal traditions respecting religious freedom, which include the rights of religious dissidents to operate within the secular framework of civil corporations and private-sector associations, this Court should affirm the right to religious freedom from the abortifacient mandate for family-run businesses and closely-held companies.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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In the Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL,
PETITIONERS,
v.
HOBBY LOBBY STORES, INC., ET AL.

CONESTOGA WOOD SPECIALTIES CORP. ET AL,
PETITIONERS,
v.
KATHLEEN SEBELIUS, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD AND TENTH CIRCUITS

BRIEF OF *AMICI CURIAE* STATES OF MICHIGAN, OHIO, AND 18 OTHER STATES FOR CONESTOGA, HOBBY LOBBY, MARDEL

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act protects the family businesses here that are closely-held, for-profit corporations operated consistent with religious principles that are contravened by the application of the HHS Mandate promulgated under the Affordable Care Act.

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INTEREST OF *AMICI CURIAE*

The *Amici* States have a strong interest in preserving their ability to structure the law of corporations, as this Court long has recognized. There is no general federal common law of corporations, and the *Amici* States urge the Court not to embark on the creation of such a thing. The apparent position of the federal government is that some national precept sounding either in federal corporate common law or in some sort of federal religious theory as applied to corporations precludes association in corporate form to carry out profit-seeking business in accordance with guiding religious principles. This view, which has no basis in statute or precedent, affronts fundamental concepts of federalism and the values of religious liberty that Congress sought to protect through the Religious Freedom Restoration Act (RFRA).

More specifically, to the extent that the position of the federal government rests on a notion that a for-profit company may act only to maximize profits and cannot take into account matters of corporate conscience, the premise contradicts longstanding state policies and undermines the States' traditional prerogatives to shape corporate law.

Further, the *Amici* States have a substantial interest in protecting religious liberty as one of the central features of American self-governing society. Religious liberty is a foundational freedom. Each state constitution has provisions safeguarding the religious exercise of the State's citizens. Like the federal government, many States have enacted additional laws to guarantee religious freedom.

Moreover, the States seek to foster a robust business climate in which diverse employers can succeed to the benefit of all: the States have a very real interest in the businesses and jobs that the harsh penalties of the HHS Mandate threaten to eradicate. The States seek to prevent judicial revision of RFRA that would fabricate a blanket exclusion from the statute's coverage for enterprises operated by families that are guided by their faiths as they engage in commerce. RFRA as written advances both liberty and prosperity. Without its protections, the family-owned businesses before this Court would be in jeopardy of having to shutter their facilities, lay off their employees, or operate under threat of draconian penalties in a way that violates sincerely held principles of religious faith.

The *Amici* States submit that Conestoga Wood Specialties, Hobby Lobby, Mardel, and businesses like them—that is, entities maintained to operate consistent with religious principles—may raise claims under RFRA, and that the HHS Mandate is a substantial burden on these family-owned, for-profit businesses. The *Amici* States thus urge this Court to affirm the decision of the *en banc* Tenth Circuit in *Hobby Lobby* and to reverse the Third Circuit panel majority in *Conestoga Wood* on RFRA grounds.

INTRODUCTION AND SUMMARY OF ARGUMENT

The threshold question here is whether for-profit, secular businesses may exercise religion and therefore fall within the religious liberty protections of RFRA. It is a question that is basic to American democracy. Its answer requires this Court to return to first principles. And the answer is a simple one.

Americans may form a corporation for profit and at the same time adhere to religious principles in their business operation. This is true whether it is the Hahns or Greens operating their businesses based on their Christian principles, a Jewish-owned deli that does not sell non-kosher foods, or a Muslim-owned financial brokerage that will not lend money for interest. The idea is as American as apple pie. And RFRA guarantees that federal regulation may not substantially burden the free exercise of religion absent a compelling governmental interest advanced through the least restrictive means.

Any contrary conclusion creates an untenable divide between for-profit and non-profit corporations. All sides admit that RFRA extends its protections beyond individuals to at least some corporations. Despite assumptions made by certain of the judges below, nothing in the relevant state laws restricts corporate endeavors to the sole purpose of maximizing revenue at all cost. There is and should be no general federal common law of corporations. And nothing in RFRA limits its application to administratively certified religious entities.

The argument put forward by the United States is predicated on a view that seeking profit changes everything. Not so. The Hahns and the Greens, as do others, seek to operate their family-owned businesses according to religious principles. That they seek also to earn a profit does not nullify or discredit their beliefs. The federal courts cannot rewrite state law on corporations somehow to change this reality.

The Mandate also imposes a substantial burden on these family-owned businesses. Conestoga, Hobby Lobby, and Mardel are guided by religious principles affirming the inviolability of human life, and no one questions the sincerity of those beliefs in these cases. Courts should not become enmeshed in evaluating the interpretive merits or proper doctrinal weight of religious principles. Their religious propriety is not for the courts to second guess. And the government lacks a compelling interest justifying the substantial burden it seeks to impose when the businesses adhere to these guiding religious principles. The Affordable Care Act includes several sweeping exceptions. The claim that the Mandate must be applied to entities with a sincere religious objection is belied by the fact that it already excludes tens of millions of plan participants.

Government directives cannot confine religious liberty to the sanctuary or sacristy. Such a truncated view of religion threatens to create a barren public square, empty of the religious beliefs of ordinary Americans. This is an important principle, and it protects all persons.

ARGUMENT

I. Congress did not exclude for-profit corporations from RFRA's protections.

The government's position that religion can be exercised through certain corporate forms but not others cannot appropriately be established as governmental religious theory and has no basis in the relevant state corporations laws. As the Tenth Circuit observes, "no one disputes that at least some types of corporate entities can bring RFRA claims." *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1129 (2013) (also noting that "the Supreme Court has affirmed the RFRA rights of corporate claimants, notwithstanding the claimants' decision to use the corporate form," citing *O Centro Espirita Beneficiente Uniao do Vegetal* v. *Ashcroft*, 546 U.S. 418 (2006)).

After all, Congress deliberately chose to extend the protections of RFRA not only to individuals, but to "persons." 42 U.S.C. § 2000bb(b)(2) (purpose of RFRA is "to provide a claim or defense to persons whose religious exercise is substantially burdened by government"). RFRA thus provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the test of strict scrutiny is satisfied. 42 U.S.C. § 2000bb-1(a). And Congress has made itself clear—in the very first section of the first chapter of the United States Code—that unless otherwise indicated by context, "the word[ ] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1; cf. *Mohamad* v.

Palestinian Auth., 132 S. Ct. 1702, 1707 (2012) (federal statutes and courts typically use the word "individual" when seeking "to distinguish between a natural person and a corporation").

Even the *Hobby Lobby* dissenters and the *Conestoga* panel majority, along with the government, concede that RFRA does not limit its protections to "individuals" and that, for example, "Congress clearly recognized that . . . religious organizations enjoy free exercise rights, and . . . that RFRA's reach would extend to them." *Hobby Lobby*, 723 F.3d at 1169 (Briscoe, C.J., dissenting); *Conestoga*, 724 F.3d at 385 ("other religious entities" along with churches can exercise religion); U.S. Pet. in *Hobby Lobby* at 19 (adopting Judge Briscoe's formulation and acknowledging that RFRA extends beyond individuals to reach various religious "'organizations'" and "institutions"). Nonetheless, they take the view that, while non-profits or corporations the government deems not "secular" are "able to engage in religious exercise" under RFRA, "a for-profit, secular corporation" is categorically excluded from RFRA protections. See, e.g., *Conestoga*, 724 F.3d at 388.[1] But RFRA's statutory language, universally acknowledged as extending beyond individuals, makes no such distinction. "[T]he plain language of the text encompasses 'corporations,' including ones like Hobby Lobby and Mardel." 723 F.3d at 1129.

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[1] The *Conestoga* panel majority does not analyze the RFRA question apart from its First Amendment discussion, but conflates the two issues by stating that "[o]ur conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion . . . [.so Conestoga] cannot assert a RFRA claim." *Id.*

Rather than accepting the binary choice the Dictionary Act suggests between a context in which "persons" includes corporations and one in which, contrary to general rule, "persons" excludes corporations, the government and certain of the lower court judges somehow divine that Congress intended—silently—to distinguish among different types of corporations and flatly exclude from RFRA protection those authorized by state charter to engage in for-profit commerce. Congress, they say, intended to delineate a distinction based on tax status and the IRS code. But "[t]hat line is nowhere to be found in the text of RFRA or any related act of Congress. Nor can it be found in the statute's broader contextual purpose." *Korte* v. *Sebelius*, 735 F.3d 654, 675 (7th Cir. 2013).

The textually required "interpretive presumption," cf. *Soto-Hernandez* v. *Holder*, 729 F.3d 1, 5 (1st Cir. 2013) (evaluating in another context Dictionary Act's "context" phrase), that "person" includes corporations and associations unless the context indicates otherwise is not trumped by legislative history. "'Context' here means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts, and this is simply an instance of the word's ordinary meaning . . . . If Congress had meant to point further afield, as to legislative history, for example, it would have been natural to use a more spacious phrase . . . " *Rowland* v. *California Men's Colony*, 506 U.S. 194, 199 (1993). So, ineluctably, the lack of any legislative history suggesting that some in Congress may have wanted to limit the reach of RFRA contrary to the usual Dictionary Act presumption cannot provide "context" to overcome the general rule.

Given the text of the enactment and this Court's precedents, courts may not reverse the presumption simply because Congress did not debate the presumption in enacting RFRA. Chief Judge Briscoe's *Hobby Lobby* dissent thus errs in seeking to stand the presumption on its head. 723 F.3d at 1167 (Briscoe, C.J.: "it is unreasonable to assume from Congress's silence that Congress anticipated that for-profit corporations would be covered as 'persons' under RFRA"; also making a similar countertextual argument that "[a]t the time of RFRA's passage, the Supreme Court had never addressed whether . . . a for-profit corporation possessed free exercise rights under the First Amendment").[2]

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[2] The Sixth Circuit panel decision in *Autocam Corp.* v. *Sebelius*, 730 F.3d 618 (6th Cir. 2013), also acknowledges that RFRA's "legislative history makes no mention of for-profit corporations." *Id.* at 627. But from this lack of evidence, the Sixth Circuit concludes: "This is a sufficient indication that Congress did not intend the term 'person' to cover entities like Autocam when it enacted RFRA." *Id.* Jurists in equally good faith could conclude precisely the opposite—that the absence of any legislative history that Congress sought to exclude for-profit corporations proves that the government has failed to overcome the presumption that they qualify as "persons." Regardless, the concept of Congress legislating through silence in legislative history presents a treacherous path, and the *Amici* States urge that the prudent course is to rely on what Congress actually said in the statute that it passed.

The government, confronted with the acknowledged application of RFRA to certain corporations, and unable to point to any enactment or even congressional statements drawing its proposed for-profit/non-profit distinction in the RFRA context, instead leans upon an apparent amalgam of governmentally determined religious theory and a federal gloss on state corporations law. The government's position errs both in suggesting that religious belief cannot be practiced in a commercial endeavor, and in urging federal courts to superimpose onto state law a concept that religious practice somehow is incompatible with state law principles of limited liability (principles that do not hinge on profit status).

Because the government's position appears to rest on a mishmash of religious opinion and state corporate law apprehensions, it is useful to unpack what analytically should be separate components.

A. The government can establish no universal religious principle excluding the for-profit corporate form as a "means" for the practice of religion.

The record is unequivocal that the devout Christian Mennonite family that owns Conestoga Wood and the devout Christian family that operates Hobby Lobby and Mardel understand as a matter of their religious faiths that their family companies provide a "means by which individuals [should] practice religion" (to use a formulation of the *Conestoga* panel majority, 724 F.3d at 386). "It is undisputed that the Hahns are entirely committed to their faith, which influences all aspects of their lives. They feel bound, as the district court observed, 'to operate Conestoga in accordance with their religious beliefs and moral principles.'" 724 F.3d at 390 (Jordan, J., dissenting) (quoting *Conestoga Wood Specialties Corp.* v. *Sebelius*, 917 F. Supp. 2d 394, 402 (E.D. Pa. 2013); cf. 724 F.3d at 389 ("our decision here is in no way intended to marginalize the Hahns' commitment to the Mennonite faith"); *Hobby Lobby*, 723 F.3d at 1120, 1121-22 (Hobby Lobby and Mardel are closely held family businesses whose owners "operate them according to a set of Christian principles," for "[t]he Greens have organized their businesses with express religious principles in mind").

The government and the judges who have adopted its position provide no support for their implicit assumption that while the non-profit corporate form may provide a "means by which individuals practice religion," the for-profit corporate form cannot. See *Conestoga*, 724 F.3d at 386 ("That churches—as means by which individuals practice religion—have long enjoyed the protections of the Free Exercise Clause is not determinative of the question of whether for-profit, secular corporations should be granted these same protections"). Indeed, Chief Judge Briscoe's *Hobby Lobby* dissent finds the (religious) proposition that anyone could understand operation of "a successful for-profit corporation" as a "form of evangelism" to be "most remarkabl[e]." 723 F.3d at 1172. A judge is entitled, of course, to her own religious views. But the *Amici* States submit that what is truly "remarkable" in our pluralistic society is that the government would seek to enshrine this theological conclusion as the basis for regulation.

After all, the question of what sort of corporate entity may provide a "means by which individuals practice religion" would seem intrinsically a religious one and not readily or appropriately susceptible of government determination. And to any extent that it might be fitting for government to ponder the matter, some have found it far easier to conceive of religious views that would understand all aspects of endeavor as a "means by which" to practice religion than to identify any certain religion that insists that religious practice be confined exclusively to church services. "At bottom, the government's argument is premised on a far-too-narrow view of religious freedom. Religious exercise is protected in the home and the house of worship but not beyond. Religious people do not practice their faith in that compartmentalized way; free exercise rights are not so circumscribed." *Korte*, 735 F.3d at 681.

Because the Hahns and the Greens believe that their religions require that they live out their faiths in all their walks of life, it is not clear by what principle the government concludes that church corporations may provide a "means by which" these Americans may practice their religion but their family-held businesses cannot. To whatever extent this unexplained conclusion is advanced as a matter of religious doctrine, the lower court judges who have adopted it exceed their proper scope in decreeing on the subject. As this Court has underscored: "Courts are not arbiters of scriptural interpretation." *Thomas*

v. *Review Board of Indiana Employment Sec. Division*, 450 U.S. 707, 716 (1981).

The *Amici* States have a strong interest in not having the religious views of their citizens evaluated for correctness or orthodoxy by the government or the federal courts. And Congress has protected that interest through RFRA, defining the protected "exercise of religion" broadly as "any exercise of religion, whether or not compelled by or central to, a system of religious belief." 42 U.S.C. § 2000bb-2 (referencing 42 U.S.C. § 2000cc-5's definition). If it is the view of at least some religions, or more precisely some religious adherents, that religion is to inform all aspects of one's life and can be practiced behind the checkout counter at a wood-products store, the kosher deli, or the local family bookstore, it is not for the government to gainsay such belief.

The only further light that supporters of the government's position shed on the religious theory component of their analysis in the determinations below is found in the *Conestoga* panel's quotation from the reversed district court opinion in *Hobby Lobby*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012), rev'd en banc, 723 F.3d 1114 (10th Cir. 2013), that "[g]eneral business corporations do not . . . exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors." 724 F.3d at 385. But the fact that corporations can act only through human agency in no way distinguishes for-profit corporations from the non-profits and churches that the panel concedes can exercise religion. Churches do not pray or "observe the sacraments or take other religiously-motivated actions separate and apart" from their individual actors any more than Conestoga or Hobby Lobby or Mardel do, and RFRA protections extend to guard their corporate religious exercise precisely to safeguard the religious liberties of the "individual actors" involved. See *Hobby Lobby*, 723 F.3d at 1136 ("The Church of Lukumi Babalu Aye, Inc., for example, did not *itself* pray, worship, or observe sacraments—nor did the sect in *O Centro*. But both certainly have Free Exercise rights.") (emphasis in original).

People commonly associate to exercise religion, and religion can be exercised through the corporate form. See, e.g., *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 525 (1993) ("[The] Church of the Lukumi Babalu Aye, Inc. is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion."). And neither the *Conestoga* panel majority nor the district court *Hobby Lobby* opinion on which it relies ever explains how any corporate entity—including those that they and the government acknowledge do qualify for RFRA protection—can exercise religion apart from the direction and management of the human beings who participate in them. That is the way that all entities work.

Similarly, *Conestoga's* related suggestion that corporations are excluded from RFRA protection because they cannot "'believe' at all," 724 F.3d at 385 (quoting implication from Judge Briscoe's *Hobby Lobby* dissent), again fails to reckon with the universal acknowledgment that RFRA protects churches and other non-profit religious corporations. Nor can the suggestion be reconciled with decades of precedent that the right to express corporate views (views held and shared corporately, even if deemed not "believed") indeed is constitutionally protected. Cf. *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).[3]

As Judge Jordan's *Conestoga* dissent notes, "[o]f course, corporations do not picket, or march on Capitol Hill, or canvas door-to-door for moral causes either, but the [m]ajority would not claim that corporations do not have First Amendment rights to free speech or to petition the government. Corporations have those rights . . . because we are concerned in this case with people, even when they operate through the particular form of association called a corporation." 724 F.3d at 398 n.14.

Thus, the government's position rests on what the *Conestoga* majority identifies as a failure to "see how a for-profit 'artificial being, invisible, intangible, and existing only in contemplation of law,' . . . that was created to make money could exercise such an inherently 'human' right." 724 F.3d at 385 (citation omitted). Because all corporations are in this sense "artificial . . .. invisible, intangible, and existing only in contemplation of law," the only distinction the panel majority identifies between (covered) non-profits and for-profit entities to which the government says RFRA protections do not extend is found in the phrase "created to make money." But to say that for-profit corporations are not covered because they are for-profit is not so much an explanation as a tautology. *Conestoga* provides no real explanation for the analytic distinction. As the Tenth Circuit observes, no legal principle precludes entering "the for-profit realm intending to demonstrate to the marketplace that a corporation can succeed financially while adhering to religious values. As a court, we do not see how we can distinguish this form of evangelism from any other." *Hobby Lobby*, 723 F.3d at 1135. And an individual Judge's hesitation over that religious concept is not an appropriate basis for legal decision and is trumped in any event by the text of RFRA.

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[3] Moreover, the law is accustomed to looking to the conduct and intent of humans in assessing corporate purposes or intent. See, e.g., M. Rienzi, *God and the Profits: Is There Religious Liberty For Money-Makers?* 21 Geo. Mason L. Rev. 59, 112, 116 (2013). (recognizing that for-profit corporations can form criminal intent, be found liable for religious discrimination, assert rights under the Establishment Clause, and act on corporate ethical and environmental views: "the corporate form does not foreclose assertion of . . . RFRA rights," and there is "no principled or permissible reason to treat religious exercise in [a] . . . disfavored manner").

Surely no judicially cognizable universal religious principle marks "profit" as invalidating any and all religious exercise. Cf. *Thomas*, 450 U.S. at 709-11; *Sherbert* v. *Verner*, 374 U.S. 398, 399-400 (1963). At least for government purposes under RFRA, "[t]here is nothing inherently incompatible between religious exercise and profit-seeking." *Korte*, 735 F.3d at 681. On the flip side, too, generally "[t]he fact that a corporation is one not for profit does not mean that its activities or enterprises may not be conducted for gain, profit, or net income so long as it is used for the purposes set forth in its articles and there is no pecuniary gain to the incorporators or members nor distribution of income or profits to them." 1 Fletcher Cyc. Corp. §68.05.

RFRA applies broadly to any sincere religious exercise and even in the context of generally applicable and neutral regulation. 42 U.S.C. §2000bb-1(a). Nothing in its text begins to suggest that Congress intended a carve-out based, for example, on whether Mardel elects to sell its Bibles at a price-point that yields a monetary "profit," or at a price that yields a loss. The government to date has not offered any citation supporting the proposition that religion is so alien to the marketplace that it never can be exercised in commercial pursuits. Nonetheless, "[o]n the government's understanding of religious liberty, a Jewish restaurant operating for profit could be denied the right to observe Kosher dietary restrictions. That cannot be right." *Korte*, 735 F.3d at 681.

What remains of the government's theory depends, then, on the view that some nationally applicable theory of the law of corporations bars for-profit corporations from pursuing any motive beyond profit seeking.

B. The federal judiciary should not impose on the state law of corporations a rule mandating that for-profit corporations may pursue only policies best calculated "to make money."

Just as "profit" is not a dirty word that automatically should discredit the values by which an enterprise is operated, neither is it necessarily the exclusive animating reason for corporate existence of family-owned businesses such as Conestoga, Hobby Lobby, and Mardel. States do not generally require for-profit corporations to reject all goals that do not maximize revenues, and the government points to no federal law to that effect.

Rather, states including Pennsylvania and Oklahoma (the states of incorporation of the companies at issue here) allow corporations to be formed and operated for lawful purposes including the pursuit of their owners' conception of the public good in the business context. The federal courts should not deem pursuit of such higher ends to be somehow inconsistent with a hope of remuneration in the here and now. So long as they act consistent with their fiduciary responsibilities to shareholders, corporate charters, and other applicable requirements, corporate directors may lead their companies to pursue a wide variety of missions. See, e.g., 15 Pa. Cons. Stat. § 1715(a)(1) (explicitly authorizing corporate directors to "consider to the extent they deem appropriate" factors including the effects of any corporate action not only on the Hahn family as shareholders and their employees and customers, but upon the broader communities in which Conestoga operates). Federal courts should not engraft onto state law new constraints restricting all corporate policies solely to those best calculated "to make money." Cf. *Conestoga*, 724 F.3d at 385.

Significantly, neither the government nor the judges below who adopt its position identify any provision of Pennsylvania or Oklahoma law that precludes a corporation from operating according to guiding religious principles agreed upon by its ownership. The *Amici* States also are aware of no such relevant law. Cf. 15 Pa. Cons. Stat. §1301 (business corporations may be incorporated "for any lawful purpose or purposes"), §1501 (business corporations given "the legal capacity of natural persons to act"); 18 Okl. St. §1005(B) (corporation may be incorporated or organized "to conduct or promote any lawful business or purposes" not barred by state law), §1016(9) (corporations may contribute to the public welfare). Hence, family-owned companies that sell products and create jobs may be operated legally, as a general matter, according to agreed-upon guiding religious principles of their owners regardless of whether such companies are organized under Pennsylvania's or Oklahoma's general business or non-profit statutes. And RFRA ensures that the guiding religious principles under which they are operated can be overridden by federal dictate only where that federal policy satisfies strict scrutiny.

For example, a corporation formed to foster "green energy," as part of its ownership's commitment to ecological stewardship, should not be barred for that reason by some sort of federal common law of corporate responsibility from seeking to earn a profit. The states are fully entitled to calibrate their laws on corporations to acknowledge and account for that exercise of corporate citizenship, and to determine that doing so in no way undermines their legal structures. And the government does not go so far as to suggest that Pennsylvania or Oklahoma law must constrain closely-held family companies to be guided by principles of social conscience only to the extent that those guiding principles eschew religion. Cf. *Thomas*, 450 U.S. at 718-19.

Yet the *Conestoga* panel majority reasons that to hold that a for-profit corporation can engage in religious exercise as defined by RFRA "would eviscerate the fundamental principle that a corporation is a legally distinct entity from its owners." 724 F.3d at 389. What the panel majority does not explain is—why? As the majority notes, corporations pursue the freedom of speech with some regularity, *id.* at 400; the victory achieved in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), for example, has not "eviscerate[d]" the principles of corporate law. An editorial page may reflect the views of individual members of its board, and no one suggests that free speech accommodations in the law of libel demand surrender of a newspaper company's limited liability as some sort of judicially ordained fair trade. The *Amici* States find no provision of Pennsylvania or Oklahoma law suggesting that limited liability and operation of a family business according to religious principles may not go hand-in-hand.

Again, this is not a judgment for federal courts to be making. The *Conestoga* majority draws on no provision of Pennsylvania law in decreeing that corporations organized for profit cannot—because they operate under limited liability rules that extend also to non-profit corporations—exercise religion in following guiding religious principles established by their ownership. Rather, the panel majority appears to adopt a general common law rule to that effect.

But as this Court has observed, there is no general federal common law of corporations. *Federal Election Comm'n* v. *NRWC*, 459 U.S. 197, 204 (1982); *Burks* v. *Lakser*, 441 U.S. 471, 478 (1979) ("the first place one must look to determine the powers of corporate directors is in the relevant State's corporation law . . and it is state law which is the font of corporate directors' powers"). And Pennsylvania law says that non-profit status—which the panel majority finds to be compatible with religious exercise—does not preclude limited liability treatment for corporate participants. 15 Pa. Cons. Stat. § 5553 ("A member of a nonprofit corporation shall not be liable, solely by reason of being a member . . . for a debt, obligation, or liability of the corporation"). Oklahoma law is much to the same effect. 18 Okl. St. §§ 865-66, 1124(B) (corporate directors). See also *Korte*, 735 F.3d at 675 ("we take it as both conceded and noncontroversial that the use of the corporate form and the associated legal attributes of that status—think separate personhood, limitations on owners' liability, special tax treatment—do not disable an organization from engaging in the exercise of religion within the meaning of RFRA").

Moreover, a federal position that corporations can and should display no corporate conscience is odd given developments in social organization and state law regulation of corporations over the last century. General trends in state law permitting or favoring good corporate citizenship were well underway by the 1930s, and it was commonplace by the 1950s for state courts to observe that "modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate." See, e.g., *A.P. Smith Mfg Co.* v. *Barlow*, 98 A.2d 581, 586, 590; 13 N.J. 145 (N.J. 1953) (reviewing trends and literature, and lauding corporation's "long-visioned corporate action in recognizing and voluntarily discharging its high obligations as a constituent of our modern social structure"); cf. *Hobby Lobby*, 723 F.3d at 1147 (Hartz, J., concurring) ("no law requires a strict focus on the bottom line, and it is not uncommon for corporate executives to insist that corporations can and should advance values beyond the balance sheet and income statement," citing ALI Principles of Corporate Governance: Analysis and Recommendations § 2.01(b) (2012)).

Thus, and contrary to the implication of Chief Judge Briscoe's dissent in *Hobby Lobby*, see 723 F.3d at 1171, these developments in the States were underway many decades before the enactment of RFRA. Yes, a century ago it well may have been the law in Oklahoma that every "corporation must be organized or incorporated for a particular purpose," 723 F.3d at 1171 (Briscoe, C.J. dissenting and quoting from *Lankford* v. *Menefee*, 45 Okla. 228, 145 P. 375, 378 [1914]), but today the law of the State is that: "It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the general corporation law of Oklahoma, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any." 18 Okl. St. § 1006(A)(3). The Oklahoma statute—that is, the law as duly adopted and updated by the people's elected representatives, pursuant to their authority under our federalist system—thus seems quite distinct from Chief Judge Briscoe's conception (advanced without citation on that score to current Oklahoma statute) that a corporation must be organized for a purpose specified with particularity and that "the specific purpose for which this new entity is created matters greatly to how it will be categorized and treated under the law." 723 F.3d at 1171. That unsupported proposition, contrary to the thrust of written state law, should not be used as the basis for a new federal common law of restricted, pecuniary corporate purpose.

In sum, RFRA protects religious organizations, "but it does not stop there. The remedy is available to any sincere religious objector—individuals and organizations alike—and its organizational applications are not limited to religiously affiliated organizations. The exemption is comprehensive in that it applies across the United States Code . . and restrains the conduct of all federal officials. But it can be overridden by a sufficiently strong governmental interest." *Korte*, 735 F.3d at 678-79. And the parade of horribles the government summons to urge against honest application of the law both ignores the statute's compelling interest provision and expresses a post-enactment policy disagreement with Congress's application of RFRA to rules of general applicability. "The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make an exception for everybody, so no exceptions. But RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rules of general applicability' . . . . Congress determined that the legislated test 'is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.' §2000bb(a)(5)." *O Centro*, 546 U.S. at 436.

And "the government's shell game," see *Gilardi* v. *U.S. Dep't of HHS*, 733 F.3d 1208, 1214 (D.C. Cir. 2013), in arguing that closely-held, for-profit companies are precluded from claiming protection under RFRA while the family ownership is also unprotected because only the company is penalized just highlights the flaws in its understanding of RFRA. It may not be much consolation to the Hahn family that the *Conestoga* "decision . . . is in no way intended to marginalize the Hahns' commitment to the Mennonite faith," 724 F.3d at 389, when it leaves them with little option but to violate their sincere understanding of that faith (through actions by which they must direct the company as coerced by ruinous fines). It places the Hahns and the Greens into a Catch-22.

The *Conestoga* majority—after ballyhooing the notion that this Court has construed free exercise "'to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority,'" see *id.* at 385 (emphasis and citation omitted)—says that RFRA provides no relief because the "family chose to incorporate and conduct business through Conestoga, thereby obtaining both the advantages and disadvantages of the corporate form," *id.* at 388. Coupled with the majority's emphasis that free exercise is "an inherently 'human right," *id.* at 385, such reasoning shows Congress's wisdom in extending RFRA protections to "persons," including family-owned businesses and other entities operated according to agreed-upon religious principles.

The *Conestoga* panel majority's contrary view would mean that RFRA scrutiny would not be triggered if federal regulation required family businesses—in violation of their guiding religious principles, but absent any showing of a compelling governmental purpose—to be open on their Sabbath, to distribute materials they deem blasphemous, or to market meat products antithetical to their religious observance. Cf. 724 F.3d at 405 (Jordan, J., dissenting) ("the Supreme Court's decisions establish that Free Exercise rights do not evaporate when one is involved in a for-profit business"). The oddity of such results under a statute designed to protect "Religious Freedom" strongly signals the fallacy of this reasoning. But again, RFRA extends its protections to "persons" as that term is commonly employed throughout federal law, and does not in any way cast out certain businesses based on their tax status. Cf. *Elgin* v. *Dep't of Treasury*, 132 S. Ct. 2126, 2134-35 (2012) ("That Congress declined to include an exemption . . indicates that Congress intended no such exception").

In short, and as indicated "as a matter of statutory interpretation," "Congress did not exclude for-profit corporations from RFRA's protections. Such corporations can be 'persons' exercising religion for purposes of the statute." *Hobby Lobby*, 723 F.3d at 1129. The government's misguided effort to circumscribe religious liberty to only religious organizations is similar to confining religious practice to worship, as if religious principles may not animate a corporation—or a person—in public and commercial life. It is akin to suggesting that only ordained religious officials should express religious views. But this is a misunderstanding of religion and religious freedom.

II. The HHS Mandate does not pass muster under RFRA.

A. The HHS Mandate imposes a substantial burden on the free exercise of religion of Conestoga, Hobby Lobby, and Mardel as family-owned businesses.

The courts are not equipped or empowered to second-guess an adherent's own assessment of the requirements of his religious beliefs. See *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981) ("it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith"); *United States* v. *Ballard,* 322 U.S. 78, 86 (1944) (adherents "may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others"). This deference is not influenced by corporate form. See *O Centro,* 546 U.S. at 425 (role of an hallucinogenic tea in the sacramental system of the a Brazilian Christian Spiritist sect); *Church of the Lukumi*, 508 U.S. at 524-25 (Santeria religion).

Congress passed RFRA to ensure that courts would apply strict scrutiny to generally applicable laws that substantially burden religion. "[L]aws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise." 42 U.S.C. § 2000bb(a)(2).

The two cases that RFRA cites favorably, *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), each examined state laws of general applicability and their effect on the religious exercise of the plaintiffs at issue. In *Sherbert*, this Court determined that a South Carolina law that disqualified from unemployment benefits a Seventh Day Adventist who refused to work on Saturdays had to yield to her free exercise of her religion. 374 U.S. at 410. Even though this was an "incidental burden," i.e., an unintended effect, the State was required to come forward with a compelling interest to justify it. *Id.* at 403. Similarly, in *Yoder*, a Wisconsin law obligated compulsory education through age 16. 406 U.S. at 207. This statute was an unconstitutional burden on Amish religious exercise, despite its general applicability. *Id.* at 220.

RFRA's general standards for determining whether a law "substantially burdens" a person's exercise of religion are informed by *Sherbert* and *Yoder*. The "disqualification for benefits" in *Sherbert* was a substantial burden on religious exercise:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. [*Sherbert*, 374 U.S. at 404.]

The same is true here. The HHS Mandate requires these family-owned businesses either to abandon their commitment to their guiding religious principles or face ruinous fines. For Conestoga and the Hahns, the yearly fine approaches $35 million, while for Mardel and Hobby Lobby and the Green family, the fine would be almost $475 million each year. These costs obviously dwarf the $5 fine at issue in *Yoder*.

The record below in each case shows religious belief sincerely held. In such circumstances, courts applying RFRA should acknowledge the religious claims of the family businesses and defer to their understanding of their own religious doctrine. Such deference is consistent with the Court's precedent. *Thomas*, 450 U.S. at 716.

In contrast, in *Conestoga,* the district court engaged in its own assessment of religious doctrine to determine whether the mandate is a substantial burden. It erred in investigating the Hahns' understanding of their Mennonite faith as Christians. The district court determined that the Mandate did not impose a real burden on Conestoga or on the Hahns:

> [A]ny burden imposed by the regulations is too attenuated to be considered substantial. A series of events must first occur before the actual use of an abortifacient would come into play. These events include: the payment for insurance to a group health insurance plan that will cover contraceptive services . . . ; the abortifacients must be made available to Conestoga employees through a pharmacy[ ]; and a decision must be made by a Conestoga employee and her doctor[.] [Pet. App. 35b-36b.]

Likewise in *Hobby Lobby,* the district court reached the same conclusion:

> [T]he particular burden of which plaintiffs complain is that funds . . . might, after a series of independent decisions by health care providers and patients covered by [Hobby Lobby's] plan, subsidize someone else's participation in an activity that is condemned[.] [Pet. App. 80a-81a.]

The courts adopted these positions at the invitation of the government, which claims that any burden here is "too attenuated" to qualify. But such analysis misapprehends the religious objection to providing the mandated insurance in the first instance. The family businesses object here not to the use of the insurance by others, but to themselves being compelled to provide it. See *Korte*, 735 F.3d at 685. ("'The religious-liberty violation at issue here inheres in the coerced coverage …, not—or perhaps more precisely, not only—in the later purchase or use'.") (emphasis omitted).[4]

As an example, consider a Quaker business's commitment to pacifism and its owner's objection to handguns. If a mandate required the business either to provide handguns to employees for self-defense or to contract with a weapons supplier to provide a handgun, that would be understood as something different from paying the employees' wages. To put it another way, it is one thing for employees to use their paycheck to buy alcohol. It is an entirely different matter to compel the employer to provide the beer.

---

[4] Indeed, the government seems to have understood while arguing in other contexts that the religious liberty interest here relates to religious objections to provision of the specifically mandated insurance coverage at issue. Consider, for example, the government's memorandum to this Court from earlier this year opposing the emergency application for injunction sought by the Little Sisters of the Poor in *Little Sisters of the Pooor v. Sebelius*, (No. 13A691) (memo at 2, emphasizing government's view that "[a]pplicants are not, however, situated like the for-profit corporations that brought suit in *Hobby Lobby Stores, Inc. v. Sebelius* …. [because applicants] are eligible for religious accomodations [sic] set out in the regulations that exempt them from any requirement 'to contract, arrange, pay, or refer for … coverage'").

Regardless, a federal court should not even have engaged in the weighing of religious doctrine. Rather, the courts should have accepted the good-faith belief of these family businesses that the religious principles on which they operate prohibited them not simply from using abortion-inducing drugs but also from including those drugs in their health plans under the HHS Mandate. *Thomas*, 450 U.S. at 715 (courts could not inquire into whether "the line [plaintiff] drew was an unreasonable one"); *Hernandez* v. *Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question . . . the validity of particular litigants' interpretations of [the] creeds [of their faith]."). See also, e.g., *Roman Catholic Archdiocese of N.Y.* v. *Sebelius*, ___ F. Supp.2d ___; 2013 WL 6579764 at *14 (ED NY, December 16, 2013) ("The Government feels that the accommodation sufficiently insulates plaintiffs from the objectionable services, but plaintiffs disagree. Again, it is not the Court's role to say that plaintiffs are wrong about their religious beliefs").

The effort at this kind of line drawing was also rejected by this Court in *United States* v. *Lee*, 455 U.S. 252 (1982). In *Lee*, the issue was whether the Social Security tax imposed an unconstitutional burden on the Amish, and the Court concluded that because "the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their free exercise rights." *Id.* at 257. The United States had argued that the taxes did "not threaten the integrity" of their religious system. *Id.* at 257. But this Court held that such an argument was outside the court's "competence." and the Court deferred to the community's judgment on the question. *Id.* See also *Hobby Lobby*, 723 F.3d at 1139 ("*Lee* similarly demonstrates that the burden analysis does not turn on whether the government mandate operates directly or indirectly").

As the Seventh Circuit spells out, the "government's 'attenuation' argument . . . .. purports to resolve the religious question underlying these cases: Does providing this coverage impermissibly assist the commission of a wrongful act in violation of the moral doctrines of the [plaintiffs' faith]. No civil authority can decide that question." *Korte*, 735 F.3d at 685.

Once the actual religious free exercise right at stake is credited, the "substantial burden" imposed on that religious exercise is apparent—to exercise their religion by refusing to follow the HHS Mandate costs them heavy fines. See *Yoder*, 406 U.S. at 208, 218. There is no suggestion that the claim here is so "bizarre" or "clearly nonreligious in motivation" to be a spurious claim. *Thomas*, 450 U.S. at 715. Instead, these cases are like *Yoder*, where the Supreme Court determined that the requirement for Amish children to attend compulsory second education would "contravene[ ] the basic religious tenets and practices of the Amish faith." *Yoder*, 406 U.S. at 218. Likewise, the provision of the products at issue here would contradict the religious tenets of the Hahns and Greens as reflected in their businesses' formal policies.

In these cases, just as in *Korte*, "the federal government has placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate. Refusing to comply means ruinous fines." 735 F.3d at 683-84. And it is no answer to suggest that the companies can lower their fines to some extent by dropping employee health coverage altogether. Cf. *Hobby Lobby*, 723 F.3d at 1125 (penalties then would be some $26 million per year). Not only would the penalties still be astronomical (at millions of times the amount of the fine involved in *Yoder*), but the companies further would be forced to surrender the ability to provide a competitive benefit package for their employees. The government cannot insist upon this sort of trade-off. See, e.g., *Thomas*, 450 U.S. at 717-18 (conditioning receipt of important benefit on conduct contrary to religious faith substantially burdens religious exercise: "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial"); *Hobby Lobby*, 723 F.3d at 1141 (coerced surrender of insuring ability is a "Hobson's choice" and therefore imposes a substantial burden).

B. The United States has exempted others and does not have a compelling interest in applying this mandate to the family businesses here.

In *O Centro*, this Court outlined the proper framework for determining whether a compelling governmental interest justifies a substantial burden on a person's religious liberty. 546 U.S. at 424-31. The Court was careful to note that this examination requires an inquiry into whether there is a compelling interest to apply the government mandate to the "*particular* claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31 (emphasis added).

This focusing of the inquiry undercuts the government's claim here, where the Mandate already contains multiple categories of employers to which the mandate does not apply, including employers with fewer than 50 employees and "grandfathered" plans with millions of plan participants. See *Newland* v. *Sebelius*, 881 F Supp.2d 1287, 1298 (D. Colo., 2012) ("this massive exemption [for grandfathered plans] completely undermines any compelling interest in applying the preventive care coverage mandate to Plaintiffs"). See also *Legatus* v. *Sebelius*, 901 F.Supp.2d 980, 993 (E.D. Mich. 2012). The particular businesses here have fewer than 15,000 employees total. Conestoga with approximately 1,000 employees and Hobby Lobby and Mardel with some 13,000.

In *O Centro*, 546 U.S. at 423, the government urged as a compelling interest "the *uniform* application of the Controlled Substances Act, such that no exception to the ban on use of the hallucinogen can be made to accommodate the sect's sincere religious practice." *Id.* (emphasis in original). This Court rebuffed the attempted uniformity justification because the Act itself contemplated exceptions since the Attorney General was authorized to grant "waiv[ers]" where consistent with the public health and safety. *Id.* at 432. Likewise here, the government claims that the Mandate must be "comprehensive," even while exempting or excluding huge numbers of businesses.

As for businesses with fewer than 50 employees, the 2007 economic census (compiled every five years) indicates that there were more than 20 million paid employees at firms nationwide with fewer than 20 employees. See Table 2b "Employment Size of Employer and Nonemployer Firms, 2007."[5] In other words, there are tens of millions of U.S. employees whose employers are not required to comply with the Mandate, not even considering the broad "grandfathering" provision. And the government "has not offered contrary estimates of individuals covered by exempt health plans" to counter the estimates based on governmental sources that some 50 million to more than 100 million people are covered by exempt health plans. *Hobby Lobby*, 723 F.3d at 1124.

"Since the government grants so many exceptions already, it can hardly argue against exempting these plaintiffs." *Korte*, 735 F.3d at 686. The fact that small employers that account for millions of employees are not subject to the ruinous penalty provisions is fatal to the government's claim that the federal mandate must be imposed on all other businesses, including the family-owned businesses here. The assertion that there can be no exceptions to this rule—even where it burdens the free exercise of religion— rings hollow. *O Centro*, 546 U.S. at 431. Even considering other businesses that are similarly-situated with the businesses here who may raise these claims, the number of businesses operated according to such religious principles pales in comparison with the other groups that are beyond the reach of the penalties.

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[5] This United States Census Bureau document may be found at: http://www.census.gov/econ/smallbus.html (last visited on January 17, 2014).

Equally important, other less restrictive means are available to the government. The Seventh Circuit explained in *Korte* that the government can provide a "public option" for the insurance. it can provide tax incentives for suppliers to provide these medications and services at no cost to consumers, and it can provide tax incentives to consumers. 735 F.3d at 686. "No doubt there are other options." *Id.*

Thus. the genius of RFRA is to safeguard religious liberty, protecting persons from substantial burdens except when the government has a compelling justification that can be achieved by no other practical means. That justification has not been demonstrated here for these family-owned businesses and for others like them. This Court should vindicate their religious freedom and grant relief.

CONCLUSION

State *Amici* respectfully ask that this Court affirm the decision of the *en banc* Tenth Circuit in *Hobby Lobby* and reverse the decision of the Third Circuit panel in *Conestoga* on the basis of the federal Religious Freedom Restoration Act.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

United States Senators Patty Murray, Max Baucus, Barbara Boxer, Sherrod Brown, Maria

---

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae*, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have given their consent to this filing in letters that have been lodged with the Clerk.

Cantwell, Benjamin J. Cardin, Richard J. Durbin, Dianne Feinstein, Tom Harkin, Tim Johnson, Patrick J. Leahy, Carl Levin, Edward J. Markey, Robert Menendez, Barbara A. Mikulski, Harry Reid, Bernard Sanders, Charles E. Schumer, and Ron Wyden respectfully submit this brief as *amici curiae*.

Amici were all Members of Congress at the time of enactment *both* of the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb–2000bb-4), and the Patient Protection and Affordable Care Act (Affordable Care Act), Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. Because *Amici* contributed to the passage of both bills, they are uniquely positioned to discuss the legislative history and intent of RFRA—and most qualified to explain how exempting secular, for-profit corporations from the Affordable Care Act's contraceptive-coverage requirement is inconsistent with the plain language and legislative intent of RFRA, and undermines the government's compelling interest in providing women access to preventive health care under the Affordable Care Act.

The Tenth Circuit's overly expansive decision will permit a secular, for-profit corporation's owners or shareholders to impose their religious beliefs on employees by denying female employees access to preventive health care, including insurance coverage for contraception. Congress could not have anticipated, and did not intend, such a broad and unprecedented expansion of RFRA. Nor did Congress intend for courts to permit for-profit corporations and their shareholders to use RFRA to deny female employees access to health care benefits to which they are otherwise entitled. The Court should clarify that RFRA does not allow a secular, for-profit corporation to deny health coverage to their employees based on the religious objections of the corporation's owners.

SUMMARY OF ARGUMENT

1. The Tenth Circuit in *Hobby Lobby* grounded its decision extending free-exercise rights to secular, for-profit corporations in an erroneous interpretation of Congressional intent with respect to the Religious Freedom Restoration Act of 1993 (RFRA), codified at 42 U.S.C. § 2000bb–2000bb-4. As the Tenth Circuit saw it, Respondents Hobby Lobby and Mardel are "persons" under RFRA. The court then found that the contraceptive-coverage requirement imposed a substantial burden on Hobby Lobby and Mardel because they must choose either to compromise their religious beliefs or to pay significant penalties for failing to comply with the Patient Protection and Affordable Care Act (Affordable Care Act). The court deemed the government's interest in safeguarding public health and achieving gender equality not sufficiently compelling to justify such burdens.

The Tenth Circuit's decision runs afoul of both a plain-text reading of RFRA and RFRA's extensive and informative legislative history.

Congress passed RFRA to advance a single limited purpose: to restore the compelling-interest test to government actions that burden the free exercise of religion. The test Congress reinstated through RFRA—which was established and repeatedly articulated by this Court and others prior to RFRA—extended free-exercise rights *only* to individuals and to religious, non-profit organizations. No Supreme Court precedent had extended free-exercise rights to secular, for-profit corporations. Thus, in passing RFRA, Congress had no rational reason to anticipate, nor could it have contemplated based upon that well-established precedent, that a court would later choose to unilaterally extend RFRA's protections well beyond those precedential bounds to secular, for-profit corporations.

2. Congress enacted the Affordable Care Act with full understanding of RFRA—and of its limited purpose. Congress also recognized the need to balance the government's compelling interest in extending women's access to preventive health care with respect for the traditional free-exercise rights of individuals and religious organizations, which is why Congress included the Affordable Care Act's religious exemptions for individuals and religious organizations. These exemptions strike such a balance precisely and accurately, and appropriately recognize the free-exercise rights Congress intended for RFRA to protect.

Exempting secular, for-profit corporations from the Affordable Care Act's contraceptive-coverage requirement is inconsistent with RFRA's legislative history and intent, and undermines the Affordable Care Act's carefully crafted balance between a compelling governmental interest and individual free-exercise rights.

ARGUMENT

I. CONGRESS DID NOT INTEND RFRA TO EXTEND FREE-EXERCISE RIGHTS TO SECULAR, FOR-PROFIT CORPORATIONS.

The Tenth Circuit concluded that RFRA protects for-profit corporations like Hobby Lobby and Mardel because nothing before the court suggested that Congress intended RFRA's protection of a "person's" free-exercise rights to exclude for-profit corporations. *Hobby Lobby*, Pet. App. 24a. The corporate parties—Hobby Lobby, Mardel, and Conestoga Wood Specialties Corporation and their shareholders—similarly contend that Congress did not intend to exclude for-profit corporations from RFRA. *Hobby Lobby*, Resp. Br. 24; *Conestoga*, Pet. Br. 24-25.

The Tenth Circuit and the corporate parties share an inaccurate understanding of RFRA's purpose, and the Tenth Circuit's conclusion is at odds with the expectations of the Members of Congress who passed RFRA. As we explain below, in enacting RFRA, Congress only intended to restore the compelling-interest test the Supreme Court had overturned three years earlier. Congress did *not* intend to extend statutory religious-exercise rights to secular, for-profit corporations that had never before enjoyed such protections. The text and legislative history of RFRA show that Congress carefully—and narrowly—drafted RFRA to plainly codify this intent. And neither RFRA's text nor its legislative history suggest that Congress had any reason to anticipate—much less intend—that twenty years after RFRA's enactment, courts would unilaterally extend its protections to secular, for-profit corporations or use it to elevate the religious beliefs of corporate shareholders over the rights of employees to access preventive health care provided under the Affordable Care Act.

A. Congress Crafted RFRA Only To Restore The Compelling-Interest Test.

In *Employment Division, Department of Human Resources* v. *Smith*, 494 U.S. 872 (1990), the Supreme Court overturned the compelling-interest test that historically applied to government actions alleged to burden free-exercise rights. That test, first set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and further discussed in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), required the government to justify any actions that substantially burden the First Amendment free-exercise right by demonstrating a compelling governmental interest. *Smith*, 494 U.S. at 883. After *Smith*, however, a neutral law of general applicability trumped the free-exercise right—meaning that if a law was both neutral and generally applicable, no compelling interest need be shown. *Id.* at 890. And after *Smith*, a plaintiff who claimed impingement of her free-exercise rights by a neutral and generally applicable law could prevail only by showing that the legislature had acted with an inappropriate motive. *See, e.g., You Vang Yang* v. *Sturner*, 750 F. Supp. 558, 560 (D.R.I. 1990).

A diverse coalition of religious organizations, public interest groups, and constitutional scholars petitioned the Court for rehearing in *Smith* to highlight the significant consequences of the Court's departure from the previously settled compelling-interest standard. Linda Greenhouse, *Court Is Urged to Rehear Case on Ritual Drugs*, N.Y. Times, May 11, 1990, at A16. The coalition's petition failed to persuade the Court to rehear the case, 496 U.S.

913 (1990), but the Court's decision spurred Congressional action.

In July 1990, Representative Stephen J. Solarz introduced the Religious Freedom Restoration Act of 1990 "[t]o protect the free exercise of religion." H.R. 5377, 101st Cong. (1990). In testimony before the House Judiciary Committee, Representative Solarz explained that the bill would "enable States to insist that their laws of general applicability be applied even when individuals say this would obligate them to violate the tenets of their faith if they can demonstrate they have a compelling interest in doing so and if they can demonstrate that they've chosen the least restrictive way of achieving that objective." Hearing on H.R. 5377 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 101st Cong. (1990). Several months later, Senator Joseph R. Biden, Jr., introduced similar legislation that would "protect the free exercise of religion" by requiring the government to show that laws of general applicability that discriminate against religion are essential to furthering a compelling governmental interest and are the least restrictive means of doing so. S. 3254, 101st Cong. (1990). In his statement introducing this legislation, Senator Biden stated the bill's limited intent: "to restore the previous rule of law, which required the Government to justify restrictions on religious freedom." 136 Cong. Rec. 35840 (Oct. 26, 1990).

Congress's focus on restoring the compelling-interest test permeates each of six bills "[t]o protect the free exercise of religion" introduced between 1990 and 1993. *See* H.R. 5377 § 2(b)(2); S. 3254 § 2(b)(2); H.R. 2797 § 2(b)(1), 102d Cong. (1991); S. 2969 § 2(b)(1), 102d Cong. (1992); H.R. 1308 § 2(b)(1), 103d

Cong. (1993) (codified at 42 U.S.C. § 2000bb(b)); S. 578 § 2(b)(1), 103 Cong. (1993). The 1990 legislation introduced in the House by Representative Solarz and later that year in the Senate by Senator Biden proposed to permit government restriction of free-exercise rights only when the application of the restriction "is essential to further a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." S. 3254 § 2(b)(2); H.R. 5377 § 2(b)(2).

The next iterations of the legislation, introduced in 1991 by Representative Solarz and in 1992 by Senator Edward M. Kennedy, stated that the purpose of the legislation was "to restore the compelling interest test as set forth in *Sherbert* v. *Verner* and *Wisconsin* v. *Yoder*." H.R. 2797 § 2(b)(1); S. 2969 § 2(b)(1). That stated purpose remained in the religious freedom companion bills that would become RFRA, introduced in March 1993 by Senator Kennedy and Representative Charles E. Schumer. S. 578 § 2(b)(1); H.R. 1308 § 2(b)(1).

Congress passed RFRA in the fall of 1993 with widespread, bipartisan support—by a 97-3 vote in the Senate and a voice vote in the House of Representatives. Democrats and Republicans alike, including Senators Patty Murray, Max Baucus, Barbara Boxer, Sherrod Brown, Maria Cantwell, Benjamin J. Cardin, Richard J. Durbin, Dianne Feinstein, Tom Harkin, Tim Johnson, Patrick J. Leahy, Carl Levin, Edward J. Markey, Robert Menendez, Barbara A. Mikulski, Harry Reid, Bernard Sanders, Charles E. Schumer, and Ron Wyden, supported the legislation. Senator Kennedy noted RFRA's widespread support: "The act is supported by a broad coalition of organizations with differing views on many issues of our day * * *. These organizations don't agree on much—but they do agree on the need to pass the Religious Freedom Restoration Act." 139 Cong. Rec. S14351 (daily ed. Oct. 26, 1993).

Senator Bill Bradley explained that RFRA "restor[es] the legal standard that was applied to the decisions which preceded *Smith*, the compelling interest standard. RFRA simply insures that courts will protect the fundamental right to freely exercise one's religion at an appropriate level of scrutiny." 139 Cong. Rec. S14469 (daily ed. Oct. 27, 1993). Senator Kennedy similarly declared that RFRA was "designed to restore the compelling interest test for deciding free exercise claims * * * by establishing a statutory right that adopts the standard previously used by the Supreme Court." 139 Cong. Rec. S14351 (daily ed. Oct. 26, 1993). Moreover, he emphasized RFRA's limited purpose: "The act creates no new rights for any religious practice or for any potential litigant." *Id.* When he signed RFRA, President William J. Clinton remarked that the Act "reestablishes a standard that better protects all Americans of all faiths in the exercise of their religion * * *." Remarks on Signing the Religious Freedom Restoration Act of 1993, 2 Pub. Papers 2001 (Nov. 16, 1993).

This consistent legislative backstory is preserved in the statute itself, which expressly states that RFRA's purpose is "to restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened" and "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b). Thus it is clear that from the introduction of House Bill 5377 in 1990, through the introduction of similar bills in 1991 and 1992, and concluding with RFRA's passage in 1993, Congress consistently framed its limited intent and RFRA's limited purpose as, first, restoring the compelling-interest test that *Smith* had curtailed, and second, protecting the free exercise of religion by requiring the government to show a compelling justification for burdening a person's religious exercise.

B. Congress Could Not Have Anticipated RFRA's Application To Secular, For-Profit Corporations.

1. When Congress began laying the groundwork for RFRA in 1990, it did so against the backdrop of centuries of jurisprudence applying the First Amendment's protection of the freedom to exercise religion to individuals and to non-profit religious institutions. Against this backdrop—and in the marked absence of any statutory *expansion* of free-exercise protections—Congress had no reason to believe that secular, for-profit corporations could "exercise religion" when it drafted and enacted RFRA, or that courts would permit shareholders of such corporations to wield RFRA as a sword to force their religious beliefs on others.[2]

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[2] *See O'Brien* v. *U.S. Dep't of Health and Human Srvs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012) ("RFRA is a shield, not a sword. It protects individuals from substantial burdens on religious exercise that occur when the government coerces action one's religion forbids, or forbids action one's religion requires; it is not a means to force one's religious practices upon others.").

The hearings and committee reports for House Bill 1308, which Congress enacted as RFRA, and Senate Bill 578, the corresponding bill in the Senate, reveal the scope of RFRA's intended reach. Of nineteen Supreme Court cases cited in the House and Senate Judiciary Committee reports accompanying the legislation, *none* so much as suggest that secular, for-profit corporations might possess free-exercise rights.[3] *See Church of the Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 524-525 (1993) (church's challenge to city ordinance regarding ritual slaughter of animals); *Smith*, 494 U.S. at 874 (individuals' challenge to a state controlled-substance law); *Hernandez* v. *Comm'r*, 490 U.S. 680, 683-684 (1989) (individuals' challenge to denial of tax deduction for payments made to churches for training courses); *Lyng* v. *Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 443 (1988) (challenge by "an Indian organization, individual Indians, nature organizations and individual members of those organizations, and the State of California" to government harvesting and construction in a portion of a National Forest used for religious purposes); *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 344-345 (1987) (prison inmates' challenge to policies that prevented their attendance at a weekly Muslim congregational service); *Bowen* v. *Roy*, 476 U.S. 693, 695 (1986) (individual's free-exercise challenge to statutory requirement of use of social security number); *Goldman* v. *Weinbarger*, 475 U.S. 503, 504 (1986) (individual's challenge to air force regulation preventing wearing yarmulke while in uniform); *Bob Jones Univ.* v. *United States,* 461 U.S. 574, 577 (1983) (religious, nonprofit school's challenge to denial of tax-exempt status); *United States* v. *Lee*, 455 U.S. 252, 254 (1981) (individual employer's challenge to social security and unemployment insurance taxes); *Thomas* v. *Review Bd., Ind. Emp't Sec. Div.*, 450 U.S. 707, 709 (1981) (individual's challenge to denial of unemployment compensation); *Harris* v. *McRae*, 448 U.S. 297, 320 (1980) (individuals' free-exercise challenge to Hyde Amendment); *Yoder*, 406 U.S. at 208-211 (individuals' challenge to compulsory school-attendance law); *Tilton* v. *Richardson*, 403 U.S. 672, 676-677 (1971) (individuals' challenge to federal aid for church-related colleges and universities); *Sherbert*, 374 U.S. at 399 (individual's challenge to state unemployment compensation statute); *Braunfeld* v. *Brown*, 366 U.S. 599, 600-601 (1961) (individuals' challenge to state criminal statute proscribing the retail of "certain enumerated commodities" on Sundays.); *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 629 (1943) (individuals' challenge to regulation requiring public school students to salute the American flag); *Minersville Sch. Dist.* v. *Gobitis*, 310 U.S. 586, 591-592 (1940) (individuals' challenge over expulsion for refusal to salute national flag); *Cantwell* v. *Connecticut*, 310 U.S. 296, 300-301 (1940) (individuals' free-exercise challenge to convictions for solicitation of money and inciting a breach of peace); *Reynolds* v. *United States*, 98 U.S. 145, 146 (1878) (individual's challenge to bigamy statute); H.R. Rep. No. 103-88 (1993); S. Rep. No. 103-11 (1993).[4]

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[3] This case list does not include those cited in the separate legislative discussions on whether RFRA should apply to prisoners.

Similarly, *all* of the pre-*Smith* Supreme Court free-exercise cases mentioned in the House and Senate floor speeches during consideration of RFRA involved the free-exercise rights of individuals or of religious, non-profit organizations. *See* 139 Cong. Rec. S14461 (daily ed. Oct. 27, 1993); 139 Cong. Rec. S14350 (daily ed. Oct. 26, 1993); 139 Cong. Rec. H2356 (daily ed. May 11, 1993). So, too, did the examples of post-*Smith* infringements on the free-exercise right mentioned in the House and Senate floor speeches: autopsies of deceased Hmong and Jewish people; challenges to the practices of the Amish; a federal investigator fired because investigating a pacifist organization was against his religion; and evangelical churches being zoned out of commercial areas. *See* 139 Cong. Rec. S14351 (daily ed. Oct. 26, 1993); 139 Cong. Rec. H2357, H2360 (daily ed. May 11, 1993).

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[4] Seven members of the House who offered their additional views on whether RFRA would be effective to reinstate the pre-*Smith* standard cited, in a footnote providing authority for an unrelated point about the effectiveness of free-exercise protections, one Title VII case in which the Ninth Circuit adverted to a for-profit corporation's "religious exercise." *See* H.R. Rep. No. 103-88, at 16 n.5 (citing *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F.2d 610 (9th Cir. 1988)). But even the *Townley* panel found it "unnecessary to address the abstract issue whether a for profit corporation has rights under the Free Exercise Clause independent of those of its shareholders and officers." 859 F.2d at 619-620.

2. Congress could have explicitly included secular for-profit corporations in RFRA. It did not. Indeed, even the earliest iterations of RFRA reveal a consistent lack of intent to break new ground by extending free-exercise protections to secular, for-profit corporations. *See, e.g.*, Hearing on H.R. 5377 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary, 101st Cong. (1990) at 2, 28-29, 32-33, 35, 57 (referencing *Smith*, 494 U.S. at 874 (individuals' challenge); *Lee*, 455 U.S. at 254 (individual's challenge); *Yoder*, 406 U.S. at 208-211 (individuals' challenge); *Sherbert*, 374 U.S. at 399 (individual's challenge); *Barnette*, 319 U.S. at 629 (individuals' challenge)).

Some of the earliest versions of the bill that gave rise to RFRA defined person to include "both natural persons and religious organizations, associations, or corporations." *See* H.R. 5377 § 4(4) (introduced by Rep. Solarz in 1990, and defining "person" to "include[ ] both natural persons and *religious organizations, associations, or corporations*" (emphasis added)); S. 3254 § 4(4) (introduced by Sen. Biden in 1990, and defining "person" to include "natural persons, religious organizations, associations, *and corporations*" (emphasis added)). But the final version of the bill passed by Congress does not include such language. Thus, no one subsequently debated whether the "person" contemplated in RFRA went beyond the scope of those who were at that time entitled to claim the benefit of a free-exercise contention. Even if a single member of Congress may have fleetingly contemplated in 1990 the idea of *some* separate corporate personhood capable of exercising religion, that idea was left on the cutting-room floor, without further explanation. *See Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947) ("The interpretation of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers.").

3. Moreover, during its consideration of RFRA, Congress repeatedly relied upon the longstanding view, based on existing jurisprudence, that free-exercise rights were limited to individuals and religious organizations. The House Judiciary Committee "expect[ed] that the courts [would] look to free exercise of religion cases decided prior to *Smith* for guidance * * *." H.R. Rep. No. 103-88, at 6-7. That jurisprudence has never extended free-exercise rights to secular, for-profit corporations. *See Hobby Lobby*, Pet. App. 115a (Briscoe, C.J., concurring in part and dissenting in part); *Conestoga*, Pet. App. 28a ("Our conclusion that a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause necessitates the conclusion that a for-profit, secular corporation cannot engage in the exercise of religion. Since Conestoga cannot engage in the exercise of religion, it cannot assert a RFRA claim.").

RFRA's limited scope also ensured it would not disturb the law governing "cases determining the appropriate relationship between religious organizations and government." H.R. Rep. No. 103-88, at 8; S. Rep. No. 103-111, at 12; *see* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 238-239 (1994). Jurisprudence on religious organizations' "participat[ion] in publicly funded social welfare and educational programs" was of particular to concern to Congress, as were prior precedents addressing religious organizations' exemption from income taxes and other laws. H.R. Rep. No. 103-88, at 8; S. Rep. No. 103-111, at 12. Responding to this concern, the House Judiciary Committee explained that courts rely on the Establishment Clause—not the Free Exercise clause—to decide such cases. H.R. Rep. No. 103-88, at 8; *see* S. Rep 103-11, at 12-13. The committee report then identified two sections of RFRA that enforce this position that the free-exercise legislation would not change the relationship between religious organizations and government: the section requiring RFRA claimants to have Article III standing, H.R. 1308 § 3(c) (codified at 42 U.S.C. § 2000bb—1(c)), and the section providing that RFRA does not affect Establishment Clause jurisprudence, H.R. 1308 § 7 (codified at 42 U.S.C. § 2000bb-4). H.R. Rep. No. 103-88, at 8. The Senate Judiciary Committee Report included similar reassurances. *See* S. Rep. No. 103-11, at 12-13. Thus, as Congress understood the legislation before it, not even a *religious* organization would be in a position to claim *new* free-exercise rights as a result of RFRA.

Despite all this, certain contributing *amici* in the court below sought to characterize RFRA, after the fact, as a "super-statute" providing "heightened, across-the-board protection for the free exercise of religion." Brief of *Amici Curiae* Senator Orrin G. Hatch, *et al.*, at *6, *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294), 2013 WL 773280. That is not the statute Congress passed. And that reimagining of RFRA is inconsistent with the text of the statute, the interests of the diverse coalitions that supported it, and the members of Congress who drafted and passed it. Indeed, even the members of Congress who expressed concerns about whether RFRA was sufficient to protect free exercise rights acknowledged that the law was simply "seeking to replicate, by statute, the same free exercise test that was applied prior to *Smith*." H.R. Rep. No. 103-88, at 16 (additional view).

Thus, despite the "unique opportunity presented by this legislation" to extend the reach of free-exercise protections, *id.*, Congress recognized, over and over again, that RFRA's purpose and scope were limited. RFRA's text clearly expresses the legislation's return to pre-*Smith* jurisprudence. The statute further contains provisions assuring that it would not expand or restrict the rights of religious organizations. *See* H.R. 1308 § 3(c) (codified at 42 U.S.C. § 2000bb—1(c)); H.R. 1308 § 7 (codified at 42 U.S.C. § 2000bb-4). The debates and hearings on RFRA further confirm that Congress was not deviating from decades of precedents and its own history of restricting free-exercise protections to individuals and non-profit, religious organizations. Consequently, Congress had no reason to contemplate in 1993 that courts would interpret the Act as expansively as the Tenth Circuit did for the first time in 2013. And nothing in the legislative history suggests they intended this application of RFRA. The foundation on which the Tenth Circuit built its decision is fundamentally flawed because it is based on a text that does not direct the result it reached there, and on a legislative history that does not exist.

II. EXEMPTING SECULAR, FOR-PROFIT CORPORATIONS FROM THE AFFORDABLE CARE ACT'S CONTRACEPTIVE COVERAGE REQUIREMENT IS NOT CONSISTENT WITH RFRA.

Throughout the debate on the Affordable Care Act—before and after passage—Congress carefully considered how to further the government's compelling interest in health care, and specifically in women's preventive care, while respecting the religious exercise rights protected by RFRA. A combination of statutory and regulatory exemptions for individuals and religious organizations ensures that the Act and its implementing regulations are the least restrictive means of furthering the government's compelling interest in access to preventive health care. *Nothing* in the Affordable Care Act altered the scope of RFRA, and there is no indication that the legislators who passed the Affordable Care Act ever contemplated extending RFRA's protections to secular, for-profit corporations.

A. The Affordable Care Act And Its Implementing Regulations Strike The Proper Balance Between The Government's Compelling Interest And Free Religious Exercise.

Congress carefully and deliberately structured the Affordable Care Act in accordance with RFRA's focus on "striking sensible balances between religious liberty and competing prior governmental interests" and its requirement that the government use "the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. §§ 2000bb(a)(5), 2000bb-1(b)(2). *Cf. Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 698 (1979) (Congress is presumed to legislate with knowledge of court precedents). Among other things, the Senate debates prior to the Act's passage include an analysis from the O'Neill Institute advising that RFRA "prevents the federal government from enacting a law that substantially burdens an individual's exercise of religion, unless the government has a compelling interest." *See, e.g.*, 155 Cong. Rec. 32847 (2009). The O'Neill Institute also encouraged Congress to add a measure of protection for religious freedom. 198 Cong. Rec. S13721 (daily ed. Dec. 22, 2009).

Congress addressed concerns about potentially burdening religious exercise by including religious exemptions in the statute. Individuals who are members of recognized religious sects or divisions and adherents of the religion's established tenets are exempt from the Act's individual responsibility requirement. Pub. L. 111-148 § (d)(2)(A), 124 Stat. 119, 246 (codified at 26 U.S.C. § 5000A(d)(2)(A)). Similarly, the Act exempts individuals belonging to health care sharing ministries, defined as nonprofit organizations whose members "share a common set of ethical or religious beliefs and share medical expenses." Pub. L. 111-148 § (d)(2)(B), 124 Stat. 119, 246 (codified at 26 U.S.C. § 5000A(d)(2)(B)).

The Affordable Care Act also includes an amendment demonstrating Congress' intent to ensure and protect women's access to preventive health care, including contraception. During the 2009 debates leading up to the Act's passage, Senator Barbara Mikulski proposed an amendment to require health plans to cover comprehensive women's preventive care and screenings. That amendment, which came to be called the Women's Health Amendment, relied on comprehensive guidelines developed by the independent Institute of Medicine and adopted by the Department of Health and Human Services. It required insurance coverage for "preventive care and screenings" for women to ensure "essential protection for women's access to preventive health care not currently covered in other prevention sections of the [Affordable Care Act]." *Mikulski Amendment Improves Coverage of Women's Preventive Health Services and Lowers Costs to Women*, http://www.mikulski.senate.gov/_pdfs/Press/ MikulskiAmendmentSummary.pdf (last visited Dec. 7, 2013); *see* Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (2011). As Senator Feinstein explained, the Women's Health Amendment "will require insurance plans to cover at no cost basic preventive services and screenings for women. This may include mammograms, Pap smears, family planning, screenings to detect postpartum depression, and other annual women's health screenings." 155 Cong. Rec. S12,114 (daily ed. Dec. 2, 2009) (statement of Sen. Feinstein). *See also* 155 Cong. Rec. S12,033, S12,052 (daily ed. Dec. 1, 2009) (statement of Sen. Franken) ("[A]ffordable family planning services must be accessible to all women in our reformed health care system."). The Senate adopted the Women's Health Amendment by a vote of 61 to 39. *See* 155 Cong. Rec. S12,265, S12,277; 42 U.S.C. § 300gg-13(a)(4).

The inclusion of contraception among the preventive services guidelines required under the Affordable Care Act prompted additional attention to potential burdens on religious exercise from the Executive branch as well. The Act's implementing regulations include exemptions for religious employers and eligible nonprofit religious organizations with religious objections, demonstrating that the Executive branch understood Congress's intent to strike a careful balance between the government's interest in women's preventive health furthered by the Affordable Care Act, and RFRA-protected religious freedoms. *See* 26 C.F.R. § 54.9815-2713A(a) (eligible organizations); 45 C.F.R. § 147.131(a) (religious employers and eligible organizations). The regulations exempt more than 335,000 religious organizations, including churches and synagogues, from the contraceptive-coverage requirement. 45 C.F.R. § 147.131(a) (defining "religious employers"); 158 Cong. Rec. S375, 377, 379 (daily ed. Feb. 7, 2012). The regulations also include an "accommodation" for non-profit organizations that hold themselves out as religious and oppose birth control for religious reasons. 45 C.F.R. § 147.131(b). Such non-profit organizations do not have to provide contraceptive coverage in their health insurance plans; instead, their employees will receive this benefit directly from their insurance company. Women who work in some religiously affiliated organizations, as Senator Jeanne Shaheen explained, thus may choose to use birth control or access the Act's preventive health measures in spite of the religious affiliation of their employer. 158 Cong. Rec. S375. "That is their decision. It is not their employer's." *Id.*

By adding these exemptions to those Congress passed in the statute, the Administration furthered the balance Congress sought to strike in the Act between the beliefs of non-profit religious organizations and women's access to critical preventive health care. As one Member noted, the

Administration's regulations respect the rights of religious institutions without "trampl[ing] on the rights of others." *Id.* at H628 (daily ed. Feb. 8, 2012) (statement of Representative Eleanor Holmes Norton). *See also id.* at H586 (statement of Representative Gwen Moore that the exemption "represents a respectful balance between religious persons and institutions and individual freedom"); *id.* at H625 (statement of Representative Nita Lowey that the exemption "strikes a delicate balance representing the rights of both religions ideologically opposed to birth control and American women").

When considered together, the statutory religious exemptions for individuals and health sharing ministries and the administrative exemptions for religious employers and eligible nonprofit religious organizations collectively demonstrate how the Affordable Care Act strikes a balance between Congress' interest in women's right to access preventive health care and the free-exercise rights of individuals and religious organizations under RFRA.

In 2012, the Senate directly weighed in on the question whether secular non-profit corporations should be able to refuse to comply with the contraceptive coverage requirement when it considered—and rejected—an expansive application of religious free-exercise rights by voting down an amendment to the Affordable Care Act that would have enabled *any* secular employer or insurance provider to deny coverage based on religious beliefs or moral convictions. Senator Mikulski characterized this so-called "conscience" amendment, introduced by Senator Roy Blunt, as "put[ting] the personal opinion of employers and insurers over the practice of medicine." 158 Cong. Rec. S1127 (daily ed. Feb. 29, 2012). Senator Richard Durbin similarly recognized the potential reach of the amendment: "[I]t would allow employers to deny coverage for any health service. * * * The Blunt amendment will have a harmful effect on all people and would undermine our Nation's effort to ensure that everyone in this country has access to a basic standard of health coverage." *Id.* at S1078 (daily ed. Feb. 28, 2012). Senator Durbin further explained that the Affordable Care Act and its implementing regulations struck the proper "balance between respecting the conscience and religious values of certain institutions while still protecting the freedom of individuals." *Id.* Senator Al Franken described the amendment as "violat[ing] a core belief in our society that our religious doctrines are our own and that each of us, every woman and man in our society, has the right to make decisions about our own health for ourselves and for our families." *Id.* at S1083. And Senator Carl Levin also spoke out against the amendment; he explained that it would "codify infringement on personal healthcare decisions, would grant an employer the right to substitute his moral convictions for those of his employees, and would effectively deny access to critical healthcare services." *Id.* at S1141.

The Senators who opposed the amendment were not only concerned about the amendment's proposed infringements on personal decisions about contraception but also about the doors that passage of the amendment would open. Senator Patrick Leahy explained that the "amendment would allow any employer or insurer to refuse contraceptive coverage, annual well-women visits, gestational diabetes screening and domestic violence screenings." *Id.* at S1171. Similarly, Senator Patty Murray described the amendment as a "radical assault on the comprehensive preventive health care coverage" that would allow employers to eliminate coverage for children's immunizations and prenatal care for children born to unmarried parents based on personal objections. *Id.* at S1172.

The Senate voted down the amendment 51-48. *Id.* at S1172-1173 (daily ed. Mar. 1, 2012).

B. Congress Did Not Understand The Affordable Care Act To Change The Scope Of RFRA.

Congress passed the women's preventive services provision to advance the health and equality of women in this Nation. Congress also acknowledged the need to balance the Affordable Care Act's broad goals with respect for the religious beliefs of individuals and some religious organizations. Nowhere did Congress go so far as to suggest that this balance should reach secular, for-profit corporations—indeed, the Senate explicitly rejected such an attempt to do so when it rejected an amendment on this very subject.

The Tenth Circuit's decision, however, authorizes an even more extreme situation than the one Senator Levin posed when he spoke out against the 2012 amendment—one in which shareholders of a secular, for-profit corporation deny their employees access to critical healthcare services as a result of their own religious convictions. The Congress that passed the Affordable Care Act could not have anticipated such a vast extension of RFRA.

The free exercise rights of *individuals* and *religious organizations* were a focus of debates about the Affordable Care Act, just as they had been for RFRA.

Most notably, there was no focus on—or even any discussion of—secular, for-profit corporations. During debate on the contraceptive-coverage requirement and related administrative regulations and policy, Senator Mike Johanns offered the view that "*religious organizations* are forced to face two options: act against their convictions or drop health care coverage altogether." 158 Cong. Rec. S331 (daily ed. Feb. 6, 2012) (emphasis added). Similarly, Senator Dan Coats claimed that "[a] wide variety of *religious institutions and organizations* across the country will resist providing insurance coverage for birth control." *Id.* at S370 (daily ed. Feb. 7, 2012) (emphasis added). And Senator John Boozman expressed concern about "protect[ing] *religious organizations*" from the effects of the implementing regulations. *Id.* at S371 (emphasis added). *See id.* at S373 (statement of Senator Kelly Ayotte arguing that the contraceptive-coverage "mandate places *religious institutions*" in an untenable position) (emphasis added).

The concurrent debate in the House even more directly addressed the application of the contraceptive-coverage requirement for employers. As Representative Jerrold Nadler explained, "The liberty of the church must be protected in its churchly function and in its function as a religious institution. In its function as an employer, the liberty belongs to the employees." 158 Cong. Rec. H629 (daily ed. Feb. 8, 2012). He further noted, "[W]e must not confuse the religious liberty of the church to propagate its views and to conduct its religious affairs as it sees fit with the liberty of employees in a secular institution affiliated with the church to have the normal protections against discrimination and the normal rights that we afford all people." *Id.*

These debates, and the regulations that prompted and followed them, demonstrate that the free-exercise rights that Congress considered during the debate over the Affordable Care Act's implementing regulations were those of individuals and religious organizations. *Nothing* in the Affordable Care Act altered the scope of RFRA, and there is no indication—none—that the legislators who passed the law, debated the contraceptive-coverage mandate, and examined the mandate's implementing regulations, ever contemplated extending RFRA's protections to secular, for-profit corporations.

The Tenth Circuit, however, saw things quite differently. Over the objections of the dissenting judges, the Tenth Circuit broadly equated the religious beliefs of a corporation's shareholders with those of the corporation *itself.* This effectively allows a secular, for-profit corporation's shareholders, through the corporation, to impose their religious beliefs on their employees and to deny employees health benefits and rights to which they are entitled based on those corporate shareholder beliefs. That holding is flatly contrary to the text and intent of RFRA. And that court-created exemption for secular, for-profit corporations will only widen the gap in women's health care that the Affordable Care Act sought to close.

RFRA's supporters represented an unusual convergence of interests: an "unprecedented coalition of religious denominations and civil rights groups * * * united" in the name of religious liberty. 139 Cong. Rec. H2357 (daily ed. May 11, 1993). And RFRA was enacted by a wide margin by a bipartisan

Congressional group with full understanding of the rights—the rights of *individuals* and *religious institutions*—they sought to restore through that statute. It is not correct—indeed, it is not fathomable—that the bipartisan group of legislators who worked to enact it would intentionally have advanced legislation to transform free exercise from an individual right to a corporate benefit, from an individual's shield to an employer's sword. Yet that is precisely what the Tenth Circuit's decision suggests: that a highly celebrated, and widely shared, vision of the importance of the right to free exercise instead opened the door to allowing corporate shareholders to impose their religious beliefs on others, by virtue of their control of secular, for-profit corporations.

This gross misapplication of RFRA creates a situation where a person's right to freely exercise her religion is freed from the undue interference of government—but is newly subjected to the undue interference of her employer. Nothing in RFRA's text or legislative history supports such an application. Congress's carefully crafted response to *Smith* does not license a secular, for-profit corporation or its shareholders to disregard the government's compelling interest in ensuring women employees' access to health care.

CONCLUSION

For the foregoing reasons, and those in the respective party briefs amici support, the Tenth Circuit's decision should be reversed and the Third Circuit's decision should be affirmed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
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Nos. 13-354 & 13-356

In The
Supreme Court of the United States

◆

KATHLEEN SEBELIUS, et al.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., et al.,
Respondents.

◆

CONESTOGA WOOD SPECIALTIES CORP., et al.,
Petitioners,
v.
KATHLEEN SEBELIUS, et al.,
Respondents.

◆

On Writs Of Certiorari To The
United States Courts Of Appeals
For The Third And Tenth Circuits

◆

BRIEF OF NATIONAL ASSOCIATION OF EVANGELICALS AS AMICUS CURIAE SUPPORTING HOBBY LOBBY AND CONESTOGA, ET AL.

◆

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QUESTIONS PRESENTED

This brief addresses the constitutionality under the Establishment Clause of a RFRA accommodation that might place the cost of emergency contraception on employees rather than accommodated employers, and if there is a shifting of cost from employers to employees, whether such a shift constitutes a compelling governmental interest.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

NAE believes that religious freedom fully makes sense only on the premise that God exists, and that God's character and personal nature are such as to give rise to human duties that are prior and superior in obligation to the commands of civil society. NAE also holds that religious freedom is God-given, and therefore the civil government does not create such freedom but is charged to protect it. It is grateful for the American legal tradition of church-state relations and religious liberty, and believes that this constitutional and jurisprudential history should be honored, nurtured, taught, and maintained.

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part. No party, party's counsel, or other person, other than *amicus curiae*, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties' written consents to the filing of this brief are on file with the Clerk.

SUMMARY OF ARGUMENT

An argument for rejecting an accommodation for Conestoga Wood Specialties Corporation and Hobby Lobby Stores, Inc., under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.* (2006), is that one consequence might be that their employees will have to pay for their own emergency contraception. The claim has a certain emotional appeal. But the argument is mistaken, as is evident upon resort to the everyday business of statutory interpretation, congressional intent, and constitutional principles.

The government's way of framing the argument is that the sought-after RFRA exemption will shift the cost of emergency contraception from a closely held business to its employees and their families. The government's *amici* argue that the shift-of-burden, if allowed, would violate the Establishment Clause. The government argues that preventing the cost-shift from taking place contributes to the government's compelling interest in rejecting a RFRA accommodation. The arguments are wrong, both conceptually and legally.

1. Rightly understood, there is no shift of benefit from employer to employee. Effective January 1, 2013, the Affordable Care Act ("ACA") imposed a regulatory burden on Conestoga and Hobby Lobby that included the cost of providing emergency contraception to their employees. On that same day, the employees became recipients of a statutory entitlement.

A RFRA exemption, however, will return Conestoga and Hobby Lobby back to where matters started. The result is no change.

2. Assuming, arguendo, that there is a relevant shift in costs from employer to employee, that shift does not violate the Establishment Clause. The ACA imposes a number of regulatory burdens on employers. RFRA is a command by Congress to refrain from imposing those regulatory burdens on sincere religious claimants. The operative legal principle is that government does not establish a religion by leaving it alone.

Over a half dozen cases decided by this Court have already upheld the constitutionality of statutory religious exemptions. In most of these cases there was burden-shifting to third parties, but the shift made no difference in the outcome. In the one case where this Court did strike down a state statute accommodating religion, the statute created an absolute right to an accommodation, thereby compelling a private-sector employer to act in conformity with a religious tenet of one employee, and ignored the competing interests of other employees and the employer. RFRA suffers from neither infirmity.

3. Again, assuming arguendo that there is a relevant shift in costs from employer to employee, preventing that shift is not a compelling interest of the government excusing a RFRA accommodation for Conestoga and Hobby Lobby. The government carries the burden of producing evidence on the question of

the government's compelling interests sufficient to override RFRA, and on the factual record in these two appeals it has failed that burden.

The government cannot unilaterally assert a need for a health care system that is "comprehensive," meaning without exceptions, because in enacting RFRA Congress has already spoken in favor of case-by-case accommodations for sincere religious claimants. Unlike a total exemption from the federal income tax system for those claiming a religiously informed conscientious objection to how general tax revenues are being spent by the government, the RFRA accommodations sought by Conestoga and Hobby Lobby are small in nature and amount. The accommodations do not come anywhere close to defeating the functioning of the entire ACA.

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ARGUMENT

I. Accommodating Closely Held Business Employers Under RFRA Does Not Violate the Establishment Clause.

Although the government has not argued that RFRA violates the Establishment Clause, we anticipate that its *amici* will.[2] Such an argument immediately

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[2] *See, e.g.*, Frederick Gedicks & Rebecca Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 Harv. C.R.-C.L. L. Rev.

(Continued on following page)

strikes one as overreaching. If correct, it would mean that Congress, or an Administration more willing to protect the free exercise of religion, could not exempt enterprises such as Conestoga and Hobby Lobby from the contraception mandate even if Congress or the Administration wanted to.[3] The argument is wrong both conceptually and legally.

A. RFRA Exemptions Shift No Cognizable Burden to Employees.

The first question is who is burdening whom. The employers in these cases do not seek to force their employees to live by the employers' moral and religious commitments. Conestoga and Hobby Lobby do not seek to legally bar their employees from purchasing abortifacient drugs and devices using their own funds or other resources.

(forthcoming Apr. 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328516 (Jan. 24, 2014).

[3] Those who make the Establishment Clause argument claim that it would be unconstitutional to exempt religious nonprofit and for-profit organizations, except for churches and their integrated auxiliaries. *Id.* at 45. They want to avoid arguing that it is unconstitutional as to churches, for that is too improbable. So they indulge in speculation about the contraceptive use by employees of churches who teach that contraception, or emergency contraception, is morally prohibited. *Id.* at 44 (unfounded speculation that employees of such churches "are overwhelmingly likely to share their anti-contraception views"). *See also*, *id.* at 45 (unfounded speculation that many employees of nonprofit religious organizations that are not churches do not share their employer's views on contraception).

The government *does* seek to legally force the employers to conform to its moral values. It would make the employers pay, with their own funds, for an earmarked employee benefit – a prepaid right to drugs and devices that the employers believe act as abortifacients. It is not even the case that the employers are buying a menu of benefits that the employee could spend *either* on these drugs and devices *or* on some other medical benefit. Because the ACA eliminates coverage limits,[4] spending on emergency contraception does not reduce the other benefits available under the health care plan. The employers are asked to prepay for whatever contraceptive drugs are thought by the government to be beneficial for their employees.

In many contexts, this Court has held that a mere failure to pay for some good or service is generally not a cognizable burden on a person who desires that good or service. Most akin to the matter here, the Court has held that a state's discriminatory refusal to pay for scholarships for theology majors imposed no cognizable burden on the religious exercise of theology majors. "The State has merely chosen not to fund a distinct category of instruction." *Locke v. Davey*, 540 U.S. 712, 721 (2004). The Court has acted similarly with respect to free speech, *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991), and abortion, *Harris v.*

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[4] 42 U.S.C. § 300gg-11(a)(1) (Supp. V 2011).

McRae, 448 U.S. 297, 311-18 (1980); *Maher v. Roe*, 432 U.S. 464, 471-74 (1977).

Under the ACA, effective January 1, 2013, the government imposed a regulatory burden on all employers of more than fifty persons, and it conferred a corresponding benefit on their employees. If two of those employers now invoke the congressionally enacted RFRA seeking an accommodation, it removes the burden on the employers and takes the benefit from the employees. The net effect of the two governmental actions is no cognizable burden on anyone, economically or religiously. The employers and employees are back to where they started. To consider one of these actions without considering the other, as the government's *amici* do, is to ignore the context in which this dispute arises.

Gedicks & Van Tassell, *supra*, note 2, claim that the controlling baseline should be 1993, which is when RFRA was enacted by Congress. *Id.* at 34-35. But that choice is contrary to *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). In *Amos*, the baseline was on the eve of the effective date of Title VII of the Civil Rights Act of 1964, which was when a regulatory burden was first imposed on religious employers. Congress amended Title VII in 1972 so as to lift the relevant burden from religious employers. *Id.* at 332 n.9. Accordingly, the 1972 amendment is the parallel to RFRA here. In *Amos*, it was the 1972 amendment that was attacked as violative of the Establishment Clause (*id.* at 335-37), and here it is RFRA that is subjected to the same constitutional challenge by Gedicks & Van Tassell. The ACA is the parallel to Title VII when first enacted in 1964. Both legislative acts altered the *status quo ante* from no regulatory burden to imposing such a burden. So in a "before and after" comparison, the circumstances on the eve of the ACA and the 1964 Title VII are the "before," which is to say they are the baseline for comparing later events. That was the approach of the *Amos* Court. *Id.* at 337 ("[W]e find no persuasive evidence in the record before us that the Church's ability to propagate its religious doctrine through the Gymnasium is any greater now than it was prior to the passage of the Civil Rights Act in 1964.").

B. RFRA's Application to a Closely Held Business Employer Does Not Create an Unyielding Preference for Religion in Violation of the Establishment Clause.

When government burdens the religious exercise of an individual or organization, it is free to lift that burden by enacting a religious exemption without violating the Establishment Clause. The leading case is *Amos*, in which the Court upheld a statutory exemption in Title VII, 42 U.S.C. § 2000e-1(a) (2006), that permits religious organizations to prefer employees of like-minded faith. 483 U.S. at 332 n.9. Mayson, a building custodian employed at a gymnasium operated by the Church of Jesus Christ of Latter-day Saints, was discharged when he ceased to be a church member in good standing. The Court began by reaffirming that the Establishment Clause did not mean that government must be indifferent to religion, but aims at government not "act[ing] with the intent of promoting a particular point of view in religious matters." *Id.* at 335. The Title VII exemption, however, was not an instance of government "abandoning neutrality," for "it is a permissible legislative purpose to alleviate" a regulatory burden leaving religious organizations free "to define and carry out their religious missions." *Id.* The organizing principle is that government does not establish religion by leaving it alone.

In addition to *Amos*, the Court has on five other occasions turned back an Establishment Clause challenge to a religious exemption.[5] If one focuses only on the narrow consequence, in all of these cases there was a shift in burden to others, sometimes great and sometimes small. But the shifting burden never altered the result.[6]

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[5] *See Cutter v. Wilkinson*, 544 U.S. 709 (2005) (Religious Land Use and Institutionalized Persons Act, which accommodates religious observance by prison inmates, does not violate Establishment Clause); *Gillette v. United States*, 401 U.S. 437 (1971) (religious exemption from military draft for those opposing all war does not violate Establishment Clause); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (property tax exemption for religious organization does not violate Establishment Clause); *Zorach v. Clauson*, 343 U.S. 306 (1952) (release from compulsory education law to enable students to attend religion classes off public school grounds does not violate Establishment Clause); *The Selective Draft Law Cases*, 245 U.S. 366 (1918) (military draft exemption for clergy does not violate Establishment Clause).

It is true that if Conestoga and Hobby Lobby prevail in this litigation, then their employees might end up paying for their own Plan B or Ella. So there is no denying that there might be a modest shift of burden – or, more precisely, a shift of the pharmaceutical cost back to the employee where the burden originally lay before the government imposed the contraception mandate. But lifting a government-imposed burden from a rights holder will frequently mean that the burden falls elsewhere. That is a necessary implication of the First Amendment, as well as RFRA.

1. *Thornton* is distinguishable.

In only one of this Court's religious exemption cases has a shift in burden been a factor in determining that the Establishment Clause was violated. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), entailed multiple considerations, however, and was not decided solely on the shifting of a burden from a religious claimant to others.

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[6] We expect the government's *amici* will argue that when the shift in burden is to identifiable third parties it is more concerning, whereas there is little problem when the burden is diffused among many and thus those incurring it are not easily identified. That might make a difference for standing, but it is surely irrelevant to the Establishment Clause. The focus of no-establishment is on whether government has transgressed the boundary between church and government. If it has, it is of little moment that the resulting burden falls on a known few or is spread over a wide population.

In *Thornton*, Connecticut had amended its laws to permit more retail stores to be open on Sunday. Out of concern for those who would now be pressured to work on their Sabbath, the state adopted a law to help employees who desired to remain observant. The statute read: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day." *Id.* at 706. Donald Thornton was an employee for Caldor, Inc., a department store. He was a Presbyterian and observed Sunday as his Sabbath. When Caldor began opening on Sunday, Thornton worked Sundays once or twice a month. He later invoked the Connecticut statute. Caldor resisted and a lawsuit was filed on Thornton's behalf by the State Board of Mediation. *Id.* at 705-07. Caldor argued that the Connecticut statute violated the Establishment Clause, and this Court agreed. *Id.* at 707, 710-11.

Thornton noted that the "statute arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designated as their Sabbath." *Id.* at 709 (footnote omitted). The statute failed to account for what an employer was to do "if a high percentage of an employer's workforce asserts rights to the same Sabbath." *Id.* Hence, the law granted an "unyielding weighting in favor of Sabbath observers over all other interests." *Id.* at 710. For example, coworkers with more seniority may want weekends off because those are the same days a spouse is not working. *Id.* at 710 n.9. All this was problematic "[u]nder the Religion Clauses," the Court reasoned, not because of cost-shifting, but because "government . . . must take pains not to compel people to act in the name of any religion." *Id.* at 708. It was not the money as such, but that Caldor was being compelled to act in the name of Thornton's conviction about keeping the Sabbath holy.

The Court also noted that Thornton's religious burden was caused by the demands of the private retail sector. The Connecticut law, in response to the anticipated demands, empowered Thornton to call on the state's assistance to secure the observance of his Sabbath. *Id.* at 709. *Thornton* is thus unlike *Amos*, the latter an exemption that merely lifted a government burden that was imposed by that same government. The Connecticut statute, in contrast, spurred government into taking a side as between two disputants. It did so by arming Thornton with an affirmative legal right against others in the private sector.

It was in this context that the Court in *Thornton* said "a fundamental principle of the Religion Clauses" is that the First Amendment "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Id.* at 710 (internal citations and quotations omitted). Clarification concerning the reach of this "fundamental principle" was needed and quickly came in two cases decided just two years later.[7]

The first was *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987). *Hobbie* was the third occasion for this Court to rule on the application of the Free Exercise Clause to an employee seeking benefits under a state's unemployment compensation law.[8] On each of these occasions, the state had denied benefits because the worker declined to take a job for which she was qualified. In *Hobbie*, the employee was discharged when she refused to work on Saturday, her Sabbath.

With a nod to *Thornton*'s "fundamental principle," the employer in *Hobbie* argued that to compel accommodation of an employee's Sabbath entailed a shift in burden to the employer and coworkers contrary to the Establishment Clause. *Id.* at 145. This Court rejected the argument:

> In *Thornton*, we . . . determined that the State's "unyielding weighting in favor of Sabbath observers over all other interests . . . ha[d] a primary effect that impermissibly

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[7] It is not even clear whether the *Thornton* Court was attributing this "fundamental principle" to the Free Exercise Clause or the Establishment Clause. If the attribution was to the Free Exercise Clause, then the passage is simply irrelevant to the argument here that no-establishment principles are implicated.

[8] *See Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

> advance[d] a particular religious practice," . . . and placed an unacceptable burden on employers and co-workers because it provided no exceptions for special circumstances regardless of the hardship resulting from the mandatory accommodation.

Hobbie, 480 U.S. at 145 n.11 (internal citations omitted; brackets in original). *Hobbie* thus showed how narrow *Thornton* was. In lifting a religious burden, the statutory accommodation in *Thornton* favored the religious claimant unyieldingly, thus entirely disregarding the interests of the employer and coworkers. That is not the case with RFRA, which entails a balancing test familiar to free exercise law that takes into account the interests of others.

A few months later, the *Amos* Court addressed the scope of the "fundamental principle" passage in *Thornton*. In *Amos*, a religious exemption in Title VII permitted religious organizations to prefer those of like-minded faith. Mayson, a building custodian, claimed the statutory exemption shifted a burden to him resulting in loss of employment. Tracking the *Thornton* passage, Mayson argued that the exemption pressured him to conform his conduct to the religious necessities of others contrary to the Establishment Clause. This Court disagreed:

> Undoubtedly, Mayson's freedom of choice in religious matters was impinged upon, but it was the Church . . . , and not the Government, who put him to the choice of changing

> his religious practices or losing his job. This is a very different case than *Estate of Thornton v. Caldor, Inc.*. . . . In *Caldor*, the Court struck down a Connecticut statute prohibiting an employer from requiring an employee to work on a day designated by the employee as his Sabbath. In effect, Connecticut had given the force of law to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees. *See Hobbie* . . . 480 U.S. [at] 145 n.11.

Amos, 483 U.S. at 337 n.15.

The Court thus distinguished *Thornton* from *Amos* on two counts, and the case here is like *Amos*. First, in *Amos* the religious exemption had the government merely lifting a burden on the LDS Church that the government imposed on others. What the church did with that freedom was the responsibility of the church not the government. *Thornton* was different: the religious exemption there had the government intervening in the dispute and taking the side of the religious claimant against others in the private sector. RFRA, on the other hand, merely lifts a burden on religion that the Federal government has imposed. Second, the statute in *Thornton* favored the religious claimant unyieldingly, thus totally disregarding the interests of others. As said above in the context of *Hobbie*, RFRA is not unyielding but does interest balancing.

In *Cutter v. Wilkinson*, 544 U.S. 709 (2005), the religious exemption was by operation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc *et seq.*, at a state correctional facility. *Cutter* involved a religious exemption of Federal origin that was being used to intervene in a dispute by taking the side of the inmate against State authorities. In one respect *Cutter* resembled *Thornton*, namely, there were two parties disputing over a religious practice (inmate and State) and the Federal government had adopted a law (RLUIPA) that took the side of the religious claimant. As a consequence, the Court in *Cutter* gave a warning about shifting burdens from the religious claimant to other inmates or to the State. *Id.* at 722, 726 (dictum collecting factors to consider, one of which is burden shifting). Notwithstanding, this Court held that given RLUIPA's "tak[ing] adequate account of the burdens [that] a requested accommodation may impose on nonbeneficiaries," the statute met the strictures of the Establishment Clause. *Id.* at 720. Because RLUIPA was not unyielding to third-party considerations, a unanimous Court upheld its constitutionality. RLUIPA is parallel to RFRA, as the next case demonstrates.

In this Court's most recent encounter with RFRA, the government argued that it had satisfied its burden under the compelling interest test by arguing there was a need for uniform application of a controlled substances statute. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435-36 (2006). That argument was rejected because that is not how RFRA operates. Rather, under RFRA the judiciary is charged with striking "sensible balances" that often lead to religious accommodations. RFRA assumes "the feasibility of case-by-case consideration of religious exemptions." *Id.* at 436 (referencing *Cutter*). The *O Centro* Court noted how RLUIPA and RFRA operate alike. *Id.* (RLUIPA claimants "seek religious accommodations pursuant to the same standard as set forth in RFRA"). And both RLUIPA in *Cutter* and RFRA in *O Centro* avoided implicating the Establishment Clause by their case-by-case interest balancing, as opposed to the "unyielding preference" statute struck down in *Thornton*.

From *Hobbie, Amos, Cutter*, and *O Centro* we have two distinct factors that set *Thornton* apart. First, the religious exemption in *Thornton* created an "unyielding preference" for religion. Second, the religious exemption had Connecticut vesting the religious claimant with a new legal right against competing private-sector interests. *Thornton* was not a case where the exemption merely lifted a government-imposed burden. Only when both factors occurred together, as they did in *Thornton*, did they bring down the Connecticut statute.

Neither factor identified in *Thornton* is present here. RFRA creates no unyielding preference for religion, but sets up the familiar interest-balancing calculus of free exercise law. And RFRA operates to merely lift a burden on religion that the same Federal government has imposed elsewhere by regulation.

Accordingly, the Establishment Clause is not remotely triggered by the RFRA exemptions afforded Conestoga and Hobby Lobby.

2. The Establishment Clause operates categorically, not as an invitation for the interest-balancing used by *amici* for the government.

The Establishment Clause argument by the government's *amici* overreaches in another sense. From the outset, the government has conceded that for reasons of religious freedom churches and their integrated auxiliaries should be exempt from the contraception mandate. But a woman working for a church suffers the same burden-shifting loss, as *amici* characterize it, as does a woman working for Conestoga or Hobby Lobby. To avoid that comparison, *amici* for the government press their argument hardest when it comes to business entities with many employees. *See*, *e.g.*, Gedicks & Van Tassell, *supra*, note 2, at 38-42. But there is no principled basis for doing so. The issue is not how large is the total dollar amount of a given shift in pharmaceutical costs, for the Establishment Clause operates categorically rather than as a balancing test. That means the religious exemption in question either breaches the wall between church and government because there is something wrong in principle about shifting a burden or it does not.

The government's *amici* agree that the Establishment Clause is "a structural bar on government action rather than a guarantee of personal rights. [Thus, v]iolations . . . cannot be . . . balanced away by weightier private or government interests, as can violations of the Free Exercise Clause." *Id.* at 6-7. However, they seem not to realize that a structural Establishment Clause undermines their core thesis which is that at some point the cost-shifting becomes so great that "the scales tip" against a religious exemption's validity under that Clause. *Id.* at 27-30. As if the case law under the Establishment Clause was not complex enough, these *amici* would turn the clause into an occasion for *Lochner*-era interest balancing. *Id.* at 38-42 (a little economic cost-shifting is constitutionally valid, but at some juncture a Federal judge is to somehow know when too many dollars tote up to the "tipping point" against RFRA).[9]

In the few cases that have paid attention to burden shifting, such as *Thornton*, the Court did so because the law in question granted an "unyielding weighting in favor of [religious] observers over all other interests." 472 U.S. at 710. And such a shift in burden was problematic "[u]nder the Religion Clauses," not because of the total dollars involved in the shift, but because "government . . . must take pains not to compel people to act in the name of any religion." *Id.* at 708. So it was not the money as such, but that a private-sector employer, a department store, was being compelled by the state to act in the name of someone else's religion. The *Thornton* Court thought that set of facts had the "primary effect" of advancing "a particular religious practice." *Id.* at 710. A party being compelled by an unyielding law to act in the name of another's religious creed is something a categorical Establishment Clause can, in the right case, get its teeth into, unlike the balancing test engaged in by the government's *amici*.

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[9] How is it that the Establishment Clause operates categorically? When the clause is structural it negates power that otherwise might be thought to have been delegated to government. It denies power to "make . . . law respecting an establishment," thereby separating church and government. U.S. CONST., Amend. I. As with power-delegating and power-negating clauses generally, when the negative on power that is the Establishment Clause is exceeded, there is no balancing. Either the government has exceeded its power or it has not, much as with a federal court's subject matter jurisdiction.

II. There Is No Compelling Interest in Preventing the Cost of Contraceptives from Being Shifted to Employees.

A RFRA claim can be defeated by a showing of "a compelling governmental interest" that is the "least restrictive means of furthering" that interest. 42 U.S.C. § 2000bb-1(b). The government argues that the Federal government has a compelling interest in employer-provided preventive health care services being part of a "comprehensive insurance system," a goal disrupted by RFRA shifting some contraceptive costs from employer to employees. Brief for the Petitioners 38-42, No. 13-354.

For the government to assert an interest in a "comprehensive" health insurance system is similar to the government's defense in *O Centro*, 546 U.S. at 435-36, to have an interest in a "uniform" controlled substances law. The Court rejected that argument in *O Centro*, not because there was no such governmental interest but because the argument misconceives how RFRA works. Under RFRA, Congress has instructed the judiciary to strike "sensible balances" that often lead to exemptions. The Act assumes "the feasibility of case-by-case consideration of religious exemptions." *Id.* at 436. For the government to therefore insist on "uniformity" or "comprehensiveness" is a non-starter with Congress. Rather, the government has to meet its burden of proving that the "comprehensiveness" it desires is objectively compelling.[10] Given the factual record in this appeal, it has failed that burden.

The government claims that it is "compelling" to prevent the shifting of the cost of emergency contraception from Conestoga and Hobby Lobby to their employees. There are multiple reasons why this is not true. First, as pointed out in Part I.A., *supra*, there has been no net shift in the relevant costs. Effective January 1, 2013, the contraception mandate would have shifted the costs to the employer, but the employer's RFRA exemption prevents that shift from occurring. The result is no change.

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[10] The government carries the burden of producing evidence on the question of its compelling interests. 42 U.S.C. § 2000bb-2(3).

Second, the cost of emergency contraception is not large. And until January 1, 2013, there was no Federal entitlement vested in the employees to have preventive reproductive health care including emergency contraception. It makes no sense to claim that something that did not exist until January 1, 2013, is suddenly compelling. Common sense tells us it is not.

Third, the Federal government has an array of "less restrictive means" of relieving the employees of certain pharmaceutical costs, all while leaving the employer's religious practices unburdened. RFRA requires that these means be actively pursued by the government in good faith. Until it does so, the government has not met all of the burdens it carries under RFRA.

Fourth, the government draws our attention to a passage in *United States v. Lee*, 455 U.S. 252, 261 (1982), to the effect that the cost-shifting sought there would operate to impose the employer's faith on his employees. Brief for the Petitioners 39, No. 13-354. In *Lee*, an Amish claimant sought to be exempt from paying the employer's payroll tax to the Social Security Administration for all of his employees. But what Conestoga and Hobby Lobby ask for has no such drastic an impact on the ACA. Rather, they ask only to be relieved of a very small part of the ACA's coverage, *i.e.*, emergency contraception, while continuing to bear their overall obligation to provide a health care plan for their employees. To put it bluntly: even if they should prevail in this litigation, Conestoga and Hobby Lobby will be paying out millions of dollars as they meet their ACA obligations to their employees. The thrust of *Lee* was that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." 455 U.S. at 260. But what the employer was asking for in *Lee* is nowhere close to the situation with Conestoga and Hobby Lobby. The requested accommodation here is narrowly focused on emergency contraception. The ACA's vast health care system will function nicely should Conestoga and Hobby Lobby prevail in this litigation. On the other hand, if the government's argument is that to exempt these two employers means that it will get requests to accommodate yet additional RFRA claimants and therefore it has a compelling interest in granting no accommodations, that "slippery slope" rejoinder has already been rejected in *O Centro*, 546 U.S. at 435-36.

The government cannot unilaterally insist that the ACA be devoid of exceptions because it is "comprehensive." Under RFRA, the government carries the burden of stepping up to accommodate these two employers. On this record, there is no evidence it has begun to do so.

◆

CONCLUSION

The government and some of its *amici* advance various arguments that a RFRA accommodation for Conestoga and Hobby Lobby would mean that their employees will be responsible for the cost of any emergency contraception. Those arguments are mistaken, both in believing that there is a relevant shift in costs, and in attributing any merit to its legal significance.

This Court should order the government to recognize a RFRA accommodation for Conestoga and Hobby Lobby.

Respectfully submitted,

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CURIAE
BRIEF

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Supreme Court, U.S.
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In the Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL.,
Respondents.

On Writs of Certiorari to the United States
Courts of Appeals for the Tenth and Third Circuits

BRIEF OF NATIONAL HEALTH LAW PROGRAM, ET AL. AS *AMICI CURIAE* IN SUPPORT OF THE GOVERNMENT

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INTEREST OF THE AMICI[1]

The *amici curiae* are the National Health Law Program, American Public Health Association, National Family Planning & Reproductive Health Association, National Women's Health Network, National Latina Institute for Reproductive Health, National Asian Pacific American Women's Forum, Asian Americans Advancing Justice, Asian & Pacific Islander American Health Forum, Black Women's Health Imperative, Forward Together, National Hispanic Medical Association, Ipas, Sexuality Information and Education Council of the U.S. (SIECUS), HIV Law Project, Christie's Place, National Women and AIDS Collective, California Women's Law Center, and Housing Works. While each *amicus* has particular interests, they collectively bring to the Court an in depth understanding of the standards of care and existing federal laws that address the use and coverage of preventive reproductive health services. The *amici* want to bring accurate information on these topics to the Court as it considers the legality of the requirements for preventive health care services under § 2713(a)(4) of the Public Health Service Act, added by the Patient Protection and Affordable Care Act (ACA).

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[1] Counsel for Conestoga Wood Specialties Corp. and the Federal government have filed with the Clerk blanket consent to *amicus* briefs in this case. Counsel for Hobby Lobby Stores, Inc. consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund preparation or submission of this brief. No person, other than *amici* and *amici*'s counsel, contributed money intended to fund preparation or submission of this brief.

SUMMARY OF ARGUMENT

The ACA recognizes that preventive health services are critical to individual and community health. It accordingly requires new group health plans and health insurance issuers to cover such additional women's preventive health care services as provided for in guidelines supported by the Health Resources and Services Administration (HRSA).[2] By doing so, the ACA recognizes that women have unique reproductive and gender specific health needs.

Well-established standards of medical care and prevailing federal laws and policies predating the ACA recognize that family planning services are essential preventive care for women. The contraceptive coverage requirement adds to these larger federal policies and seeks to ensure that health plans sold in the individual and small group markets cover essential preventive services for women.

ARGUMENT

I. Accepted evidence-based standards of medical care recognize that contraception is essential preventive care for women.

This case concerns the ACA and United States Department of Health and Human Services' (HHS) requirement that most new health insurance plans cover women's preventive health services, including contraception.[3] This requirement is in accord with accepted standards of medical care recognized by various professional medical academies and associations.

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[2] *See* Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1001, § 2713(a)(4), 124 Stat. 119, 131 (codified at 42 U.S.C. § 300gg-13(a)(4)).

According to the American Medical Association's (AMA) Council on Ethical and Judicial Affairs, a standard of care is "'that level of care, skill and treatment' . . . which a 'reasonable and prudent [physician] similarly situated would provide under similar circumstances.'"[4] Standards are based on "information from clinical experience that has met some established set of validity, and the appropriate standard is determined according to the requirements of the intervention and clinical circumstance."[5] Researchers consider a variety of evidence in developing standards. Generally, standards are based on large quantities of evidence from empirical studies, but clinicians' practice experiences may also contribute to their development.[6]

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[3] *See id.*; 45 C.F.R. § 147.130(a)(1); U.S. Dep't of Health & Human Servs. (HHS), Health Res. & Servs. Admin., Women's Preventive Services: Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines (last visited Jan. 21, 2014).

[4] Am. Med. Ass'n (AMA) Council on Ethical & Judicial Affairs, *Report of the Council on Ethical & Judicial Affairs* 12-A-04, at 3 (2004) (footnote omitted) (citations omitted) (defining standard of care in context of medical testimony in legal proceedings).

[5] LeighAnne Olsen et al., *The Learning Healthcare System: Workshop Summary (IOM Roundtable on Evidence-Based Medicine)* app. D 353, 354 (July 2011) (defining evidence).

Prevailing standards of medical care recognize family planning services as a necessary component of preventive care for women. These standards are reflected in the formal practice recommendations of health care professional associations such as the American Congress of Obstetricians and Gynecologists (ACOG), the Society of Family Planning, the American Academy of Pediatrics (AAP), the Society for Adolescent Medicine, the AMA, the American Public Health Association (APHA), and the Association of Women's Health, Obstetric and Neonatal Nurses, all of which "recommend use of family planning as part of preventive care for women."[7] For example, ACOG recommends that women have access to family planning services.[8] According to the American Academy of Family Physicians, effective contraceptive use is a component of preconception care for all women who are not planning to become pregnant.[9] The APHA has endorsed universal access to contraception for over thirty years.[10]

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[6] Nat'l Health Law Program, *Health Care Refusals: Undermining Quality Care for Women* 8 (2010) (defining standard of care).

[7] *See* Inst. of Med. (IOM) of the Nat'l Acads., *Clinical Preventive Services for Women: Closing the Gaps* 104 (2011) (citing Kay Johnson et al., *Recommendations to Improve Preconception Health and Health Care—United States: A Report of the CDC/ATSDR Preconception Care Work Group and the Select Panel on Preconception Care*, 55 MORBIDITY & MORTALITY WKLY. REP. 1 (2006) (discussing practice guidelines)).

[8] *See, e.g.*, Am. Cong. of Obstetricians & Gynecologists (ACOG), *Technical Bulletin No. 205, Preconception Care*, 50 INT'L J. OF GYNECOLOGY & OBSTETRICS 201 (1995); ACOG Comm. on Gynecologic Practice, Comm. Op. No. 313, *The Importance of Preconception Care in the Continuum of Women's Health Care*, 106 OBSTETRICS & GYNECOLOGY 656, 656-66 (2005).

Similarly, the United States Centers for Disease Control and Prevention's (CDC) Agency for Toxic Substances and Diseases Registry concludes that preconception (before pregnancy) and inter-conception (between pregnancies) care should include family planning counseling along with health insurance coverage of contraceptives, because, among other things, this coverage can reduce the risk of maternal and infant mortality and pregnancy-related complications.[11] The AMA supports these CDC recommendations.[12] These recommendations are particularly important for women of color who disproportionately experience chronic health conditions such as diabetes, heart disease, and obesity, all of which may be exacerbated by pregnancy.[13] In particular, these conditions underlie complications related to pregnancy or childbirth that contribute to the disproportionate maternal mortality rate among African American women.[14]

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[9] Michael C. Lu, *Recommendations for Preconception Care*, 76 AM. FAMILY PHYSICIAN 397, 399-400 (2007).

[10] Am. Pub. Health Ass'n, *Population: Family Planning as an Integral Part of Health Services*, Pol. No. 7518 (Jan. 1, 1975).

[11] Johnson et al., *supra* note 7, at 14, 17, 19-20.

[12] AMA House of Delegates, Policy No. H-425.976 (aff'd 2007).

[13] *See generally*, Kaiser Family Found., *Putting Women's Health Care Disparities on the Map: Examining Racial and Ethnic Disparities at the State Level* (2009).

AAP and ACOG further recommend that every visit with a woman's clinician include a reproductive health screen and related counseling.[15] If pregnancy is not desired, AAP and ACOG standards call for the clinician and patient to discuss contraceptive options and proper use of the woman's chosen contraceptive method.[16] The discussion between the woman and her clinician is to "assist the [woman] in identifying the most appropriate and effective method for her" needs.[17]

A. Standards of care recommend effective contraceptive use for pregnancy spacing.

Unintended pregnancy is associated with poor health outcomes, maternal morbidity and mortality, and risky health behaviors. The World Health Organization's standards of care recommend that a woman space her pregnancies at least two years apart so that her body can properly recover.[18] According to ACOG, women who become pregnant less than six months after their previous pregnancy are seventy percent more likely to have membranes surrounding the fetus rupture prematurely and are at a significantly higher risk of other complications.[19] Research also shows that short birth intervals are associated with higher than average rates of low birth weight and neonatal death.[20] Thus, the professional associations, including the AMA and ACOG, recommend that women have access to contraceptive counseling and services, which will enable them to appropriately space their pregnancies.[21]

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[14] *See generally*, D. Goffman et al., *Predictors of Maternal Mortality and Near-Miss Morbidity*, 27 J. PERINATOLOGY 597 (2007) (discussing racial disparities in maternal outcomes).

[15] Am. Acad. of Pediatrics (AAP) & ACOG, *Guidelines for Perinatal Care* 101 (7th ed. 2012); *see also* ACOG Comm. on Gynecologic Practice, *supra* note 8 (referring to guidelines for perinatal care and women's health care).

[16] *See* AAP & ACOG, *supra* note 15, at 101.

[17] *Id.*

B. Standards of care recommend that women taking drugs contraindicated for pregnancy have access to contraception.

Access to contraception is critical for women taking medications that pose serious risks for maternal and fetal health. A number of commonly prescribed pharmaceuticals are known to cause impairments in the developing fetus or to create adverse health conditions for the pregnant woman.[22]

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[18] Cicley Marston, World Health Org., *Report of a WHO Technical Consultation on Birth Spacing, Geneva, Switzerland, 13-15 June 2005*, at 2 (2007).

[19] Thomas Gellhaus, Statement of ACOG to the U.S. Senate, Comm. on Health, Educ., Labor & Pensions, Pub. Health Subcomm: Safe Motherhood (Apr. 25, 2002).

[20] *See, e.g.*, James S. Rawlings, *Prevalence of Low Birth Weight and Preterm Delivery in Relation to the Interval between Pregnancies among White and Black Women*, 332 N. ENG. J. MED. 69, 69 (1995) (citing studies).

[21] *See* discussion *supra* pp. 2-6.

Approximately 11.7 million prescriptions for drugs, which the United States Food & Drug Administration (FDA) has categorized as Pregnancy Category D (there is evidence of fetal harm, but potential benefits may warrant use despite the harm) or Category X (contraindicated in women who are or may become pregnant because the risks of use of the drugs by a pregnant woman outweigh the potential benefits) are filled by significant numbers of women of reproductive age each year.[23] Approximately 5.8% of pregnancies in the United States are exposed to Category D or X drugs.[24] Multiple studies recommend that women of reproductive age who are taking these drugs use a reliable form of contraception to prevent pregnancy.[25]

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[22] David L. Eisenberg et al., *Providing Contraception for Women Taking Potentially Teratogenic Medications: A Survey of Internal Medicine Physicians' Knowledge, Attitudes and Barriers,* 25 J. GEN. INTERNAL MED. 291, 292 (2010); Susan E. Andrade et al., *Prescription Drug Use in Pregnancy*, 191 AM. J. OBSTETRICS & GYNECOLOGY 398, 406 (2004).

[23] Eleanor B. Schwarz et al., *Documentation of Contraception and Pregnancy When Prescribing Potentially Teratogenic Medications for Reproductive-Age Women*, 147 ANNALS OF INTERNAL MED. 370, 370 (2007); Eleanor B. Schwarz et al., *Prescription of Teratogenic Medications in United States Ambulatory Practices*, 118 AM. J. MED. 1240, 1240-41 (2005).

[24] Eisenberg et al., *supra* note 22, at 291.

[25] *See, e.g.*, *id.* at 291-92; Schwarz et al., *Documentation of Contraception*, *supra* note 23, at 374-75.

For example, Isotretinoin, a drug used to treat severe cystic acne, can cause multiple fetal impairments.[26] The FDA requires that women of reproductive age who are taking this drug agree to use two forms of contraception.[27] Iodine 131, which is used to treat hyperthyroidism and cancer, is another example of a drug for which pregnancy is contraindicated because it may destroy the developing fetus.[28] ACOG recommends that women taking Iodine 131 avoid pregnancy.[29]

C. Standards of care recommend that women with heart conditions have access to contraception.

Heart disease is the number one cause of death for women in the United States.[30] African American women have twice the age standardized rate of fatal incidence of cardiovascular disease as white women.[31] Hispanic and non-Hispanic Black women are also more likely to have multiple risk factors for heart disease, including high blood pressure, diabetes, and obesity.[32] There are a number of cardiac conditions, like valvular heart lesions, that are poorly tolerated given the physiological changes brought about during pregnancy.[33]

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[26] Ctrs. for Disease Control & Prevention (CDC), *Accutane®-Exposed Pregnancies,* 49 MORBIDITY & MORTALITY WKLY. REPT. 28, 28 (2000).

[27] U.S. Food & Drug Admin., *iPledge Program Frequently Asked Questions as of July 21, 2006*, at 5 (2006), http://www.fda.gov/downloads/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/ucm094313.pdf (last visited Jan. 23, 2014).

[28] ACOG on Practice Bulletins, *Practice Bulletin No. 37: Clinical Management Guidelines for Obstetrician—Gynecologists, Thyroid Disease in Pregnancy* (2002).

[29] *Id.*

[30] CDC, *Women and Heart Disease Fact Sheet* (Aug. 2013), http://www.cdc.gov/dhdsp/data_statistics/fact_sheets/docs/fs_women_heart.pdf (last visited Jan. 21, 2014).

The American College of Cardiology and the American Heart Association Task Force on Practice Guidelines have issued specific recommendations for preconception management of women with valvular heart disease.[34] These guidelines recommend that management include provision of information about contraception and maternal and fetal risks of pregnancy.[35] These professional associations recommend that clinicians counsel women with certain heart conditions, including valvular heart disease, against pregnancy.[36] The decision of whether to use contraception is, however, ultimately left to the woman.[37]

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[31] Monika M. Safford et al., *Association of Race and Sex with Risk of Incident Acute Coronary Heart Disease Events*, 308 J. AM. MED. ASS'N 1768, 1772 (2012).

[32] Elsa-Grace V. Giardina, M.D. et al., *The DHHS Office on Women's Health Initiative to Improve Women's Heart Health: Focus on Knowledge and Awareness Among Women with Cardiometobolic Risk Factors*, 20 J. WOMEN'S HEALTH 893, 898 (Nov. 6, 2011).

[33] Robert O. Bonow et al., *2008 Focused Update Incorporated Into the ACC/AHA 2006 Guidelines for the Management of Patients With Valvular Heart Disease*, 118 CIRCULATION e523, e598-e604 (2008).

[34] Robert O. Bonow et al., *Guidelines for the Management of Patients with Valvular Heart Disease: Executive Summary A Report of the American College of Cardiology/American Heart Association Task Force on Practice Guidelines (Committee on Management of Patients With Valvular Heart Disease)*, 98 CIRCULATION 1949, 1973 (1998).

D. Standards of care recommend that women with diabetes have access to contraception.

Standards of medical care also advise women with diabetes to prevent pregnancy until their condition is under control. People with diabetes either produce insufficient insulin or cannot properly use insulin.[38] An estimated 10-18% of nonpregnant women of reproductive age have some type of abnormal glucose tolerance that carries maternal and fetal risks if they become pregnant.[39] Pregestational diabetes mellitus is a type of diabetes in women that develops before they become pregnant.[40] Pregestational diabetes is observed in about one percent of all pregnancies.[41] The type 2 diabetes prevalence rate is higher for women of color.[42] Moreover, "compared with non-Hispanic white adults, the risk of diagnosed diabetes was 18 percent higher among Asian Americans, 66 percent higher among Hispanics/Latinos, and 77 percent higher among non-Hispanic blacks."[43] Latinas also have higher rates of gestational diabetes than non-Hispanic white women, which puts them at greater risk for type 2 diabetes later in life.[44]

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[35] *Id.* at 1974.

[36] Bonow et al., *2008 Focused Update Incorporated Into the ACC/AHA 2006 Guidelines for the Management of Patients With Valvular Heart Disease*, *supra* note 33, at e598-99.

[37] *See, e.g.*, AAP & ACOG, *supra* note 15, at 101 ("If pregnancy is not desired, current contraceptive use and options should be discussed to assist the patient in identifying the most appropriate and effective method for her.").

[38] CDC, *Diabetes and Pregnancy* (Sept. 4, 2012), http://www.cdc.gov/pregnancy/diabetes.html (last visited Jan. 24, 2014).

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[39] Thomas Buchanan, *Pregnancy in Preexisting Diabetes*, DIABETES IN AM. 719, 720 (Nat'l Diabetes Data Group et al., eds., 2d ed. 1995).

[40] CDC, *Diabetes and Pregnancy*, *supra* note 38.

[41] ACOG Comm. on Practice Bulletins, *Practice Bulletin No. 60: Pregestational Diabetes Mellitus*, 105 OBSTETRICS & GYNECOLOGY 675, 675 (2005).

[42] U.S. Dep't of Health & Human Servs. (HHS), Nat'l Diabetes Info. Clearinghouse, Diabetes Overview, http://diabetes.niddk.nih.gov/dm/pubs/overview/#who (last visited Jan. 24, 2014); Ann S. Barnes & Stephanie A. Coulter, *The Epidemic of Obesity and Diabetes: Trends and Treatments*, 38 TEX. HEART INST. J. 142, 142 (2011).

[43] HHS, Nat'l Diabetes Info. Clearinghouse, *National Diabetes Statistics, 2011* (rev. Sept. 9, 2013), http://diabetes.niddk.nih.gov/dm/pubs/statistics/#Racial (last visited Jan. 21, 2014).

The failure to manage glucose levels during and before pregnancy can lead to serious complications and harm maternal and infant health.[45] For example, women with poorly controlled pregestational diabetes are at an increased risk of hypoglycemia, blindness, complications from chronic hypertension, and life-threatening complications from coronary heart disease.[46] Further, diabetic nephropathy—a significant complication of diabetes, the leading cause of renal failure, and a critical factor affecting pregnancy outcomes—affects six percent of pregnant women with type 1 diabetes.[47] The failure to manage glucose during preconception has been linked to malformations in infants and spontaneous abortion.[48]

The American Diabetes Association (ADA) and ACOG have issued standards of practice guidelines for preconception care for women with pregestational diabetes. According to the ADA, "planned pregnancies greatly facilitate preconception diabetes care."[49] The ADA standards of care for women with diabetes with childbearing potential include: (1) "use of effective contraception at all times, unless the patient is in good metabolic control and actively trying to conceive" and (2) counseling about the risk of fetal impairment associated with unplanned pregnancies and poor metabolic control.[50] ACOG recommends that women have glucose levels under control before becoming pregnant to decrease the likelihood of spontaneous abortion, fetal malformation, and fetal or infant death.[51]

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[44] Office on Women's Health, *Minority Women's Health: Diabetes* (updated May 18, 2010), http://womenshealth.gov/minority-health/latinas/diabetes.html (last visited Jan. 21, 2014).

[45] ACOG Comm. on Practice Bulletins, *Practice Bulletin No. 60*, *supra* note 41, at 676-77.

[46] *Id.* at 677-78.

[47] E. Albert Reece et al., *Pregnancy in Women with Diabetic Nephropathy*, UptoDate (Dec. 3, 2012).

[48] Am. Diabetes Ass'n (ADA), *Preconception Care of Women with Diabetes,* 26 DIABETES CARE S91, S91 (2003).

E. Standards of care recommend that women with lupus have access to contraception.

Contraception is a critical service for women with lupus. Lupus is an auto-immune disorder, which can affect multiple parts of the body, including skin, joints, blood, and kidneys and that has multiple end-organ involvement.[52] Often called a "woman's disease," nine out of ten people with lupus are women.[53] The incidence rate for lupus is two to three times higher for African American women than for Caucasian women.[54] Lupus is also more common in women of Latina, Asian, and Native American decent.[55] Women with lupus who become pregnant face particularly increased risks of health complications.[56] A large review of United States hospital data found that the risk of maternal death for women with lupus is twenty times the risk for pregnant women without lupus.[57] Women with lupus are three to seven times more likely to suffer from thrombosis, infection, renal failure, hypertension, and preeclampsia.[58]

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[49] ADA, *Standards of Medical Care in Diabetes – 2006*, 36 DIABETES CARE S11, S44 (2013).

[50] *Id.*

[51] ACOG Comm. on Practice Bulletins, *Practice Bulletin No. 60*, *supra* note 41, at 681.

[52] HHS, Office on Women's Health, *Lupus: Frequently Asked Questions* 1-2 (June 13, 2011), http://www.womenshealth.gov/publications/our-publications/fact-sheet/lupus.pdf (last visited Jan. 24, 2014).

The National Institute of Arthritis and Musculoskeletal and Skin Diseases (NIAMS) has issued a standard of care recommending that women with lupus take these health risks and complications into consideration in determining whether to become pregnant or to carry a pregnancy to term and that physicians counsel women to use contraception until their condition is under control.[59] Because of the multiple and life-threatening risks associated with lupus, NIAMS recommends that women delay pregnancy until there are no signs or symptoms of lupus.[60] The NIAMS standard accordingly instructs women with lupus to use contraception: "Do not stop using your method of birth control until you have discussed the possibility of pregnancy with your doctor and he or she has determined that you are healthy enough to become pregnant."[61] The CDC's clinical guidance similarly concludes that unintended pregnancy presents an unacceptable health risk for women with lupus and, therefore, recommends that clinicians advise women with lupus that using only barrier or behavior-based methods of contraception may not be appropriate.[62]

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[53] *Id.* at 2.

[54] *Id.*

[55] Nat'l Inst. of Arthritis & Musculoskeletal & Skin Diseases, *Handout on Health: Systemic Lupus Erythematosus* (2013), http://www.niams.nih.gov/Health_Info/Lupus/ (last visited Jan. 22, 2014).

[56] *Id.* at 11; *see, e.g.*, Megan E. B. Clowse et al., *A National Study of the Complications of Lupus in Pregnancy*, 199 AM. J. OBSTETRICS & GYNECOLOGY. 127.e1, 127.e3 (2008).

[57] Clowse et al., *supra* note 56, at 127.e3.

[58] *Id.* at 127e.1, e.3-e.4.

Practice guidelines are clear: women require information about and access to contraceptives to prevent pregnancy. By requiring new group health plans and health insurance issuers to cover women's preventive care services, the ACA recognizes that women have unique reproductive and gender-specific health needs.[63] HHS' decision to adopt the IOM's recommendation that women receive coverage for all FDA-approved methods of contraception free of cost-sharing comports with well-established standards of medical care.[64]

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[59] Nat'l Inst. of Arthritis & Musculoskeletal & Skin Diseases, *Lupus: A Patient Care Guide for Nurses and Other Health Professionals* 45-47, Patient Info. Sheet Nos. 4-5 (3d ed. 2006).

[60] *Id.* at Patient Info. Sheet No. 11.

[61] *Id.* at Patient Info. Sheet No. 4.

[62] CDC, *U.S. Medical Eligibility Criteria for Contraceptive Use, 2010*, 59 MORBIDITY & MORTALITY WKLY. REPT. 4, 6 (2010).

II. Contraceptive coverage is widely required through federal laws and policies pre-dating the ACA.

The ACA and HHS coverage provisions reflect a long history of federal legislation which requires coverage of preventive contraceptive counseling, services, and supplies. In 1973, Congress enacted the Health Maintenance Organization (HMO) Act to encourage the delivery of health care through the HMO model.[65] The Act applies to private health plans that apply for federal qualification, a designation that enables HMOs to, among other things, avoid state laws more restrictive than the HMO Act.[66] The HMO Act identifies basic health services that HMOs must provide.[67] "Basic health services" include "family planning services."[68]

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[63] 42 U.S.C. § 300gg-13(a)(4).

[64] *See* 45 C.F.R. § 147.130(a)(1); HHS, Health Res. & Servs. Admin., *supra* note 3.

[65] Health Maintenance Organization Act of 1973, Pub. L. No. 93-222, § 1, 87 Stat. 914, 914 (1973) (codified at 42 U.S.C. §§ 300e-300e-17); *see also* S. Rep. No. 93-129, at 3037-41 (1973) (stating purpose of Act to "provide assistance and encouragement for the establishment and expansion of health maintenance organizations").

[66] 42 U.S.C. §§ 300e (defining HMO as a "public or private entity"), 300e-5 (application requirements), 300e-10 (stating that restrictive state laws do not apply to federally qualified HMOs).

The Federal Employees Health Benefits (FEHB) program also covers family planning services. The FEHB program provides employee health benefits to civilian government employees and annuitants of the United States government.[69] The United States Office of Personnel Management contracts with qualified private insurance carriers to offer health care plans through the FEHB program.[70] As part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Congress approved a "contraceptive equity provision" requiring most FEHB plans to cover contraception.[71] Accordingly, the United States Office of Personnel Management requires all FEHB plans to cover the full range of FDA-approved contraceptive drugs and devices.[72] As amended in 1998, the FEHB program includes specifically enumerated religious health plans that do not have to cover contraception, and authorizes inclusion of future plans objecting to such coverage "on the basis of religious beliefs."[73] However, the decision of whether to take up contraceptive coverage is left to the employee, who can choose from up to 300 plans, most of which cover contraception.[74] This coverage, then, is different from a refusal clause that would allow any employer to opt out of providing female employees preventive health care benefits because of the employer's religious beliefs. Unlike the FEHB program, such a proposal would leave employees without plan options that include preventive care coverage.

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[67] 42 U.S.C. § 300e-1.

[68] 42 U.S.C. §§ 300e-1(1)(H)(iv) (defining "basic health service"), 300e (requiring HMO to cover "basic and supplemental health services").

[69] *See* 5 U.S.C. §§ 8901-8914 (health insurance for government employees), 8905(a)-(b) (defining eligible persons).

[70] *Id.* § 8902; *Muratore v. U.S. Office of Pers. Mgmt.*, 222 F.3d 918, 920 (11th Cir. 2000) ("Congress enacted the FEHBA . . . to create a comprehensive program of subsidized health care benefits for federal employees and retirees."); U.S. Office of Pers. Mgmt., *The Fact Book, Federal Civilian Workforce Statistics* 82 (2007), http://www.opm.gov/feddata/factbook/ (last visited Jan. 24, 2014).

[71] Omnibus Consolidated & Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 656(a), 112 Stat. 268, 530 (1998).

Federal legislation regulating health services available to military personnel and their families also requires coverage of preventive contraceptive services. Congress established a military health system "to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents."[75] Pursuant to congressionally delegated authority, the Department of Defense established the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) in 1967 (now known as TRICARE).[76] In 1995, the Department of Defense established TRICARE as a "comprehensive managed health care program for the delivery and financing of health care services in the Military Health System."[77] TRICARE provides health care benefits to active-duty service members, retirees and their families, and other beneficiaries from any of the seven services.[78] TRICARE offers all beneficiaries a range of FDA-approved methods of contraception, including intrauterine devices, diaphragms, prescription contraceptives, and surgical sterilization.[79]

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[72] U.S. Office of Pers. Mgmt., Benefits Admin. Ltr. No. 98-418 (Nov. 6, 1998).

[73] Pub. L. No. 105-277, § 656(b), 112 Stat. 268, *supra* note 71; *see also* Cong. Research Servs., *Laws Affecting the Federal Employees Benefits Program (FEHBP)* (Feb. 13, 2013), https://www.fas.org/sgp/crs/misc/R42741.pdf (last visited Jan. 22, 2014).

[74] U.S. Office of Pers. Mgmt., *Federal Employees Health Benefits Program Patients' Bill of Rights and the Federal Employees Health Benefits Program*, http://www.opm.gov/insure/archive/health/bill rights.asp#Choice (last visited Jan. 21, 2014).

Congress' declaration of a national policy of "ensur[ing] the highest possible health status for

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[75] 10 U.S.C. § 1071.

[76] Pub. L. No. 85-861, § 1(25)(B), 72 Stat. 1450 (1958), amended by Pub. L. No. 89-614, § 2(1), 80 Stat. 862 (1966) (codified at 10 U.S.C. §§ 1071-1110b).

[77] 32 C.F.R. §§ 199.17(a), 199.3; 10 U.S.C. § 1073(2).

[78] *See* 10 U.S.C. §§ 1072 (defining TRICARE), 1074 (providing for medical and dental care for members and certain former members of armed forces), 1077 (providing for medical and dental care for dependents).

[79] 32 C.F.R. § 199.4(e)(3); 10 U.S.C. § 1077 (preventive health care services for women includes pregnancy prevention).

Indians and urban Indians" also includes the requirement that health plans cover family planning services and supplies.[80] Among other things, Congress authorized the Secretary of HHS, acting through the Indian Health Service (IHS), "to provide health promotion and disease prevention services to Indians . . . ."[81] Congress' definition of "health promotion" includes programs for "reproductive health and family planning."[82] According to the Indian Health Manual, IHS "provide[s] comprehensive family planning services to all eligible American Indian and Alaska Native men and women."[83] This includes, "[a]ll available Food and Drug Administration (FDA) approved types of contraceptive (mechanical, chemical and natural) methods," with the individual deciding the appropriate choice of method.[84]

Coverage of family planning services and supplies is also a requirement of Medicaid—the country's largest public health insurance program covering approximately sixty million low-income people.[85] States participating in Medicaid receive significant federal funding in return for providing specified health coverage to specified groups of people (with a state option to cover additional groups and services). The Medicaid Act requires participating states to cover family planning services and supplies for all categorically needy beneficiaries.[86]

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[80] 25 U.S.C. § 1602(1)-(2).

[81] 25 U.S.C. § 1621b(a).

[82] 25 U.S.C. § 1603(11)(G)(xix).

[83] HHS, Indian Health Serv., *Indian Health Manual* § 3-13.12B(1), http://www.ihs.gov/ihm/index.cfm (last visited Jan. 21, 2014).

[84] *Id.* at §§ 3-13.12F(2), 3-13.12B(1).

[85] *See* 42 U.S.C. § 1396d(a)(4)(C); *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 502 (1990) ("Although participation in the program is voluntary, participating states must comply with certain

The ACA's contraceptive coverage provision builds upon this existing body of federal law. Standards of medical care recognize that a woman's ability to use contraception is critical to her health and well-being. The federal government has long-recognized these standards of medical care by enacting laws and policies that ensure women's access to health insurance benefits that include contraception coverage.

III. Federal law seeks to ensure that private health insurance coverage adequately meets women's health care needs by requiring coverage of contraception.

In its petition for a Writ of Certiorari, Hobby Lobby Stores., Inc. argued that the federal government can achieve its contraceptive access goals through other "readily available means," highlighting Title X of the

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requirements imposed by the Act and regulations."); Kaiser Family Found., *Medicaid: A Primer* 1 (Mar. 2013).

[86] 42 U.S.C. § 1396d(a)(4)(c); 42 C.F.R. § 441.20; *see* Ctrs. for Medicare & Medicaid Srvs. (CMS), *State Medicaid Manual* § 4270; CMS, *Dear State Medicaid Director* (July 2, 2010) (discussing family planning related services in context of new eligibility option under ACA § 2303).

Public Health Service Act (Title X).[87] *Amici* accordingly briefly address the interplay between the ACA provision at issue and Title X.

The ACA seeks to increase the quality and affordability of health insurance through a number of mechanisms, including the establishment of a minimum level of "essential health benefits" in health insurance coverage.[88] Among other things, Congress added § 2713(a)(4) of the Public Health Service Act to ensure that women receiving coverage through private insurance—a "group health plan" or from "a health insurance issuer offering group or individual health insurance coverage"—have a minimum level of coverage of preventive health services necessary to preserve and maintain women's health.[89]

Title X, on the other hand, is the nation's only dedicated source of federal funding for safety net family planning services.[90] While Title X health centers can provide care to all patients, federal law requires them to give priority to "persons from low-income families."[91] In addition to being low-income, Title X patients are also disproportionately people of color. In 2012, of the approximately 4.8 million Title X family planning users, thirty one percent self-identified as black or African American, Asian, Native Hawaiian or Pacific Islander, or American Indian or Alaska Native, and twenty eight percent self-identified as Hispanic or Latino.[92]

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[87] Br. of Respondents at 34-35, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (Oct. 21, 2013).

[88] *See e.g.*, 42 U.S.C. § 300gg-6(a) (requiring individual or small group market health plans to cover a package of "essential health benefits"); 42 U.S.C.§ 18022(b)(1) (listing ten categories of "essential health benefits").

[89] 42 U.S.C. § 300gg-13(a)(4).

[90] *See* 42 U.S.C. §§ 300-300a-8; HHS, Office of Population Affairs, *Title X Funding History*, http://www.hhs.gov/opa/title-x-family-planning/title-x-policies/title-x-funding-history/ (last visited Jan. 22, 2014).

Safety net programs like Title X are not designed to absorb the unmet needs of higher-income, insured individuals. Furthermore, Title X is designed to subsidize a program of care, not pay all of the cost of any service or activity—the Title X statute and regulations contemplate how Title X and third party payers will work together to pay for care, directing Title X-funded agencies to seek payment from such third party payers.[93] Even more, Title X is already underfunded and overburdened. Between the 2010 and 2012 fiscal years, Title X funding decreased by approximately twenty-four million dollars, or 7.4%. [94] This time period also corresponds with the largest decrease in the number of patients served in Title X sites in more than a decade.[95]

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[91] 42 C.F.R. § 59.5(a)(6)-(9).

[92] Christina Fowler, et al., *Title X Family Planning Annual Report: 2012 National Summary* ES-2 (rev. Dec. 2013) http://www.hhs.gov/opa/pdfs/fpar-national-summary-2012.pdf (last visited Jan. 22, 2014).

[93] *See e.g.*, 42 U.S.C. § 300a-4(c)(2) (prohibiting charging persons from a "low-income family" for family planning services "except to the extent that payment will be made by a third party (including a government agency) which is authorized or is under legal obligation to pay such charge"); 42 C.F.R. § 59.5(a)(7), (9).

Title X and similar programs seek to ensure preventive services for primarily low-income and uninsured individuals who rely on publicly funded safety net programs for access to services. Even with the ACA's expansion of health insurance coverage, the U.S. Congressional Budget Office estimates that approximately 30 million nonelderly individuals will remain uninsured in 2016.[96]

CONCLUSION

Standards of medical care recommend that women have access to contraception as a necessary part of critical preventive health care services. The contraceptive coverage provision at issue here makes this access possible by ensuring that health plans in the individual and small group market adequately cover services that ensure women's health and well-being. This Court should find for the Government and uphold the contraceptive coverage provision.

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[94] *See* HHS, Office of Population Affairs, *supra* note 90; *see also* Nat'l Campaign to Prevent Teen and Unplanned Pregnancy, *Summary of Federal Funding Relevant to Teen and Unplanned Pregnancy Prevention* 2 note (m) (2012), http://www.thenationalcampaign.org/policymakers/PDF/FY2010-2013_Appropriations.pdf (last visited Jan. 23, 2014).

[95] Christina Fowler et al., *supra* note 92, at ES-1.

[96] Cong. Budget Office, *Payments of Penalties for Being Uninsured Under the Affordable Care Act* 1 (2012), http://www.cbo.gov/publication/43628 (last visited Jan. 22, 2014).

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AMICUS
CURIAE
BRIEF

Nos. 13-354; 13-356

JAN 28 2014
CLERK

In The
Supreme Court of the United States

◆

KATHLEEN SEBELIUS, et al.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., et al.,

Respondents.

and

CONESTOGA WOOD SPECIALTIES CORP., et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, et al.,

Respondents.

◆

On Writs Of Certiorari To The
United States Courts Of Appeals
For The Tenth And Third Circuits

◆

BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), ET AL., IN SUPPORT OF RESPONDENTS IN NO. 13-354 AND IN SUPPORT OF PETITIONERS IN NO. 13-356

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NATIONAL COUNCIL OF YOUNG ISRAEL

RABBINICAL ALLIANCE OF AMERICA

RABBINICAL COUNCIL OF AMERICA

TORAH UMESORAH

THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA

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BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"), AGUDAS HARABBANIM, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, TORAH UMESORAH, AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, IN SUPPORT OF RESPONDENTS IN NO. 13-354 AND IN SUPPORT OF PETITIONERS IN NO. 13-356

INTEREST OF THE AMICI[1]

The National Jewish Commission on Law and Public Affairs ("COLPA") is an organization of volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs in this Court in 29 cases since 1968, usually on behalf of major Orthodox Jewish organizations. It has also supported laws protecting the right of observant Jews -- and that of their non-Jewish co-religionists -- to the reasonable accommodation of their religious observances when they conflict with governmental regulation or with societal practices.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or party other than the *amici* has made a monetary contribution to this brief's preparation or submission. All parties have consented in writing to the filing of this *amicus* brief.

Agudas Harabbanim of the United States and Canada is the oldest Jewish Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

Agudath Israel of America ("Agudath Israel"), founded in 1922, is a national grassroots Orthodox Jewish organization. Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel intervenes at all levels of government -- federal, state, and local; legislative, administrative, and judicial -- to advocate and protect the interests of the Orthodox Jewish community in the United States in particular, and religious liberty in general. Agudath Israel played a very active role in lobbying for the passage of the Religious Freedom and Restoration Act ("RFRA") and the Religious Land Use and Institutionalized Persons Act ("RLUIPA").

National Council of Young Israel ("NCYI") is the umbrella organization for over 200 Young Israel branch synagogues with over 25,000 families within its membership. It is one of the premier organizations representing the Orthodox Jewish community, its challenges and needs, and is involved in issues that face the greater Jewish community in North America and Israel.

Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has, for many years, been involved in a variety of religious, social and educational causes affecting Orthodox Jews.

The Rabbinical Council of America, with national headquarters in New York City, is a professional organization serving more than 1,000 Orthodox Rabbis in the United States of America, Canada, Israel, and around the world. Membership is comprised of duly ordained Orthodox Rabbis who serve in positions of the congregational rabbinate, Jewish education, chaplaincies, and other allied fields of Jewish communal work.

Torah Umesorah (National Society for Hebrew Day Schools) serves as the pre-eminent support system for Jewish Day Schools and yeshivos in the United States providing a broad range of services. Its membership consists of over 675 day schools and yeshivos with a total student enrollment of over 190,000.

The Union of Orthodox Jewish Congregations of America ("Orthodox Union") is the nation's largest Orthodox Jewish umbrella organization, representing nearly 1,000 congregations coast to coast. The Orthodox Union has participated in many cases before this Court which have raised issues of importance to the Orthodox Jewish community. Among those issues, of paramount importance is the constitutional guarantee of religious freedom. Because of our community's stake in the most expansive protection of this "first freedom," the Orthodox Union was an active member of the coalition that advocated for the enactment of RFRA.

And because of the Orthodox Union's recognition that religious liberty must be afforded to people of all faiths on an equal and vigorous basis, it has consistently expressed concerns about the Affordable Care Act's "contraceptives mandate" and its impact on religious liberty. The Orthodox Union has lodged this concern with the President,[2] with the Department of Health and Human Services,[3] with the Congress,[4] and does so today, to the Supreme Court.

For the reasons specified in this *amicus* brief the Orthodox Jewish community in the United States will be substantially affected by how this Court construes the Religious Freedom Restoration Act ("RFRA"). If the limiting interpretation of the law suggested by the Government's position in these cases is approved by this Court, observances of American Jews may be significantly curtailed.

SUMMARY OF ARGUMENT

These consolidated cases will determine whether federal law withdraws statutory protection for the observances of religiously conscientious Americans if (1) they choose to do business through corporate structures that limit their personal financial liability and (2) they engage in profit-seeking commercial activity. The Government acknowledges that, if not for their choice to engage in profit-seeking commerce through a closely held corporation, the Green family in No. 13-354 and the Hahn family in No. 13-356 would qualify for protection under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, et seq. Federal law would exempt them from paying for contraceptive coverage in their employees' health insurance plans if they could establish that such payment is a substantial burden on the exercise of their religious beliefs and that the Government cannot demonstrate a compelling interest in subjecting their business to this financial requirement. The Government asserts that their eligibility for federal protection is dependent, however, on non-corporate and non-profit status.

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[2] http://www.jewishpress.com/news/breaking-news/orthodox-push-obama-on-israel-contraceptives-in-white-house-meeting/2012/06/06/

[3] http://www.ou.org/index.php/torah/article/ou_files_comments_on_womens_health_services_mandate/#.Uua5DidOm70

[4] Congressional Record, Senate, S1120, Feb. 29, 2012

The Government's interpretation of RFRA denies to owners and managers of closely held corporations and to all owners of for-profit businesses the protection of federal law. It is a miserly construction of a remedial statute that was designed to guarantee broadly that governmental regulation would not, directly or indirectly, impede religious freedom. It severely restricts the protection of a law that Congress enacted virtually unanimously in a ringing endorsement of religious liberty.

The two-edged limitation that the Government would place upon RFRA's application in these cases can have a particularly harmful impact on Jewish Americans who observe Jewish ritual laws in operating individual or family-owned businesses. If the Government's position in these cases is sustained, their religious observances may be hindered by government regulation simply because they are engaged in for-profit commerce and have chosen, for personal financial security, to operate their businesses in a corporate format. Neither the language of RFRA nor its legislative policy supports the abridgment of religious exercise that results from this crabbed reading of language that was intended to be a protective shield for the observances of devout Americans.

ARGUMENT

I.

NEITHER JEWISH LAW NOR THIS COURT'S PRECEDENT DISTINGUISHES, IN DEFINING RELIGIOUS OBSERVANCE, BETWEEN BUSINESSES OPERATED AS CLOSELY HELD CORPORATIONS AND THOSE OPERATED AS SOLE PROPRIETORSHIPS OR PARTNERSHIPS

The Solicitor General acknowledges that the sincerely held religious beliefs of the Green family in the *Hobby Lobby* case "merit the full measure of protection that the Constitution and laws provide." Brief for the Petitioners, No. 13-354, p. 12. This includes, one supposes, protection under RFRA for their religious conviction that they may not finance contraceptive insurance coverage by their employees. But the shield afforded by RFRA disappears, according to the Government, if the Greens choose to operate their businesses through closely held corporations rather than as sole proprietorships or as a partnership.

This is a singularly confounding distinction for any religiously observant Jewish business-owner. His or her religious duty is totally unaffected by the existence of a corporate entity. "The concept of a corporation existing as a separate entity distinct from the persons who own its stock is not recognized in Jewish Law." D.B. Bressler, "Ethical Investment: The Responsibility of Ownership in Jewish Law," in Levine & Pava, Jewish Business Ethics 181 (1999). See generally 12 Encyclopedia Judaica 604-608 ("Legal Person") (2d ed. 2007); Michael J. Broyde and Steven H. Resnicoff, "The Corporate Veil and *Halakhah*: A Still Shrouded Concept," in Levine & Pava, *supra* at 203-272; J. David Bleich, Contemporary Halakhic Problems, Vol. III, 388 (1989) ("Property must be held by individuals, otherwise it is ownerless. Corporations, at least for purposes of holding property, are regarded in Jewish law as partnerships.")

Leading Orthodox Jewish religious authorities in the modern world overwhelmingly agree that a corporation is not an independent legal person or entity. See Rabbi Yitzchak Yaakov Weisz, Teshuvot Minchat Yitzchak, Vol. III, No. 1; Rabbi Moshe Sternbuch, Moadim Uzmanim, Vol. III, No. 269; Rabbi Yaakov Breisch, Teshuvat Chelkat Yaakov, Vol. III, No. 191; Rabbi Moshe Feinstein, Igrot Moshe, Orach Chaim, Vol I, No. 90 ("A partnership called 'corporation' is also, for Sabbath-observance purposes, like any other partnership.")

From the perspective of the individual Jewish owner of a business whose religious observance is impeded by a government regulation, the burden on his religious exercise is identical whether he operates his business as a closed corporation or a sole proprietorship. His faith does not view the corporation's conduct as independent of his own. If the corporation that he owns or controls is forced to violate a religious duty, he personally suffers the Divine punishment. Since a corporate entity cannot immunize its owner from his or her religious obligation, withdrawing RFRA protection because the business is corporate leaves the "substantial burden" on its owner's religious exercise with no legal protection whatever.

In *Braunfeld v. Brown*, 366 U.S. 599 (1961), and in *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961), this Court held that the Free Exercise Clause did not entitle Sabbath-observing Orthodox Jewish shop-owners to open their businesses on Sunday in violation of local Sunday closing laws. There was no implication in the Court's majority opinions that the Free Exercise Clause distinguished between businesses conducted as sole proprietorships such as appear to have been true of the Philadelphia, Pennsylvania, shops in *Braunfeld*, and those owned by closely held family-controlled corporations such as the Springfield, Massachusetts, market in *Crown Kosher*.

The majority opinion in the *Crown Kosher* case rejected the shop-owners' constitutional claim on the ground that the same claim had been rejected on its merits in *Braunfeld*. See 366 U.S. at 631. To be sure, the majority opinion in *Crown Kosher* noted that it was "inappropriate" to pass on some "procedural arguments" presented below by the governmental appellants (366 U.S. at 631, n.7). The Massachusetts authorities had contended, as the Solicitor General contends here, that the *Crown Kosher* complaint should be dismissed because the constitutional claim had been asserted by a corporation that allegedly has no standing to assert a freedom-of-religion claim. See *Crown Kosher Super Market of Mass., Inc., v. Gallagher*, 176 F. Supp. 466, 471-472 (D. Mass. 1959).

The Solicitor General contends in these cases that this reservation "confirms that this Court's pre-*Smith* decisions had not afforded free-exercise rights to for-profit corporations." Brief for the Petitioners, No. 13-354, p. 18.

If the Solicitor General's observation were valid, it apparently escaped notice by Justices Brennan and Stewart, both of whom dissented in *Braunfeld* and in *Crown Kosher* without adverting in any manner to a corporation's exclusion from the protection of the Free Exercise Clause that the Government has now discovered. Justice Brennan observed in his dissenting opinion that the effect of the Pennsylvania and Massachusetts Sunday Closing Laws was "that appellants may not simultaneously practice their religion and their trade, without being hampered by a substantial competitive disadvantage." 366 U.S. at 613. Whether this "competitive disadvantage" impacted the individual shop-owners who were the plaintiffs in *Braunfeld* or the closely held corporation that was threatened with prosecution in *Crown Kosher* apparently made no difference to Justice Brennan.

Justice Stewart's brief dissent emphasized the commercial aspect of the plaintiffs' constitutional claim in both cases. Without distinguishing between corporations and sole proprietorships, he dissented in both cases and said, "Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand." 366 U.S. at 616. Neither dissenting Justice apparently believed that the protection of the Free Exercise Clause of the First Amendment was diminished if the individual subject to a governmental burden operated his business as a closely held corporation rather than as a sole proprietorship or partnership or if he or she was seeking a profit.

The views of Justice Brennan are particularly significant in interpreting RFRA and in deciding these cases because Congress explicitly sought in RFRA to reinstate the constitutional rule that Justice Brennan articulated for a majority of this Court two years later in *Sherbert v. Verner*, 374 U.S. 398 (1963). The legislative "purposes" set forth in 42 U.S.C. § 2000bb(b)(1) declare that RFRA was enacted "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." Justice Brennan's dissenting vote in the *Crown Kosher* case and the explicit endorsement of his majority opinion in RFRA indicate that, contrary to the Solicitor General's assertion, it was not "a foreign concept to the Congress that enacted RFRA" (Brief for the Petitioners, No. 13-354, p. 19) to provide a RFRA shield to religious individuals doing business through closely held corporations.

The irrationality and arbitrariness of distinguishing between businesses operated as closely held corporations and those that are sole proprietorships is demonstrated by the recent controversy in New York City over signs requesting customers to wear modest dress posted by Orthodox Jewish merchants in seven stores in the Williamsburg area of Brooklyn, New York. The signs read as follows:

DRESS CODE FOR STORE

כניסה לפה רק בלבוש הצנוע

[HEBREW TEXT:
"ENTRY HERE ONLY IN MODEST DRESS"]

No Shorts
No Barefoot
No Sleeveless
No Low Cut Neckline
ALLOWED IN THIS STORE

--------*--------

No Rope Escotada
No Pies Descubiertos
No Pantalones Cortos
Mangas Cortas
PERMITIDA EN ESTE NEGOCIO

The New York City Commission on Human Rights sought to impose a civil sanction on the Orthodox Jewish merchants for posting these signs in their stores notwithstanding the undisputed fact that immodest dress violated the merchants' religious convictions. *E.g.*, *York City Commission on Human Rights v. Gestetner Printing*, Complaint No. M-P-SC-12-1027203. Following a settlement conference, the dispute was resolved. The *Wall Street Journal* carried the following AP story on January 22, 2014:

> **NYC DROPS SUIT OVER MODEST DRESS-CODE SIGNS**
>
> New York City has dropped a lawsuit against seven Hasidic storeowners who posted signs in their windows for customers to dress modestly.
>
> The Williamsburg, Brooklyn, merchants had faced steep fines for banning shorts, sleeveless shirts and low-cut necklines.
>
> The Human Rights Commission said the signs discriminated against women and non-Orthodox men.
>
> The owners had maintained the dress-code was religion-based. Hasidic Jews are known for their modest clothing.
>
> Under the settlement reached Tuesday, the businesses will avoid any fines. But any future signs must make clear they do

> not discriminate on the basis of gender or race.
>
> Rabbi David Niederman, the president of the United Jewish Organizations of Williamsburg, called the settlement a victory.

A more detailed report on the disposition of the case appeared under the headline "Williamsburg Store Owners Allowed To Demand Modest Dress Code" in the *Brooklyn Daily Eagle* of January 24, 2014. It identified the stores as including Gestetner Printing and Friedman's Depot Inc., Under the Government's legal rationale Friedman's Depot would have no standing to assert its owner's religion-based ground for requesting modest dress because the store was operated by a closely held corporation. On the other hand, Gestetner Printing, located in the very same neighborhood, could assert a RFRA claim because it does not have corporate ownership.

Had RFRA not been determined in *City of Boerne v. Flores*, 521 U.S. 507 (1997), to be constitutionally inapplicable to local government, the Government's position in these cases would distinguish arbitrarily between the corporate businesses and those operated as proprietorships or partnerships. Although the store-owners had the same religious motivation in posting their signs and are all located in the same neighborhood, the Solicitor General would acknowledge the RFRA rights of sole proprietorships and, if the burden on religious exercise were imposed by the federal government, would arbitrarily deny to the owners of closely held corporations equivalent legal protection.

II.

NEITHER JEWISH LAW NOR THIS COURT'S PRECEDENT DISTINGUISHES, IN DEFINING RELIGIOUS OBSERVANCE, BETWEEN NON-PROFIT AND FOR-PROFIT ACTIVITY

If one of the Williamsburg stores described above had been a thrift shop selling used clothing and furniture for a local religious school and was operated on a non-profit basis, it would have satisfied the second of the Government's novel criteria to qualify for RFRA protection. Why should the religious observance of the manager of such a non-profit business be shielded by law while his neighbor, who runs his business to make a living for his family, be beyond the law's reach? It is most unlikely that the Congress that enacted RFRA contemplated any distinction between businesses that religiously observant individuals operate for a livelihood and identical businesses operated on a non-profit basis.

It was never suggested in either *Braunfeld* or *Crown Kosher* that the religion-based conscientious convictions of the Orthodox Jewish owners of the shops were forfeited because they engaged in profit-making commerce rather than in charitable non-profit activity. Indeed, the fact that both *Braunfeld* and *Crown Kosher* concerned family businesses conducted for profit aggravated, rather than ameliorated, the injury to the exercise of the plaintiffs' religious observance.

The expressed views of Justices Brennan and Stewart dissenting in *Braunfeld* and in *Crown Kosher* explicitly referred to "trade" and to "economic survival." 366 U.S. at 613, 616. Justices Brennan and Stewart were aware – and, indeed, emphasized – the for-profit nature of the activity which was being restricted and burdened by local law.

The Jewish faith does not prohibit the financing of contraception, which underlies the legal challenge in these cases. Judaism does, however, impose substantial conscientious faith-based restrictions on employers and other individuals in managerial positions. They are obliged, for example, by the Fourth Commandment and its rabbinic interpretation to set aside Saturday as the Sabbath and a day of rest for their employees. An observant Jew may not direct his or her employee – be the employee Jewish or gentile – to labor on the Sabbath.

A federal governmental directive to a Jewish employer – be he the owner of a business operated for profit or the manager of a non-profit charitable entity -- requiring the employer to have employees work on the Sabbath would substantially burden the Jewish employer's religious exercise. It could not, under RFRA, be lawfully demanded unless the governmental interestwere "compelling" and satisfied the statutory "least restrictive means" standard. The burden on the Jewish employer should not be entitled to greater constitutional and statutory protection if the employer is engaged in charitable work that qualifies under Section 501(c)(3) of the Internal Revenue Code than if he or she operates a for-profit business.

Under Jewish Law the same religious prohibition that bars certain proscribed activity on the Sabbath in a for-profit business applies to non-profit activity. The religious sanction for violating the Sabbath is not reduced if the actor has a non-profit motive.

A graphic illustration of the arbitrary impact on Orthodox Jewish observance that could result from the Government's construction of RFRA is a complaint filed in 2006 before the New York State Division of Human Rights. *Trotman v. The Ben Gilman Spring Valley Medical and Dental Clinic*, Case No. 10113077. The complainants alleged that the operators of the clinic, which provided medical and dental help, discriminated unlawfully by closing the clinic's Spring Valley and Monsey offices on Saturdays because of "the extremity of their own religious beliefs." The Orthodox Jewish owners and operators of the clinics filed a verified answer based on rabbinic instruction that the clinics could not open on the Sabbath. The religious freedom rights of the owners and operators of the clinics resulted in dismissal of the complaint.

Could such clinics, operated by Sabbath-observing Orthodox Jews, be compelled to stay open on Saturdays if they were for-profit medical centers? Such a result is surely a blow to religious freedom but it would be possible under the Government's interpretation of RFRA.

Insofar as it might affect Jewish religious observance, RFRA should apply equally to for-profit conduct as it does to non-profit activity. The burden on the religious exercise of the Jewish faith is the same in either event.

CONCLUSION

For the foregoing reasons, this Court should reject the Government's construction of RFRA as inapplicable to owners of for-profit businesses operated in corporate form.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

Nos. 13-354, 13-356

IN THE
Supreme Court of the United States

Supreme Court, U.S.
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KATHLEEN SEBELIUS, SECRETARY OF HEALTH
AND HUMAN SERVICES, *et al.*,
Petitioners,
v.
HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORPORATION, *et al.*,
Petitioners,
v.
KATHLEEN SEBELIUS, SECRETARY OF HEALTH
AND HUMAN SERVICES, *et al.*,
Respondents.

On Writs of Certiorari
to the United States Courts of Appeals
for the Tenth and Third Circuits

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE GOVERNMENT

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE GOVERNMENT

INTEREST OF AMICI CURIAE[1]

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the Nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the amici made a monetary contribution to its preparation (Rule 37.6).

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

Amici are organizations whose members include municipal, county, and other local governments and officials from throughout the United States. These organizations regularly file amicus briefs in cases, like this one, that raise issues of concern to the Nation's cities and counties. These organizations also frequently participate as amici in cases implicating matters in which local governments, and their officials and agencies, have experience and expertise.

These cases implicate an issue with unique importance for local governments. In the present cases, the Court is asked to decide whether for-profit, closely held secular corporations may invoke the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb *et seq.*, to assert that they must not be required to comply with the federal government's regulations implementing the 2010 Patient Protection and Affordable Care Act.

Although RFRA does not apply to state and local governments, RFRA is closely related to the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc *et seq*. Among other things, RLUIPA bars state and local governments from enforcing land use regulations that impose a substantial burden on "the religious exercise of a person" unless the government can point to a compelling interest. Because amici represent local governments whose land use decisions are subject to RLUIPA, amici have expertise in RLUIPA's administration and an interest in ensuring that RLUIPA's reach is not unwarrantedly expanded.

That experience sheds light on an important issue in these cases: whether for-profit, secular corporations are "person(s)" who may invoke RFRA's protections. RLUIPA and RFRA are sister statutes that use near-identical language, and which courts have construed in tandem. Indeed, the Tenth Circuit relied in part on RLUIPA's definition of covered entities in construing RFRA's parallel provisions—and incorrectly concluded that RLUIPA extends to for-profit, secular corporations. The Petitioners in *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013) make a similar argument about RLUIPA's definitions in seeking reversal of the Third Circuit's judgment against them. These cases will thus require the Court to ascertain the meaning of "person" in RLUIPA in construing RFRA's parallel language.

RLUIPA's context, application, and legislative history uniformly show that its protections are limited to individuals and entities like churches, religious educational institutions, and non-profit religious organizations. Amici respectfully urge the Court to reverse the Tenth Circuit's more expansive definition of "person" in RFRA, and uphold the Third Circuit's decision refusing to allow for-profit corporations to invoke RFRA.

SUMMARY OF ARGUMENT

RLUIPA is a closely related branch on the same tree that gave rise to RFRA, the statute whose reach is at issue in this case. RLUIPA and RFRA use virtually identical language extending protection to "person(s)" engaged in "religious exercise" from certain state and local land use decisions and federal government requirements, respectively. Because of the statutes' close relationship and use of near-identical means to achieve their ends, the courts, and Congress, have construed RLUIPA and RFRA congruently. Indeed, the Tenth Circuit in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013), looked to RLUIPA's terms in construing the meaning of "person" in RFRA. RLUIPA, and the meaning of its provisions, thus plays an unusually important role in this case.

Proper analysis of those provisions demonstrates that the Tenth Circuit was wrong to construe "person" in RFRA as encompassing for-profit and non-profit corporations alike. Congress's purpose—as made clear in both RLUIPA's text and its legislative history—was for RLUIPA to protect individuals, as well as churches, religious assemblies, and similar organizations, from the unreasonable application of state and local land use laws. RLUIPA, and thus RFRA, was intended to provide broad protections to a narrow subset of targets. This intention is irreconcilable with a construction that permits for-profit, secular corporations to invoke RLUIPA. Construing RLUIPA in this fashion would potentially allow a wide variety of groups to challenge local governments' use of generally applicable zoning ordinances and planning codes, and would magnify the burden on local governments beyond what Congress envisioned.

Because RLUIPA does not include for-profit, secular corporations within its definition of "person," RFRA's parallel language should be given a similarly narrow interpretation. The Tenth Circuit's unfettered definition expands this term far beyond what Congress intended. This Court should reverse the Tenth Circuit's decision in ***Hobby Lobby Stores*** and uphold the Third Circuit's judgment in ***Conestoga Wood Specialties***, and make clear that RFRA does not apply to for-profit corporations.

ARGUMENT

I. THE COURT SHOULD DEFINE "PERSON" IN RFRA CONSISTENTLY WITH "PERSON" IN RLUIPA.

RLUIPA and RFRA are sister statutes that both reflect Congress's reaction to this Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 888 (1990). *See Sossamon v. Texas*, 131 S. Ct. 1651, 1655-56 (2011). In *Smith*, this Court held that religiously neutral, generally applicable laws are constitutional under the Free Exercise Clause even when those laws fail to provide exceptions for religious objectors. 494 U.S. at 890. Congress responded by passing RFRA, which sought to overturn the Court's decision in *Smith* and codify the Court's pre-*Smith* free-exercise jurisprudence by providing that "[g]overnment shall not substantially burden a person's exercise of religion" unless "it demonstrates that application of the burden to the person . . . is in furtherance of a compelling government interest and . . . is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a). RFRA's mandate applied to any federal or state "branch, department, agency, instrumentality, and official (or other person acting under color of law)" and covered "all Federal and State law, and the implementation of that law, whether statutory or otherwise." *Id.* §§ 2000bb-2(1), 2000bb-3(a) (1993) (prior to 2000 amendments).

Although RFRA remains applicable to the federal government, its limitations no longer apply to state and local governments. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 n.1 (2006). In enacting RFRA, Congress relied on its enforcement powers under Section 5 of the Fourteenth Amendment to the U.S. Constitution. This Court held, however, that RFRA was unconstitutional as applied to state and local governments because it exceeded Congress's Section 5 powers. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). Those powers are limited to enacting legislation that is "remedial" in nature, meaning that it seeks to correct documented constitutional violations and that there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520. Because RFRA was "so out of proportion as to a supposed remedial or preventive object," and the legislative record "lack[ed] examples" of the wrongs Congress sought to correct, the Court invalidated RFRA's application to state and local governments. *Id.* at 530, 532, 536.

Congress responded to *City of Boerne* by again endeavoring to pass legislation aimed at protecting religious liberty; indeed, Congress began holding hearings on the matter within weeks of the *City of Boerne* decision. *See, e.g., Protecting Religious*

Freedom After Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 105th Cong. (July 14, 1997). Members of Congress unsuccessfully introduced bills mandating broad protections for religious practices in 1998 and 1999. Religious Liberty Protection Act of 1998, H.R. 4019, 105th Cong.; Religious Liberty Protection Act of 1998, S. 2148, 105th Cong.; Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong.[2] In 2000, Congress enacted RLUIPA, a narrower version of these proposed laws. Pub. L. No. 106-274, 114 Stat. 803. RLUIPA applies to local and state governments but regulates only religious burdens on land use and institutionalized persons.

RLUIPA's land use provisions parallel RFRA's more generally applicable prohibitions. In part, RLUIPA prohibits the government from adopting or implementing land use regulations that substantially burden a person's exercise of religion, absent a showing of a compelling government interest:

> (a)(1) No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that the imposition of the burden on that person, assembly, or institution—

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[2] The Religious Liberty Protection Act of 1998 was referred to committee in both the Senate and the House of Representatives, but never received a congressional vote. It was reintroduced as the Religious Liberty Protection Act of 1999 and was approved by the House of Representatives, but stalled at committee in the Senate and never received a Senate vote. 146 Cong. Rec. S7778 (daily ed. July 27, 2000) (statement of Sen. Reid).

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1).

While the object of RLUIPA's land use provisions—the preservation of the Court's pre-*Smith* free-exercise standard as applied to land use regulations—is narrower than the generalized aim of RFRA, the means the two statutes use is identical. *See Knight v. Thompson*, 723 F.3d 1275, 1281 (11th Cir. 2013). In drafting RLUIPA's "substantial burden" language, Congress "track[ed] the substantive language" of RFRA's parallel provisions. 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady). The test simply "applies the RFRA standard" to a more limited set of governmental actions. *Id.*[3]

RLUIPA's close relationship to RFRA derives not only from the statutes' common origins, but also from their parallel evolution since their enactment. In the wake of RLUIPA's adoption, Congress amended RFRA to bring the two statutes' definitions of "religious exercise" into harmony. While RFRA had previously defined religious exercise with reference to the First Amendment, *see* 42 U.S.C. § 2000bb-2(4) (1993), Congress amended RFRA in 2000 to link its religious exercise provision to RLUIPA's more expansive definition. *See* 42 U.S.C. § 2000bb-2(4) ("[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title."); *id*. § 2000cc-5(7)(A) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."). The symbiosis between the two statutes demonstrates the need for a harmonious interpretation of their parallel provisions.

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[3] This limitation derives from Congress's obligation to satisfy the congruence and proportionality test this Court announced in *City of Boerne*. 521 U.S. at 530. Pre-RLUIPA hearings produced evidence that churches were frequently subject to discrimination through the application of land use regulations and zoning decisions. Congress sought to remedy this discrimination by adopting RFRA's substantial burden test in the land use context. See Section II(B), *infra* p. 14.

On the basis of these parallel terms and common origins, the Courts of Appeals have held that RLUIPA and RFRA should be interpreted in *pari materia*. Courts not only have relied on RFRA when construing RLUIPA as a successor statute, *see, e.g., Garner v. Kennedy*, 713 F.3d 237, 242 (5th Cir. 2013); *Redd v. Wright*, 597 F.3d 532, 535 n.2 (2d Cir. 2010); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760-61 (7th Cir. 2003), but have also looked to RLUIPA and its case-law progeny in deciding questions arising out of RFRA's implementation, *Lebron v. Rumsfeld*, 670 F.3d 540, 557 (4th Cir. 2012); *United States v. Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011).

Indeed, the Tenth Circuit itself recognized the relatedness of the two statutes by examining RLUIPA's terms to answer the question of RFRA interpretation before it. *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354, Pet'rs' App. 25a n.6 (concluding that RLUIPA "encompasses both natural persons and anything that qualifies as an 'entity'—which of course would encompass corporations").[4]

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[4] The Petitioners in *Conestoga Wood Specialties* likewise argue that RLUIPA's application to an "entity" demonstrates that both RLUIPA and RFRA apply to "corporations" and do not distinguish among "corporations based on their profit motive."

Further, the Tenth Circuit's holding that "person[s]" who may engage in religious exercise under RFRA includes for-profit, secular corporations is rooted in the Dictionary Act. That Act provides that "person" in a federal statute includes corporations unless *"the context indicates otherwise." Sebelius* Pet'rs' App. 24a (quoting 1 U.S.C. § 1) (emphasis added). In light of RFRA's close textual similarities and common origins with RLUIPA, that context necessarily includes RLUIPA. *See Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 127-28 (2003) (construing "context" in Dictionary Act to include history of statute at issue).

The meaning of "person" in RLUIPA is therefore of central importance to this case, as the Tenth Circuit's attention to that meaning indicates. Therefore, in defining the meaning of "person" in RFRA, this Court likewise should consider the meaning of that identical term in RLUIPA. Congress's intent regarding the meaning of "person" in RLUIPA provides helpful "context" for RFRA's parallel definition. The Court should thus consider whether an expansive reading of "person" in RFRA—a reading that should be harmonized with RLUIPA's identical language—would lead to absurd results under RLUIPA's substantively identical scheme. And it should arrive at a definition of "person" that can be sensibly applied to both RFRA and RLUIPA.

Conestoga Wood Specialties Corp. v. Sebelius, No. 13-356, Pet'rs' Br. at 25.

II. RLUIPA'S DEFINITION OF "PERSON" DOES NOT INCLUDE FOR-PROFIT, SECULAR CORPORATIONS.

RLUIPA's text, legislative history, and practical application make clear that those "person(s)" whose exercise of religion may be protected under RLUIPA's heightened review provisions include individuals as well as churches, religious assemblies, and similar institutions. These individuals and institutions may require local governments to demonstrate a compelling interest to justify a land use regulation that imposes a substantial burden on their exercise of religion. But nowhere in RLUIPA's text or legislative history did Congress evince any intent to extend RLUIPA's broad protections to for-profit corporations. And amici are unaware of any decision, reported or otherwise, by any court granting a for-profit, secular corporation the protections that RLUIPA provides.

Permitting for-profit corporations to invoke RLUIPA would be unworkable, as it would dramatically expand RLUIPA's scope and hinder the orderly implementation of local land use regulations. That RLUIPA cannot sensibly be (and has never been) interpreted to include for-profit corporations within its definition of "person(s)" exercising religious beliefs provides powerful support for limiting RFRA's parallel definition to individuals and non-profit religious organizations.

A. RLUIPA's Language Strongly Suggests That "Person" Includes Individuals And Non-Profit Religious Organizations.

Although RLUIPA lacks a specific definition of the word "person," RLUIPA's language provides important contextual clues to the meaning of the term. Those clues strongly suggest that RLUIPA—and, by extension, RFRA—applies to individuals and non-profit religious organizations like churches, assemblies, and similar entities, but does not reach more broadly to include for-profit corporations.

RLUIPA uses the term "person" in two subsections, neither of which can reasonably be read to include for-profit corporations. First, RLUIPA requires the government to justify its actions when it "impose[s] a substantial burden on the religious exercise of a person residing in or confined to an institution," such as a penal institution, government-run mental health facility, or pre-trial detention center. 42 U.S.C. §§ 2000cc, 2000cc-1. Clearly, only natural persons can be "institutionalized" in the facilities Section 2000cc-1 covers. This suggests that in RLUIPA the term "person" means natural persons only.[5]

Second, when Congress intended "person" to encompass entities other than natural persons, it added specific language clarifying that intent. Thus, in the land use provisions, Congress stated that RLUIPA applies when the government "impose[s] or implement[s] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution." 42 U.S.C. § 2000cc(a)(1). This illustrative language expands the scope of the term "person" to include specific and limited entities, and it is precisely the type of "context" indicating that the broader Dictionary Act definition of "person" does not apply.

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[5] Congress's use of "person" in RLUIPA's institutionalized persons provision also disproves Judge Jordan's contention in his dissenting opinion in *Conestoga Wood Specialties* that Congress uses the word "individual" to refer to natural persons and "person" when it intends a more expansive definition that embraces for-profit corporations. *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356, Pet'rs' App. 71a n.23.

If the Tenth Circuit were correct that Congress intended "person" in RLUIPA to be defined under the Dictionary Act, *Sebelius* Pet'rs' App. 24a, (quoting 1 U.S.C. § 1), it would have been unnecessary to specifically reference religious assemblies and institutions because the Dictionary Act already provides that "person" embraces such groups. 1 U.S.C. § 1 (providing that "person" includes "corporations, companies, associations, [and] societies"). Reading RLUIPA's definition of "person" to include these institutions—as well as any and all corporations—would thus offend the statutory interpretation canon against surplusage. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992).

A narrower reading that excludes for-profit corporations is also dictated by the commonplace principle of statutory construction that "a word is given more precise content by the neighboring words with which it is associated" to avoid giving a statute "unintended breadth." *Maracich v. Spears*, 133 S. Ct. 2191, 2201 (2013) (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008) and *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Thus, "person" must be read to embrace only entities similar in nature to the specific listed examples—"a religious assembly or institution"—as those examples shed light on the reach Congress intended RLUIPA to have. *See Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384-85 (2012). Churches, religious educational institutions, and non-profit religious corporations are all similar in kind to religious assemblies and institutions—and thus covered by RLUIPA. *See Sebelius v. Hobby Lobby*

Stores, Inc., No. 13-354, Pet'rs' Br. at 17. Those organizations have as their primary purposes the worship of God, the teaching of religious precepts, or the facilitation of religious services. *See LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (describing definition of "religious organization").

By contrast, for-profit, secular corporations bear little similarity to the entities RLUIPA describes. *Sebelius* Pet'rs' Br. at 18-19. They are organized for the purpose of financial profit, generally lack ties to a church or a religious group, and engage in commercial, secular activities. *See Grote v. Sebelius*, 708 F.3d 850, 856 (7th Cir. 2013) (Rovner, J., dissenting). Those corporations cannot qualify as "person[s]" under RLUIPA, when that term is read together with its accompanying examples. *Cf. West v. Gibson*, 527 U.S. 212, 225 (1999) (looking to "the specific examples given by the statute" in defining "appropriate remedies" provision). The only plausible construction of "person" in RLUIPA is thus the construction the federal government offers of the parallel RFRA term: "person" embraces individuals and religious institutions like churches and non-profit religious corporations—but reaches no more broadly than that. *Sebelius* Pet'rs' Br. at 20-21.

B. RLUIPA's Legislative History Demonstrates Congress's Intention To Cabin The Definition Of "Person," Limiting It To Individuals And Religious Institutions.

Legislative history confirms what Congress made plain in RLUIPA's text: that the "person[s]" Congress intended to protect under RLUIPA include individuals as well as religious assemblies and institutions, and similar organizations, but *exclude* for-profit, secular corporations. Congress enacted RLUIPA after compiling evidence showing that churches and religious organizations experienced overt discrimination in the zoning context. Congress enacted RLUIPA to address this specific problem. While Congress sought to ensure that incorporated religious institutions could invoke RLUIPA to the same extent as unincorporated religious groups, Congress stopped far short of evincing any intent for RLUIPA to protect other groups or entities. In fact, RLUIPA's legislative history shows that Congress included the clarification that "person" includes "religious assemblies and institutions" to make clear that the term does not encompass all corporations. The Tenth Circuit's conclusion that RLUIPA applies broadly to all entities, regardless of their "for-profit and non-profit status" is irreconcilable with Congress's intent. *Sebelius* Pet'rs' App. 25a n.6.

To interpret a statute and discern Congress's intent, courts look to the specific harm Congress sought to address. *City of Memphis v. Greene*, 451 U.S. 100, 135 (1981) (White, J., concurring) ("That was the problem Congress intended to address and that focus should determine the reach and scope of this statute."); *see also, e.g., Porter v. Comm'r of Internal Revenue*, 856 F.2d 1205, 1208-09 (8th Cir. 1988) (determining the meaning of a statutory term "in light of the problem [the statute] was intended to address"). Here, the evidence Congress relied on in enacting RLUIPA demonstrates that Congress was attempting to address the problem of overt discrimination against "[c]hurches in general" and other similar religious institutions. 146 CONG. REC. S7774 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). The hearings Congress held in the wake of this Court's decision in *City of Boerne* produced evidence showing that churches, "new, small, or unfamiliar churches, in particular," and similar organizations like religious schools and non-profit religious institutions were "frequently discriminated against on the fact of zoning codes and also in the highly individualized and discretionary processes of land use regulation." *Id*. While much of this evidence was anecdotal, it overwhelmingly focused on the obstacles that *religious institutions* faced in obtaining and developing "a physical space adequate to their needs and consistent with their theological requirements." *Id.*

The subjects of the discrimination Congress sought to remedy in RLUIPA were either individuals or organized religious assemblies or groups. Several of the instances of discriminatory treatment Congress relied upon in enacting RLUIPA involved individuals who were punished for holding prayer meetings at their homes. *See* 146 CONG. REC. E1566 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde) (describing cease-and-desist letter a Denver, Colorado couple received for holding monthly prayer meetings at their home); *id*. at E1564-57 (describing complaints filed by the mayor of Onalaska, Wisconsin against a pastor and his wife for holding weekly bible study meetings in their home). The remaining incidents concerned difficulties that churches and similar religious institutions faced in navigating the zoning process and other land use regulations when seeking space for religious meetings. Congressional hearings showed that these institutions were subject to targeted opposition likely stemming from religious prejudice. *See id*. at E1564 (describing effort by local zoning officials in Palos Heights, Illinois to prevent a mosque from locating in their city). And even when they did not encounter such unconcealed prejudice, religious groups faced more obstacles in the planning process than did similarly situated non-religious institutions and were disproportionately the subject of complaints before zoning boards and planning commissions. *Id.* at E1565 (describing opposition to relocation of a church to a residential neighborhood because residents feared that the church would "bring indigent people to the neighborhood"). Congress enacted RLUIPA "to remedy" these instances of "well-documented discriminatory and abusive treatment suffered by *religious individuals and organizations* in the land use context." 146 CONG. REC. E1235 (daily ed. July 14, 2000) (statement of Rep. Canady) (emphasis added); *see also* 146 CONG. REC. S6687 (daily ed. July 13, 2000) (statement of Sen. Hatch) (describing RLUIPA as a "narrowly focused bill that . . . will provide protection for houses of worship and other religious assemblies from restrictive land use regulation that often prevents the practice of faith").

Nowhere did Congress indicate that for-profit corporations encountered such prejudice. Indeed, Congress made clear that the evidence showed "a widespread pattern of discrimination against churches" that "*secular* places of assembly" did not experience. 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy) (emphasis added). Members of Congress emphasized the "nonprofit" nature of religious organizations that they believed federal law should protect against discrimination. 146 CONG. REC. E1567 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde) (describing Youngstown, Ohio zoning board's denial of a permit to a "nonprofit corporation operated by Ursuline nuns who run job training and transitional housing programs"). Congress evinced no intent to allow RLUIPA to apply broadly to corporations that might claim to engage in religious practices.

To the contrary, congressional debates and legislative statements suggest that Congress intended to prevent the definition of "person" in RLUIPA from embracing for-profit, secular corporations. Congress added RLUIPA's language clarifying that "person" includes a religious institution or assembly in response to concerns that "person" might otherwise be interpreted to include for-profit corporations. H.R. 1691, the predecessor to RLUIPA drafted after the *City of Boerne* decision, provided simply that "[e]xcept as provided in subsection (b), a government shall not substantially burden a person's religious exercise . . . ," without including any language illustrating the meaning of "person." Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. § 2(a). That phrasing introduced the concern that "a business corporation could make a claim under H.R. 1691." H.R. Rep. No. 106-219, at 13 n.49 (1999). Members of Congress expressed opposition to this possibility and suggested the bill be revised to prevent corporations and companies from asserting "the religious liberty defense" to generally applicable laws. *See, e.g.*, 145 CONG. REC. H5584 (daily ed. July 15, 1999) (statement of Rep. Conyers). Even supporters of the bill as written argued that the bill should not be construed to protect for-profit, secular corporations. *Id.* at H5599 (statement of Rep. Canady) (asserting that for-profit corporations could not "come within a mile of showing that anything that was done would substantially infringe on their religious beliefs").

After the Religious Liberty Protection Act of 1999 failed to receive a Senate vote, Congress introduced the version of the bill that would eventually become

RLUIPA. That bill, S. 2869, included the language referring to religious assemblies and institutions. *See* 42 U.S.C. § 2000cc. The inclusion of this clarifying language, in light of the legislative history documenting concerns about the possibility that H.R. 1691's unqualified use of the term "person" could create confusion about whether its protections extended to for-profit corporations, suggests that Congress intended to eliminate the possibility that "person" in RLUIPA could be construed to embrace for-profit corporations. Indeed, supporters of S. 2869 emphasized that RLUIPA did not protect "secular commerce" but was limited to "religious services" and similar activities. 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady).

RLUIPA's legislative history also shows that Congress considered a wholesale exclusion of "corporations" from RLUIPA's predecessor bills, but rejected this approach in order to protect *religious organizations* that choose to incorporate. Congress understood that "[c]hurches, synagogues, other religious organizations, and their affiliates" are often "incorporated" or "organized as trusts, corporations sole, unincorporated associations, and sometimes in other ways." *See S. 2148, A Bill to Protect Religious Liberty: Hearing on S. 2148 Before the S. Comm. on the Judiciary*, 105th Cong. 174 (1998) (written response of Douglas Laycock); *id.* at 234 (written response of Christopher Eisgruber) ("Churches are often incorporated under state law. For that reason, it might be difficult to exclude corporations from the ambit of the word 'persons' in S. 2148 without thereby excluding churches from coverage."). Therefore, rather than excluding corporations in their entirety, Congress added language to RLUIPA affirmatively identifying the types of entities the statute was designed to protect: religious assemblies and institutions.

The legislative history is thus consistent with the language and structure of RLUIPA in demonstrating that Congress intended "person" to be construed in precisely the manner the federal government has construed it in these cases—as embracing non-profit religious corporations but not profit-seeking enterprises. *Sebelius* Pet'rs' Br. at 17-20. No other reading makes sense in light of Congress's desire to remedy the different treatment of "churches" and "secular places of assembly" in the land use context, 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy), and to protect against overt discrimination against houses of worship, 146 CONG. REC. E1235 (daily ed. July 14, 2000) (statement of Rep. Canady).[6]

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[6] Interpreting RLUIPA to embrace for-profit corporations could also threaten RLUIPA's viability as an exercise of Congress's Section 5 powers. Remedial legislation Congress enacts under Section 5 must be targeted to the "evil" or "wrong" that Congress intended to remedy, and "the propriety of any [Section] 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639-40 (1999) (quoting *City of Boerne*, 521 U.S. at 525). Congress enacted RLUIPA in the face of evidence of a specific "evil"—discrimination against churches and religious organizations in the land use context. If the "person[s]" RLUIPA protects includes entirely different entities, RLUIPA's reach would be disproportionate to the evidence Congress considered—and might thereby exceed Congress's Section 5 authority. *Id.* at 640.

III. RLUIPA CANNOT SENSIBLY BE APPLIED TO FOR-PROFIT, SECULAR CORPORATIONS.

Interpreting RLUIPA to provide protections to for-profit, secular corporations is also impractical and inadministrable. RLUIPA prohibits state and local governments from implementing "land use regulations in a manner that imposes a substantial burden on the religious exercise of a person" unless the government can demonstrate that the regulation is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc(1). Both Congress and the federal courts have given several terms in RLUIPA's text—"religious exercise," "substantial burden," and "land use regulation"—broad meanings. Thus, when a "person" is a protected entity under RLUIPA, that entity's religious exercise is afforded heightened protections in the land use context. In light of these broad protections, "person" must be defined narrowly if Congress's intention that RLUIPA be "narrowly focused" is to be given any effect. 146 CONG. REC. S6687 (daily ed. July 13, 2000) (statement of Sen. Hatch). Including for-profit corporations would greatly expand RLUIPA's reach, leading to results Congress did not and could not have intended, and magnifying the burden that RLUIPA would place on the local administration of land use regulations.

A. RLUIPA Provides Broad Protections To Covered Persons And Entities.

A covered entity may invoke RLUIPA whenever activities that constitute religious exercise are substantially burdened by a state or local land use regulation or planning decision. Congress and the courts have placed few limits on the types of activities that may potentially qualify as the exercise of religion. RLUIPA itself makes clear that its terms "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). Protected activity need not be "compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A). And RLUIPA places no limits on the activities that can constitute religious exercise, but does clarify that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise . . . ." *Id.* § 2000cc-5(7)(B).

Courts have thus construed "religious exercise" under RLUIPA to include a broad set of activities, beyond what the Free Exercise Clause might protect. *See Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 663 (10th Cir. 2006) (noting that RLUIPA "substantially modified and relaxed the definition of 'religious exercise'"). These activities include not only the construction of a church or other facility for purposes of gathering for worship, *see, e.g., Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1062-63 (9th Cir. 2011); but also the preservation of historic architecture, *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 97-98 (1st Cir. 2013); the management of a home as a religious retreat, *DiLaura v. Township of Ann Arbor*, 112 Fed. Appx. 445 (6th Cir. 2004); the operation of a day care center, *Grace United Methodist Church*, 451 F.3d at 663; and the operation of a private school, *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 347-48 (2d Cir. 2007).

Courts are generally required to accept a covered entity's claim that the activity at issue is religiously motivated. While a court may question whether the claimant is "sincere" in its religious beliefs, the court may not examine whether the activity at issue is "fundamental" to the claimant's religious beliefs. *See Grace United Methodist Church*, 451 F.3d at 664; *see also Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 790-92 (5th Cir. 2012) ("Though the sincerity inquiry is important, it must be handled with a light touch, or judicial shyness." (internal quotation marks and citation omitted)). Indeed, RLUIPA prohibits courts from determining whether a particular practice "is compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Consistent with this Court's warnings in the First Amendment context, which have prohibited courts from "undertak[ing] to dissect religious beliefs" and made clear that courts are "not arbiters of scriptural interpretation," *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981), courts applying RLUIPA are generally reluctant to question whether a covered entity's purportedly protected activities are in fact religious in nature. *See, e.g., Washington v. Klem*, 497 F.3d 272, 277 (3d Cir. 2007).

RLUIPA claimants also enjoy broad protections under the "substantial burden" prong of the statute's land use provisions. Under the First Amendment, and even under RLUIPA's institutionalized persons provisions, a claimant must show that the challenged government action or policy "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006); *see Thomas*, 450 U.S. at 718. That is, a substantial burden exists only when an individual is required to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . .

on the other hand." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). RLUIPA land use plaintiffs need not make this stringent showing, *i.e.*, they need not demonstrate that their failure to comply with the challenged land use regulation would cause them to violate their religious obligations. *See Westchester Day Sch.*, 504 F.3d at 349. Rather, a claimant need only show that the "government regulation puts substantial pressure on it to modify" the religious behavior at issue. *Bethel World Outreach Ministries v. Montgomery County Council*, 706 F.3d 548, 556 (4th Cir. 2013); *see also Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter*, 456 F.3d 978, 988-89 (9th Cir. 2006) ("[A] substantial burden on 'religious exercise' must impose a significantly great restriction or onus upon such exercise."). For example, a RLUIPA claimant challenging a city's denial of a permit to build new facilities for the purpose of religious activity need not show that the chosen site is the only place where such new facilities could be built, but instead must show only that the "alternatives require substantial 'delay, uncertainty, and expense.'" *Westchester Day Sch.*, 504 F.3d at 349 (quoting *Saints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005)).

RLUIPA's expansive protections have significant consequences for local governments, which must already consider RLUIPA in numerous land use regulations and planning decisions. RLUIPA applies to "the implementation of a land use regulation or a system of land use regulations under which a government makes . . . individualized assessments of the proposed uses for the property involved." 42 U.S.C. § 2000cc(2)(C). RLUIPA broadly defines a land use regulation to mean any "zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land) . . . ." *Id.* § 2000cc-5(5). In practice, RLUIPA applies to a local government's enforcement of a variety of land use regulations, ordinances, and policies.

Challenges to denials of rezoning applications or conditional use permits—*i.e.*, requests from an entity to use its property for a different use than that permitted by the zoning code—comprise a substantial number of RLUIPA cases. *See, e.g., Int'l Church of Foursquare Gospel*, 673 F.3d at 1062 (challenging denial of rezoning application and conditional use permit for church to build facility in area zoned for industrial use); *Bethel World Outreach Ministries*, 706 F.3d at 552-53 (challenging county zoning regulation preventing construction of church in area designated as an agricultural reserve). But courts have found that RLUIPA applies to a variety of additional types of planning requirements, such as: environmental review processes, *Fortress Bible Church v. Feiner*, 694 F.3d 208, 218 (2d Cir. 2012) (holding RLUIPA applicable to New York's State Environmental Quality Review Act); eminent domain proceedings, *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1222 n.9 (C.D. Cal. 2002); parking variances, *Lighthouse Cmty. Church of God v. City of Southfield*, No. 05-40220, 2007 WL 30280, at *7 (E.D. Mich. Jan. 3, 2007); local bed-and-breakfast regulations, *DiLaura*, 112 Fed. Appx. 445, at *1; and signage ordinances, *Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel*, 941 A.2d 560, 565-66 (Md. App. 2008). Commentators have argued that RLUIPA applies even more broadly than these cases demonstrate, contending that building codes, housing codes, plumbing codes, and other laws enacted pursuant to the police power to protect public health, safety, and welfare should also be subject to RLUIPA scrutiny. *See, e.g.*, Shelley Ross Saxer, *Assessing RLUIPA's Application To Building Codes And Aesthetic Land Use Regulation*, 2 ALB. GOV'T L. REV. 623, 633 (2009).

Because RLUIPA may prevent local governments from enforcing a host of public health, safety, and environmental laws as to those whom it protects, RLUIPA can be given the "narrow" effect Congress intended only if its protections extend to a limited set of entities—namely, individuals, religious groups, and non-profit religious entities. As explained below, if the protections apply to for-profit corporations as well, RLUIPA's effect would be almost limitless.

B. Permitting For-Profit Corporations To Qualify As "Person[s]" Under RLUIPA Would Expand The Statute, Destabilize Markets, And Unnecessarily Burden Local Planning Departments.

Interpreting RLUIPA to protect for-profit, secular corporations would dramatically expand the statute's reach. For-profit corporations could avail themselves of RLUIPA's broad definition of religious exercise to characterize secular commercial activity as religious in nature. They would have an incentive to do so to gain a competitive advantage in the marketplace. The likely result would be a dramatic increase in the number of for-profit corporations claiming to engage in "religious exercise," with a concomitant increased burden on local governments administering land use regulations.

RLUIPA's broad definition of religious exercise already encompasses the use of property by non-profit religious organizations for activities such as movie nights, community events, the hosting of private catered functions, and the operation of overnight retreat centers and housing facilities. *See Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 282 (5th Cir. 2012) (church challenged zoning ordinance that prevented it from obtaining larger space to "host certain community outreach events" like "Bible School" and movie nights); *Third Church of Christ, Scientist v. City of New York*, 626 F.3d 667, 668 (2d Cir. 2010) (use of church facilities for private, catered functions); *Bikur Cholim, Inc. v. Vill. of Suffern*, 664 F. Supp. 2d 267, 271 (S.D.N.Y. 2009) (operation of facility providing overnight accommodations to families of hospital patients).

If for-profit corporations may characterize their "pursuit of profit" as related to their "exercise of religion," then there would be no end to the types of "religious exercise" for which corporations could seek protection under RLUIPA. *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-356, Pet'rs' Br. at 26 (internal quotations and citation omitted). Indeed, the Tenth Circuit's opinion, if applied to RLUIPA, would open the door to precisely such possibilities. *Sebelius* Pet'rs' App. 39a. A facility hosting for-profit community events could be protected under RLUIPA if the relevant entity claimed to be performing a religious obligation by so gathering the public. *Mintz v. Roman Catholic Bishop of Springfield*, 424 F. Supp. 2d 309, 319 (D. Mass. 2006) (involving a parish meeting center). A for-profit amusement park could invoke RLUIPA if it claimed a religious obligation to provide wholesome entertainment to children. *Cf. Grace United Methodist Church*, 451 F.3d at 656 (applying RLUIPA to non-profit religious group operating a day-care center); *Westchester Day Sch.*, 504 F.3d at 347-48 (applying RLUIPA to a religious private day school). Or a for-profit hotel and convention center could avoid generally applicable zoning requirements by claiming its services to be religiously motivated. *Cf. World Outreach Conference Ctr. v. City of Chicago*, 591 F.3d 531, 533-34 (7th Cir. 2009) (applying RLUIPA to non-profit religious group operating community center and single-room-occupancy facilities). While courts reviewing these claims could determine whether these assertions of religious belief were sincere, they could do little else to question whether these activities were religious in nature. *See Thomas*, 450 U.S. at 715-16.

For-profit corporations would have strong incentives to claim "religious exercise" to gain a commercial advantage over competitors, if they could qualify as "person[s]" under RLUIPA. A corporation building a factory could evade local land use regulations—and build its factory more quickly and more cheaply—by asserting that the factory related to the corporation's "exercise of religion." This corporation would have a significant advantage over all of its competitors that remained subject to local land use requirements. At an extreme, this unequal playing field could disrupt commercial markets and hinder competition by non-religious corporations, which would be at a disadvantage in the initial stages of acquiring property and getting products or services to market. At a minimum, the consequence would be a vastly greater number of entities seeking to invoke RLUIPA to avoid land use restrictions, and the concomitant diminution of local government power to control land uses.

The result would also be a dramatically increased burden on local planning commissions, boards of appeal, and similar entities tasked with enforcing land use regulations and addressing requests for variance.

Allowing for-profit corporations to invoke RLUIPA would likely lead to a sharp increase in cases in which the government must make land use decisions with the possibility of RLUIPA litigation looming in the background. As an *amicus* brief filed with the Tenth Circuit makes clear, arguments about statutory religious protections do not surface for the first time in court, but may arise during the administrative process that precedes the government decision. Br. of Sen. Orrin G. Hatch et al. as Amici Curiae Supporting Plaintiffs-Appellants at 4-5, *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (No. 12-6294) (criticizing the federal Department of Health and Human Services for failing to address RFRA during administrative process).

Protected entities already invoke RLUIPA when seeking conditional use permits or other individualized assessments at the local administrative level. *See, e.g.*, *Trinity Assembly of God of Baltimore City, Inc.*, 941 A.2d at 562; *Timberline Baptist Church v. Washington County*, 154 P.3d 759, 760 (Or. App. 2007). Indeed, some courts have required local commissions to first determine RLUIPA's applicability to a particular action before a claimant can seek judicial relief. *See, e.g.*, *Lyster v. Woodford County Bd. of Adjustment Members*, No. 2005-CA-001336-MR, 2007 WL 542719, at *4 (Ky. App. Feb. 23, 2007) (remanding to County Board of Adjustment to "consider the provisions of RLUIPA when making its determination of whether to issue a conditional use permit"); *Trinity Assembly of God of Baltimore City, Inc.*, 941 A.2d at 561 (same). Allowing for-profit corporations to invoke RLUIPA would add to the plethora of issues that local planning commissions must already address in making zoning exceptions or granting use permits. *See, e.g.*, CAL. GOV. CODE

§ 65906 (providing that variances may be granted "because of special circumstances applicable to the property, including size, shape, topography, location or surroundings"); *see also O'Hagen v. Bd. of Zoning Adjustment*, 96 Cal. Rptr. 484, 488 (Cal. Ct. App. 1971) (setting forth showing that applicant seeking use permit must make).

And expansion of RLUIPA would entangle local boards and commissions in particularly thorny matters, as they would be required to determine the sincerity of a claimant's religious belief and weigh the magnitude of any harm to the claimant's religious exercise—determinations that may be challenging and arguably inappropriate for commissions to make. *See Sebelius* Pet'rs' App. 124a-130a (Briscoe, C.J., concurring in part and dissenting in part); *Korte v. Sebelius*, 735 F.3d 654, 703-05 (7th Cir. 2013) (Rovner, J., dissenting); *cf. Smith*, 494 U.S. at 889 n.5 (remarking that "it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice"). Limiting RLUIPA's definition of "person" to individuals, religious assemblies, and other non-profit religious institutions both minimizes RLUIPA's sheer impact on local government agencies and relieves these agencies from having to make thorny inquiries into claimants' religious motivations.

The negative practical effects of reading RLUIPA to include for-profit corporations within its definition of covered entities counsel strongly in favor of a more narrow reading of "person" in RLUIPA. *See Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2041 (2012). Congress clearly intended RLUIPA to operate narrowly and to benefit a limited set of potential claimants: individuals and religious assemblies and institutions. *See generally* 146 CONG. REC. E1567 (daily ed. Sept. 22, 2000) (statement of Rep. Hyde). The creation of skewed market incentives, expansion of protected activity, and interference with the administration of local land use ordinances cannot be squared with Congress's intent. RLUIPA should thus be read as applying only to individuals and non-profit religious organizations.

* * *

RLUIPA uses the term "person" to include individuals, religious assemblies, churches, and similar non-profit religious institutions, but to exclude for-profit corporations. In light of RLUIPA's extraordinarily close relationship to RFRA, RFRA's parallel definition should be construed in the same way.

CONCLUSION

Amici respectfully urge this Court to reverse the Tenth Circuit's judgment based on its erroneous conclusion that RFRA applies to for-profit corporations, and to affirm the Third Circuit's judgment.

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KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners.

v.

HOBBY LOBBY STORES, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

BRIEF FOR NATIONAL RELIGIOUS BROADCASTERS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

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INTEREST OF THE AMICUS[1]

The Amicus here, National Religious Broadcasters ("NRB"), is a nonprofit membership association with offices in Manassas, Virginia, and in Washington, D.C. It represents the interests of Christian broadcasters and communicators as well as allied organizations dedicated to related fields of endeavor. The President and CEO of NRB is Dr. Jerry A. Johnson.

NRB's membership includes religious nonprofit organizations and employers as well as closely-held, religious for-profit companies and employers. The rights of the latter are directly implicated by the issues in this case under the regulations promulgated by the Department of Health and Human Services ("HHS") in 45 C.F.R. § 147.130(a)(1)(iv) that require employers to provide employee health insurance coverage that includes services, drugs, and devices designed to disrupt pregnancy by preventing the uterine implantation of human embryos, sometimes referred to as "abortifacients" ("preventive care" or "preventive services"), all pursuant to the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ("ACA").

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[1] All parties have consented to the filing of this amicus brief. The government and Conestoga Wood Specialties Corp., et al. have consented to the filing of this amicus brief in letters of consent on file with the Clerk which consent to the filing of all amicus curiae briefs in support of either party or of neither party. Hobby Lobby Stores, Inc., et al. has consented to the filing of this amicus brief in a letter we have filed with the Clerk. No counsel for any party had any role in authoring this brief, and no one other than the amicus curiae provided any monetary contribution to its preparation or submission.

While we believe that the entire religious "exemption" scheme created by HHS fails to comply with the mandate from Congress for "comprehensive guidelines," including religious exemptions, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011), nevertheless, regarding the precise issue here, namely, the free exercise of religion rights of closely-held, for-profit religious corporations and their owners, whether under the First Amendment of the U.S. Constitution, or under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (2006), we believe that such rights should be recognized and vigorously protected. Accordingly we believe that *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) was correctly decided, and that *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health & Human Services*, 724 F.3d 377 (3rd Cir. 2013) was not.

This case is a unique opportunity for this Court not only to vindicate the religious rights of Hobby Lobby Stores, Inc. ("Hobby Lobby"), Conestoga Wood Specialties Corp. ("Conestoga"), and their owners, but also to address the breadth of breathing room that should be accorded to religious freedoms when they are burdened by the increasingly complex tangle of federal regulations confronting 21st-century Americans.

SUMMARY OF THE ARGUMENT

The Court's decision in this case will not only affect the two faith-based, closely-held companies and their owners as well as NRB's for-profit members, but will also impact a broad swath of similar companies and their owners who have religious objections to the "preventive care" provisions of the HHS mandate which implements the ACA. These objections spring from a Christian approach to the Bible, and specifically the New Testament, which commands that faith be integrated into one's work and business decisions. That approach flows from a theological belief that is as old as Christianity.

The status of the subject companies as for-profit corporations should not eclipse the fact that their owners, through those enterprises, should be able to fulfill their religious mission with the protections of free exercise of religion. From the earliest decisions of this Court it has been recognized that corporations are vested with constitutional rights, a fact noted in the decision of the Third Circuit in *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health and Human Services*, 724 F.3d 377, 383 (3rd Cir. 2013). However, the Court of Appeals erred by concluding that merely because no prior legal case has ruled on the availability of free exercise rights for closely-held corporations or their owners, that thereby, the "historic function" of free exercise must be interpreted as applying those rights only to *individuals*, and never to corporate businesses. The illogic of that position is evident: it would automatically foreclose to corporations any other constitutional rights from ever being recognized whenever the issue is one of first impression. Moreover, this Court has previously recognized religious freedom rights for corporations which are nonprofit. Thus, the ultimate question is whether the for-profit status of the two companies in this litigation forecloses similar constitutional protection for them.

In early American history, not only did Founders like John Jay believe that religious free exercise belonged to religious corporations, but the historical evidence also shows us that the American culture at the time of the founding was permeated with religious beliefs that constrained the everyday decisions of citizens, which certainly would have included business decisions.

Moreover, it is an arbitrary and artificial distinction that would grant religious rights to individuals in a church corporation, but deny those same rights to religious individuals who completely control their closely-held, for-profit enterprises. In the same way, the reasoning of the Third Circuit would presumably grant religious rights to *individual* owners of solo-proprietorships regarding the HHS regulations at issue here, as well as to *individual* partners in a partnership, but not to *individual* owners of a closely-held, religious business.

Free exercise rights are implicated in this case. Unlike the claims of the Amish regarding the entire Social Security system in *United States v. Lee*, 455 U.S. 252 (1982), there is a simple legal algorithm that can be applied to distinguish the religious companies here from future religious complainants who might object to such things as our taxation system (a concern in *Lee*), or perhaps who oppose other controversial aspects of health insurance coverage mandated by the ACA. The history and ubiquity of the debate in America for forty years that has pitted the beliefs of some religious adherents against the claims of others for abortion-related rights makes the free exercise context at issue here specific and discernible from other potential free exercise claims against the ACA or the HHS rules. If other claims are brought in the future by employers against objectionable medical services provided under mandated ACA health coverage, whether relating to immunizations or other services, they would certainly not share the unique historical context of the issue here.

That factor is also important in clarifying Congressional intent in its passage of RFRA. The *Congressional Record* contains numerous statements from both members of Congress as well as witness advocates in the hearings spanning the breadth of the ideological and philosophical spectrum, which illustrate that the free exercise rights contemplated in that law were intended, *inter alia*, to include the right *not to be compelled* by the government to be complicit in pregnancy disruption or termination services in violation of religious conscience.

The religious implications inherent in the intentional disruption or termination of pregnancy after conception were recognized in the earliest stages of this Court's consideration of *Roe v. Wade*, 410 U.S. 113 (1973), as well as in the Court's opinion itself. In no fewer than ten other decisions from this Court in the years subsequent to that, this Court has continued to recognize the unique religious aspects of that question. These facts provide an important background for the HHS regulations and the decision of the agency regulators to exclude religious for-profit employers entirely from the exemption scheme, despite the overwhelming evidence that the "preventive care" coverage provisions mandated by HHS would collide with the long held and well-recognized religious objections like those advanced by Hobby Lobby, Conestoga, and their owners.

The HHS "religious exemption" scheme therefore constitutes an arbitrary "religious gerrymander," apparently designed to minimize the number of religious exemptions in violation of the holding in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). This is shown by an evaluation of the regulatory structure of the entire HHS religious exemption scheme which generally creates an insufficient protection for the free exercise rights of religious employers. The facial exclusion of for-profit religious employers from any exemption protection was coupled in that regulation with the provision of an exemption *only* applicable, under 45 C.F.R. § 147.131(a), to nonprofit churches or church-related entities, as the government notes; all other nonprofit religious employers are merely given the option of an "accommodation" where they would still be forced to provide the objected-to preventive care services coverage while merely avoiding having to pay specifically for coverage relating to those services.

It is also clear that the HHS exemption guidelines, specifically providing that some religious corporations can qualify, and some cannot, therefore fails to be "religion neutral," under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). Accordingly, a full free exercise of religion analysis must be entertained regarding the religious claims of the two companies.

In so doing, because those regulations make classifications based on religion, this Court must subject those rules to strict scrutiny, particularly because the rules themselves categorically deny to for-profit, closely-held religious employers, any consideration for exemption despite the extreme hardship imposed on those employers.

In addressing the substantial burden placed on the religious free exercise of Hobby Lobby and Conestoga, it is important to note that the HHS provisions that would "grandfather" certain pre-existing health insurance plans actually provide little protection for employers, including religious ones. In fact, the government concedes that the intent was to provide only a temporary grandfathering of existing plans during the implementation of the ACA. Petition for Writ of Certiorari at 30, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354.

The religious burden in this action is substantial because religious employers who believe that it is essential to honor their faith-based conscience, an exercise for which the Founders desired the highest form of protection, are forced to choose between conscience and devastating fines. The burden here is in one aspect greater than that recognized in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), because unlike the Amish there, the regulation here is federal; thus, the religious companies do not have the option of relocating to a more "tolerant" state to avoid being complicit in practices that violate the doctrines of the owners' deeply held faith. As in *Yoder*, the government in this case does not question the sincerity of the religious beliefs at issue.

The government argues that the exercise of the employers' religious beliefs is too attenuated from the ultimate medical decisions of third party women employees to warrant protection, and that the real issue is the rights of those employees rather than the free exercise rights of the religious employers. However, a similar point was made by Justice Douglas in his dissent in the *Yoder* decision, an argument that was rejected by the Court's majority. Nor is it relevant that, as the government has argued, medical confidentiality will prevent employers from knowing the specifics of employees' use of preventive care coverage to halt a pregnancy: the depth of religious conviction is not nullified by such a simplistic "see no evil" approach.

Last, the government predicts that a short litany of abuses could occur if the religious rights of the employers here are vindicated, including such things as future religious objections from employers to immunizations and blood transfusions. However, whatever the nature of future objections might be, they most certainly would not involve the same type of burden on religious rights of conscience which is asserted in this action, particularly in view of the ubiquity and history that attaches to the legal and religious context of that issue.

ARGUMENT

I. THE NATURE OF FAITH-BASED COMPANIES IMPACTED BY THIS CASE

A. The Diversity of Faith-Based Companies

The membership of National Religious Broadcasters ("NRB") illustrates the broad diversity of faith-based, for-profit companies that are impacted by this case. In addition to NRB inclusion of nonprofit Christian ministries, we also count among our membership a diverse number of faith-based, closely-held, for-profit companies that are engaged in a variety of Christian communications, or allied fields. These include: healthcare organizations, evangelistic endeavors, communications equipment and software suppliers, individual speakers, authors and artists, Internet services and Internet video and audio platforms, law firms, marketing companies, agencies supplying media services, media production companies, Christian publishers, radio and television stations and networks, companies providing religious-themed tours, and telemarketing call centers.

These evangelical, closely-held, for-profit corporations provide a variety of services exclusively to Christian nonprofit ministries, such as advertising services, media and program consulting, and they not only refrain from working with any project that would facilitate or promote the intentional termination of pregnancy after conception, but also support pro-life organizations financially, and offer free-of-charge volunteer services to such groups, all as an extension of the belief that the Bible teaches that God is the Author of life, and that as a result, from conception onward, life in the womb is sacred. Furthermore, almost all of them provide health insurance plans for their employees, and up to now have made a concerted effort, based on their evangelical faith, to exclude from insurance coverage the types of services that the current HHS guidelines now require under the rubric of "preventive" health care services for women.

The religious missions of Hobby Lobby and Conestoga as closely-held companies and the faith basis of NRB's for-profit members are not unique. On a national scale there is a wide diversity of for-profit, closely-held, religious corporations including, just to name a few: fast-food chains In-N-Out Burger and Chick-fil-A, trucking company Covenant Transport, retail clothing store line Forever 21, and Tyson's foods.[2]

The common thread that binds the two companies in this litigation to NRB's for-profit members, as well as to the other companies mentioned above, is the shared belief that the Bible is a trustworthy and inspired guide for belief and conduct. Accordingly, faith becomes an integral part of life for such corporate owners and it therefore influences decisions made in a business setting. For such owners, one's vocational calling is "the full expression of the worker's gifts . . . the medium in which he offers himself to God."[3] The Christian is given the mandate: "So, whether you eat or drink or whatever you do," the Apostle Paul urged, "do it all for the glory of God." *I Corinthians* 10:31. "Whatever you do, work at it with all your heart, as working for the Lord, and not for men, since you know that you will receive an inheritance from the Lord as a reward. It is the Lord Jesus you are serving." *Colossians* 3:23-24.

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[2] Mark Oppenheimer, *At Christian Companies, Religious Principles Complement Business Practices*, newyorktimes.com (Aug. 2, 2013), http://www.nytimes.com/2013/08/03/us/at-christian-companies-religious-principles-complement-business-practices.html?_r=0. Chick-fil-A "supports group foster homes," Tyson's foods "offers chaplaincy services to employees," "Forever 21 prints 'John 3:16' on the bottom of its shopping bags." "Covenant Transport . . . wears its Christianity on the side of its trucks," and "[t]he Bible verses on In-N-Out Burger milkshake cups, burger bags and other packaging are quite fun, even for an atheist. The verses are tiny and varied, so you have to hunt and see what turns up." *Id.*

The sincerely held religious position of Hobby Lobby and Conestoga through their owners that religious faith must be integrated into business decisions, is consistent with the position of NRB for-profit members, and it is mirrored by faith-based companies around the nation. As we have shown above, it flows from a theological doctrine that is as old as Christianity.

B. Corporate Fiction vs. Religious Fact

The corporate status of a closely-held business, as a legal fiction, should not eclipse the seminal fact here: closely-held, for-profit employers that are faith-based can be, and often are, the instruments for, and conduits of, the religious mission and beliefs of the owners, and as such, are entitled to free exercise protection. The Third Circuit, in *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health and Human Services*, 724 F.3d 377, 383 (3rd Cir. 2013) ("*Conestoga*"), noted that this Court has recognized that "'a wide variety of constitutional rights may be asserted by corporations,'" quoting *Consol. Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 347 (2d Cir. 2002). The court in *Conestoga*, quoting from *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978), held that the question of whether a given constitutional right accrues to a corporate entity is to be determined by *exclusion*: in other words, the particular right should be denied if the constitutional guarantee in question is found to be "purely personal . . . because the historic function of the particular guarantee has been limited to the protection of *individuals*." *Conestoga*, 724 F.3d at 383 (emphasis added) (internal quotation marks omitted).

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[3] Hugh Whelchel, *How Then Should We Work – Rediscovering the Biblical Doctrine of Work* 77 (WestBow Press 2012) quoting Dorothy L. Sayers, *Creed or Chaos?* 134-35 (Sophia Institute Press 1974).

But thereafter, the *Conestoga* court erred remarkably by looking at the history of court decisions, finding none that have extended free exercise of religion rights to religiously based, closely-held, for-profit corporations, and concluded that religious liberty must be only a "purely personal" right. Respectfully, such an assertion cannot possibly be correct. First, taken to its most illogical extreme, that would create a nonsensical approach to questions of first impression, requiring this Court to conclude, as an empty tautology, that any purported right of first impression must always be denied to corporate entities because such matters are, after all, issues of first impression.

Second, if the *Conestoga* court meant to say that religious rights of organizations (as opposed to *individuals*) have never been recognized, surely that equally remarkable assertion cannot—and is not—true. We need only recall, in the recent term of this Court, where the religious liberty rights of an institution—a religious school—were vindicated. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. __, 132 S. Ct. 694 (2012). Moreover, the position of the government in this case would undoubtedly have come as a shock to John Jay, co-author of the *Federalist Papers*, and the first Chief Justice of this Court. As the president of the American Bible Society, Jay noted the "zeal . . . [that had] occasioned the establishment of institutions well calculated to diffuse the knowledge and impress the precepts of the Gospel both at home and abroad."[4] In his address at the annual meeting of the Society in 1824, Jay went on to recognize the religious liberty rights that such religious institutions and corporate organizations enjoyed:

> We have reason to rejoice that such institutions have been so greatly multiplied and cherished in the United States; especially as a kind Providence has blessed us not only with peace and plenty, but also with the full and secure enjoyment of our civil and religious rights and privileges.[5]

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[4] Address of the Hon. John Jay, President of the American Bible Society, read at the Eighth Annual Meeting, May 13, 1824 *in* 1 *Annual Reports of the American Bible Society* app. to Eighth Report at 285 (New York: American Bible Society 1838), *available at* www.books.google.com/books?id=cqVVAAAAYAAJ.

[5] *Id.* at 285.

However, at the time of the Founding, the idea of religious zeal was not relegated just to formal, religious institutions like the American Bible Society. Indeed, religious faith was integrated into the affairs of everyday life of commoners as well. The *Conestoga* court, if it meant to imply that only formal, *nonprofit* religious organizations were envisioned by the Founders as possessing religious liberty rights, then it missed a significant part of American history. Alexis de Tocqueville's travels through America in the first half of the 19th century and the subsequent compendium of his personal observations bears this out, beginning with the common understanding among early Americans that faith should be vibrant and pervasive and that the concepts of religious belief and religious liberty were joined at the hip:

> The Americans combine the notions of Christianity and of liberty so intimately in their minds that it is impossible to make them conceive the one without the other; and with them this conviction does not spring from that barren, traditionary faith which seems to vegetate rather than to live in the soul.[6]

Tocqueville goes on to write at that time of the powerful restraining force that faith exercised on the conduct, not just of clergy, but on the American culture at large:

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[6] 1 Alexis de Tocqueville, *Democracy in America* 317 (Phillips Bradley, ed., New York: Random House 1945).

> Hitherto no one in the United States has dared to advance the maxim that everything is permissible for the interests of society, an impious adage which seems to have been invented in an age of freedom to shelter all future tyrants. Thus, while the law permits the Americans to do what they please, *religion* prevents them from conceiving, and *forbids them to commit*, what is rash or unjust.[7]

The fact that some Americans, or even many of them, no longer integrate a Bible-centered, Christian worldview into their everyday lives does not change the fact that the owners of Hobby Lobby and Conestoga, as well as many others who operate closely-held companies, still do. The restraining force of religious conscience upon the practical, business decisions and actions of the owners of Hobby Lobby and Conestoga is in keeping with the earliest American experience, and must surely be deemed to be part of the "historical function" of the guarantee of free exercise, going back to the Founding, contrary to what the *Conestoga* court has decided.

We must wonder how the court's fixation on the corporate form of the Conestoga company, as an example, would translate to the situation of a non-corporate, solo-proprietorship business, operated by a person of faith who employs staff and is subject to the ACA's "preventive care" mandate and who holds similar religious objections to being complicit in the providing of pregnancy termination services to employees. Such an employer would clearly be an "individual," and, under the Third Circuit's reasoning, would qualify for free exercise protection. Yet the functional difference between that person and the owners of Hobby Lobby or Conestoga for purposes of their control over their faith-based business is non-existent. The same could be said of a two or three person partnership comprised of owners who possess an identical religious persuasion. Surely, it would *not* be logical to grant them free exercise rights, but at the same time deny such rights to the two closely-held companies in this case.

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[7] *Id.* at 316 (emphasis added).

II. FREE EXERCISE RIGHTS ARE IMPLICATED HERE

A. Distinguishing the *Lee* Case

In this brief, unless specifically indicated otherwise, we use the phrase "free exercise rights," or "free exercise of religion," to refer collectively to those rights protected by the Free Exercise Clause of the First Amendment, U.S. Const. amend. I, as well as the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb-1 (2006). We believe this is appropriate, given the fact that RFRA "was enacted to reestablish a constitutional test with the expectation that courts would look to constitutional precedent for guidance." *Village of Bensenville v. FAA*, 457 F.3d 52, 62 (D.C. Cir. 2006).

The free exercise rights that should be recognized for Hobby Lobby and Conestoga here, can be distinguished from the concerns that were the basis of this Court's decision, for instance, in *United States v. Lee*, 455 U.S. 252 (1982) (prohibiting Amish objectors, under the Free Exercise Clause, from opting-out of the Social Security system). This Court, in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), explained that the rationale in *Lee* was based on the Court's inability to distinguish (or the claimants' failure to convincingly distinguish) the claims of the Amish in that case from a multitude of other potential religious objections that might arise against taxation generally or against the Social Security system in particular if free exercise rights were recognized under those conditions. The result, this Court pointed out, could cause massive dysfunction to our entire taxation structure:

> Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion was *United States v. Lee* . . . . There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There *would be no way*, we observed, *to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have* to the collection or use of other taxes." [also citing *United States v. Lee*, where this Court predicted that by allowing similar religious-based tax

> protestations, "[t]he tax system could not function . . . ." *Lee, supra* at 260.] (emphasis added).

Smith, at 880. By contrast, there is a "way . . . to distinguish," for free exercise purposes, the specific claims of Hobby Lobby and Conestoga in this case, from any number of hypothetical, religious-based objections of employers that might arise in the future, whether opposing such things as immunizations, or a range of other medical services. The unique history and ubiquity, over the last four decades, of consistent religious objections since *Roe v. Wade*, 410 U.S. 113 (1973), to medical services designed to intentionally terminate pregnancies after conception, is just such a distinction.

This is important in two ways. First, it addresses the scope of RFRA itself. During the debates over that legislation, Congress was fully aware of the debate dynamic in this country, roughly framed as abortion rights vs. religious objections. It is reasonable to conclude that Congress intended that such objections based on religious conscience—including those in this case—would be subsumed within the rights recognized in RFRA, particularly if, as here, a religious employer is being compelled to facilitate the provision of services to employees in violation of sincerely held religious beliefs. The evidence in the *Congressional Record* is replete with examples to support that conclusion.[8]

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[8] An online search of the word "abortion" in the September 18, 1992 hearings in the Senate on RFRA, turns up 613 results. While not all references relate to the context we are discussing above, some do, and they come from a bevy of bipartisan, and ideologically diverse voices. In the House of Representatives

Thus, it is baseless to argue, as the government has here, that the position of Hobby Lobby and Conestoga "would transform RFRA from a

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hearings on May 13 and 14, 1992, there are 890 references to "abortion." Nadine Strossen, president of the ACLU, testified:

> And going to the abortion issue, Congressman Hyde, of course this legislation is completely neutral on the abortion issue. All it does is restore religious liberty, freedom of conscience, and I think that is a liberty that can enhance the rights and in many situations *will enhance the rights of those who conscientiously and religiously are opposed to abortion*. . . This law would give them a defense based on religious freedom.

Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 102nd Cong. 100 (1992) (statement of Nadine Strossen, President, National Board of Directors, ACLU) (emphasis added). Rep. Steny Hoyer asserted: "Since Smith, more than 50 cases have been decided against religious claimants," and further adding that "one Catholic teaching hospital lost its accreditation for refusing to provide abortion services." 139 Cong. Rec. H2356, 2361 (daily ed. May 11, 1993) (statement of Rep. Hoyer). In the Senate hearings, similar observations where made by law professors: "Pro-life doctors and nurses and even whole hospitals are being forced out of obstetrics and gynecology. That is real, and RFRA would protect those people." *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Committee on the Judiciary*, 102nd Cong. 87 (1992) (Prepared statement of Douglas Laycock, Professor of Law, The University of Texas). Other witnesses corroborated those opinions: "The likely outcome of a case under the RFRA would be to grant a religious pro-life medical worker protection from compelled participation in abortion." *Id.* at 149 (statement of Michael P. Farris, Esq., President, Home School Legal Defense Association).

shield for individuals and religious institutions into a sword used to deny employees of for-profit commercial enterprises the benefits and protections of generally applicable laws" regarding women's preventive health services. Petition for Writ of Certiorari at 16, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 ("Gov't Pet."). Congress was aware that RFRA would provide a shield for persons and entities having faith-based objections to being compelled to participate in the provision of pregnancy termination services. As a result, such female employees desiring those services need only obtain their own private coverage. Employee inconvenience falls far short of being cornered at "sword" point; indeed, it is Hobby Lobby and Conestoga, not their employees, that are faced with the menacing, steely thrust of government regulations.

Second, the unique history of the religious objection versus pregnancy termination issue illuminates the contextual circumstances behind the HHS guidelines themselves, and shows them to have effected a "religious gerrymander," something we discuss below.

In the past forty years there has been a consistent recognition by this Court that medical practices designed for the intentional termination of a pregnancy after conception and before birth raise religious questions, and have engendered faith-based objections by members of the American public. As such, the historical context of this particular question as applied to the HHS mandate, and the nature of the religious objections of Hobby Lobby and

Conestoga, create a highly unique and specific basis for the free exercise rights asserted here.

Official recognition that procedures and services intended to disrupt a pregnancy raise religious implications appears in the early stages of this Court's consideration of *Roe v. Wade*. During the oral re-arguments in *Roe*, Justice Stewart addressed the nature of the issue, asking: "Now, how should that question be decided? Is it a legal question? A constitutional question? A medical question? A philosophical question? Or, a religious question?"[9]

The Court's opinion in *Roe v. Wade* addressed various religious viewpoints that bore on the societal interests implicit in the abortion question. The decision addressed the beliefs of "[a]ncient religion," *Id.* at 130 (footnote omitted); "[t]he emerging teachings of Christianity," *Id.* at 132; "Christian theology and the canon law," *Id.* at 34; "[t]he theological debate . . . reflected in the writings of St. Augustine," as well as the views of the "early Christian thinkers," *Id.* at 134 n.22; "the predominant . . . attitude of the Jewish faith," *Id.* at 160 (footnote omitted); and "official Roman Catholic dogma" and the "official belief of the Catholic Church," *Id.* at 160-61 (footnote omitted).

And, of course, in the years that followed, a myriad number of cases decided by this Court noted the intersection between pregnancy termination and the religious objections of those who do not approve of such procedures.[10]

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[9] Transcript, Oral Reargument at 11, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), ***available at*** http://www.scribd.com/doc/68497271/Transcript-Roe-v-Wade-Re-Argument-Oct-1972).

In view of the unbroken history of such ongoing religious objections by a segment of the American public, the regulators in the Department of Health and Human Services cannot claim to be unaware of the religious implications of the preventive services portion of the health insurance mandate. Indeed, the mere fact that a religious exemption was attempted as part of the HHS regulations indicates that the agency knew the religious sensitivity of the issue. Knowing that, however, HHS still excluded by definition, for-profit religious employers. *See* 45 C.F.R. § 147.130(a)(1)(iv)(B)(4); *see also* 45 C.F.R. § 147.131(a) and § 147.130 (b)(2). Thus, the actions of HHS arbitrarily reduced considerably the field of potential religious employers eligible for exemption.

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[10] *Hill v. Colo.*, 530 U.S. 703, 763 (2000) (Scalia, J., dissenting) (recognizing the potential for religious objections to abortion); *Planned Parenthood v. Casey*, 505 U.S. 833, 899-900 (1992) (acknowledging that parents could want to discuss religious principles of abortion with a pregnant daughter); *Hodgson v. Minn.*, 497 U.S. 417, 448 (1990) (acknowledging that a waiting period gives parents time to discuss religious implications of abortion with a pregnant daughter); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 541-42 (1990) (Blackmun, J., dissenting) (contemplating the potential for legislatures to have religious reasons for making abortions difficult to obtain); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 571 (1989) (Stevens, J., concurring in part and dissenting in part) (acknowledging existence of deeply held religious beliefs related to the abortion debate); *Bowen v. Kendrick*, 487 U.S. 589, 640 n.9 (1988) (Blackmun, J., dissenting) (asserting that religious beliefs would influence adolescent sexuality and pregnancy counseling administered by religious organizations); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 779 (1986) (Stevens, J., concurring) (noting the religious view that a fetus is a person); *H. L. v. Matheson*, 450 U.S. 398, 409 (1981) (recognizing the existence of religious concerns over abortion); *Harris v. McRae*, 448 U.S. 297, 319-20 (1980) (acknowledging that religious doctrines address abortion); *Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (recognizing that abortion raises religious concerns).

When it comes to analyzing government regulations through the prism of free exercise rights, whether under RFRA, or the First Amendment, "[f]acial neutrality [of the regulation] is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). As we have noted above, the fact of a religious exemption of sorts contained in the HHS rules, which categorically excludes for-profit religious organizations, and carefully limits the kinds of nonprofit religious entities that can qualify, disproves that the ACA satisfies "facial neutrality" regarding religion. But even if that were not so, the HHS guidelines effect a kind of *religious gerrymander*, by expressly disfavoring religious for-profit entities, while exempting some, though most certainly not exempting all or even most, nonprofit ones. ""The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders."" *Id.* (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

This Court has recognized that "the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness* *v. Fortson*, 403 U.S. 431, 442 (1971). The basis for free exercise relief for Hobby Lobby and Conestoga in this case, is substantially different from that urged by the complainants in *Lee*. The failure to treat the cases differently would result in a grossly unfair infringement of the religious liberties of those two religious corporations.

Last, the recognition of free exercise rights for Hobby Lobby and Conestoga here will surely have none of the devastating, universal impacts envisioned by this Court in *Lee*. There will be no wholesale dysfunction caused to the ACA; rather, closely-held, for-profit religious employers would merely be protected in addition to the limited number of nonprofit religious employers currently exempt under the inadequate exemption that has been made available for religious organizations.[11]

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[11] The insufficiency of the religious exemption is illustrated by the fact that 45 C.F.R. § 147.130(a)(1)(iv)(B) not only defines "religious employer" as one that has religious purposes, and primarily employs persons of the same faith, and is a nonprofit corporation under the Internal Revenue Code, but it also must be one that "serves primarily persons who share the religious tenets of the organization." That last caveat would exclude most, if not virtually all of the nonprofit religious organizations within National Religious Broadcasters, as they are, as the foreword to our organizational Constitution declares, concerned for the spread of the Gospel of our Lord and Savior Jesus Christ, a mission that sends them into the world with the mandate to serve communities and to spread the Gospel to those who in fact may not "share [their] religious tenets;" in fact, very often that mission, whether by proclamation or by acts of public service, is directed toward persons who are non-adherents to the "evangelical" beliefs of our members. It should be noted, however, that 45 C.F.R. § 147.131 appears, curiously, to create a new set of qualifying factors for a "religious employer." *See* 45 C.F.R. § 147.131(a) and § 147.131(b), while

Such a result would not remove any of those employers entirely from the reach of the ACA, but would only protect them from one small portion of the Act, namely, the provision requiring preventive services coverage.

B. Strict Scrutiny for Classifications "Based on Religion"

The HHS guidelines at issue here call for this Court to evaluate those regulations pursuant to a strict scrutiny standard, requiring them to be justified, if at all, under a compelling-interest test, whether pursuant to RFRA or the Free Exercise Clause. In *Smith*, this Court noted those categories of government classifications sufficiently suspect so as to invoke strict scrutiny, stating:

> Just as we subject to the most exacting scrutiny laws that make classifications based on race, see *Palmore v. Sidoti, 466 U.S. 429 (1984)*, or on the content of speech, see *Sable Communications of California v. FCC, 492 U.S. 115 (1989)*, so too we strictly scrutinize governmental classifications *based on religion*, see *McDaniel v. Paty, 435 U.S. 618 (1978)*; see also *Torcaso v. Watkins, 367 U.S. 488 (1961)*.

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still incorporating by reference § 147.130(a)(1)(iv). *See* 45 C.F.R. § 147.131(a) and § 147.131(c). However, § 147.131(a) ultimately limits the exemption to nonprofit churches and church-related entities, while offering only a flimsy "accommodation" to other faith nonprofits. *See* Brief for Petitioners at 7, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354.

Smith, 494 U.S. 886 n.3 (emphasis added). Thus, regulations or classifications within those regulations that are "based on religion" cannot be religion-neutral.

By contrast, where there is a law that is entirely religion-neutral, and it *only* has the mere *effect* of interfering with free exercise of religion as an incidental and unintended consequence, then, this Court noted, it need not be justified by a compelling governmental interest. *Id.* (i.e. "generally applicable laws *unconcerned with regulating* speech [or religious exercise] . . . .") (emphasis added).

Here, however, it can hardly be said that the HHS guidelines were "unconcerned with regulating" religious entities in light of the fact that they purported to create a "religious" exemption scheme, they specified in detail that some religious groups could qualify for exemptions, some could not, and then expressly determined that for-profit employers, despite their religious mission, the faith of their owners, or the religious nature of their activities, would be categorically ineligible for the "religious" exemption. It seems clear that the flawed HHS religious exemption approach was the quintessential "governmental classifications *based on religion*," *Id.* (emphasis added), anticipated in *Smith* as requiring proof of a compelling governmental interest in order to satisfy the demands of free exercise of religion.

More to the point, as this Court noted in *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997) where the government "'has in place a system of . . . exemptions,'" it cannot thereafter "'refuse to extend that system to cases of religious hardship without compelling reason.'" *Id.* (quoting *Smith*, 494 U.S. at 884; and citing in accord, *Thomas v. Review Bd. of Indiana Emp't Security Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987). Considering the factual "hardship" in the form of huge fines that will be imposed on the religious companies here, this is strong evidence that the religious exemption provisions of the HHS guidelines, to be sustained at all, must be justified by a "compelling reason."

C. The Burden on Free Exercise Rights

1. The De Minimis Protection of Grandfather Provisions

The HHS guidelines permit some existing health insurance plans to be "grandfathered" out of the preventive services coverage requirement. Gov't Pet. at 30 (citing 45 C.F.R. § 147.140). The government admits, however, that this "does not effect a permanent exemption; instead, it is transitional in effect," during only the period of time that the ACA "is implemented." *Id.*

Moreover, 45 C.F.R. § 147.140(g) indicates that "cessation of grandfather status" can be caused with ease, triggered by any one of a long litany of changes to existing health insurance plans, including substantial changes to benefits for diagnosis or treatment of a condition, any increase in an individual's co-insurance requirement, increase in deductible or out-of-pocket limits, certain increases in a fixed-amount copayment, adoption of certain annual dollar value limits, or decreases in the dollar value of some annual limits. 45 C.F.R. §§ 147.140

(g)(i)–(v). Given the nature of employers' needs to meet changing economic and staffing circumstances, and to adjust insurance coverage accordingly, the actual benefit of the "grandfather" exclusion is *de minimis* and transitory at best, something the government appears to concede.[12]

2. The Religious Burden

When government regulations "require [citizens] to choose between their religious beliefs and receiving a government benefit" (or even worse, to incur "civil sanctions"), such regulations are not facially neutral with respect to religion, and a free exercise analysis is required to determine whether those regulations have imposed a substantial burden on the religious rights of the complainant. *Locke v. Davey*, 540 U.S. 712, 720 (2004) (footnote omitted). Here, the two closely-held religious companies will face such staggering fines and civil sanctions that they could be forced to close their doors. Short of imprisonment, one can hardly conceive of a greater interference with those who founded, invested their lives in, and control those enterprises.

The rights of religious conscience were recognized as preeminent rights in the First Amendment by the Founders. During the Bill of Rights debates in the First Congress, the *Gazette of the United States* records that James Madison called

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[12] Not surprisingly, Hobby Lobby received no benefit from these grandfather provisions. As they indicate: "[t]he plan [of Hobby Lobby] lost grandfather status due to changes made before the contraceptive-coverage requirement was proposed." Brief for Respondents on Petition for Writ of Certiorari at 8 n.7, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354.

"the rights of conscience [among] those choicest flowers in the prerogative of the American people . . . ."[13]

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a violation of religious conscience and belief was determined to be "substantial" where state regulations commanded the Amish complainants "to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218. Their choice was to comply, "or be forced to migrate to some other and more tolerant region;" that latter option struck at the heart of what the Free Exercise Clause was meant to prevent. *Id.*, *see also* n.9. Because the HHS regulations, and indeed the ACA as well, are federal laws that sweep the nation, the owners of the faith-based companies here do not have the choice to move to a more "tolerant" state, a bitter and unconstitutionally compelled choice perhaps, but one that at least the Amish had in *Yoder*.

In *Yoder* it was also noted that "the State [did not] undertake to meet the claim that the Amish mode of life [at issue] . . . is inseparable from and a part of the basic tenets of their religion . . . ." *Id.* at 219. The same can be said here. The government has not refuted the fact that the owners of both companies held a faith-based objection of such a nature that it commanded them to refuse to comply with the specific preventive services portion of the HHS regulations. In fact, the government concedes it in its merits brief. Brief for Petitioners at 8, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 ("Pet. Br. in Hobby Lobby") ("The Greens maintain the sincere religious conviction 'that human life begins at conception' . . . .") (citation omitted).

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[13] *Creating the Bill of Rights – The Documentary Record from the First Federal Congress* 66-67 (Helen E. Veit, Kenneth R. Bowling, & Charlene Bangs Bickford, eds., The John Hopkins University Press 1992). Rights of "conscience" was the term of art used for free exercise of religion during the Bill of Rights debates in the First Federal Congress. James Madison summed up the essence of the Free Exercise Clause as protecting persons from being "compelled" to disobey God and to obey "laws of such a nature as might infringe the rights of conscience . . . ." *Id.* at 157-58.

The government argues that the free exercise claims of the faith-based owners and their companies are "too attenuated" to succeed, because "independent third parties" (i.e. the employees and their doctors) will make the decision whether to use medications that will prevent a pregnancy from continuing, and therefore such decisions are in no "meaningful sense" the employer's decision. *Id.* at 32-33, citing *Grote v. Sebelius*, 708 F.3d 850, 865 (7th Cir. 2013) (Rovner, J., dissenting).[14]

However, the government's argument ignores the fact that individual decisions by employees to use pregnancy altering drugs under the employer's insurance coverage ***are made possible because of employment at the employer's company***, regardless of who pays for that part of the coverage. A similar approach was argued by Justice Douglas in his dissent in *Yoder*, where it was asserted that vindication of the free exercise rights of the Amish parents could violate the independent rights of their children, who were entitled to a voice in the decision about their own education: "If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children." *Yoder*, *supra* at 242, Douglas, J., dissenting. Yet, that position was rejected by this Court. *Id.* at 230-31 ("It is the parents who are subject to prosecution . . . and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent").

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[14] The government also cites *Zelman v. Simmons-Harris*, 536 U.S. 639, 654-55 (2002) for this point. Pet. Br. in Hobby Lobby at 33. But that case involved the endorsement test of the Establishment Clause.

Last, the government argues that a substantial burden on religion is avoided due to medical confidentiality, because the religious employers would never know whether employees were actually using coverage supplied through their place of business. Pet. Br. in Hobby Lobby at 34 (citation omitted). This approach is an odd and highly suspect approach to religious freedom: in effect telling religious employers – "if you don't like the thought of being complicit in a forbidden act, but you don't want to close your doors, then simply close your eyes." Just as this Court refused to tell the Amish in *Yoder* that they could avoid a burden on their religion by moving to a more "tolerant" state, so this Court should also refuse to tell faith-based, closely-held companies and their owners that they will be forced to "close their eyes" to the religious implications of providing that part of the insurance coverage that is at issue here.

D. The Mirage of Harmful Religious Claims

The government has raised the specter, if their position is rejected by this Court, of "ad hoc opt-outs by employers outside of clearly drawn categories . . . . [C]ontrolling shareholders might have religious objections to other preventive services (such as immunizations) . . . ." Gov't Pet. at 29. In the government's merits brief it has constructed a miniature *parade of horribles*: religious employers "might," they argue, "assert religious objections to coverage of . . . immunizations, blood transfusions, anti-depressants, medications derived from pigs, and gene therapy." Pet. Br. in Hobby Lobby at 45.

But such threats are illusory. Context is critical. The religious objections of Hobby Lobby and Conestoga must be viewed in the historical and legal context of religious-based objections to medical practices that are designed and intended to end pregnancies after conception and before birth. We have previously indicated the obvious legal and historical context that makes this case and this issue unique from other religious-based objections that might be raised over the propriety of other medical services provided through ACA health insurance coverage. *See* section II. A, *supra*.

The free exercise rights of Hobby Lobby and Conestoga should be recognized on the basis of this record, and upon the fact that the jurisprudence of this Court has recognized for many decades that some Americans have religious objections to those medical services—or similar to those—which are at issue here. This Court should reject any invitation to engage in speculation about possible objections of hypothetical future employers regarding other unrelated health services, because those cases, whatever they might be in the future, could not possibly share any of the long, well-documented history or context that belongs to the precise religious liberty burden that is complained of here.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the 10th Circuit Court of Appeals in the *Hobby Lobby* case, and should reverse the judgment of the 3rd Circuit Court of Appeals in the *Conestoga* case.

Respectfully submitted,

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IN THE

Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH
AND HUMAN SERVICES, et al.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., et al.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORPORATION, et al.,
Petitioners,
v.
KATHLEEN SEBELIUS, SECRETARY OF HEALTH
AND HUMAN SERVICES, et al.,
Respondents.

*On Writs of Certiorari to the
United States Courts of Appeals
for the Tenth and Third Circuits*

BRIEF FOR THE NATIONAL WOMEN'S LAW CENTER AND SIXTY-EIGHT OTHER ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF THE GOVERNMENT

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STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are the National Women's Law Center and sixty-eight other national, regional, and state organizations committed to protecting and advancing women's health and promoting equal opportunity, with a particular interest in ensuring that women receive the full benefits of access to contraceptive coverage without cost-sharing as intended by the Affordable Care Act. A list of the *amici* parties is set forth in the Appendix to this brief.

SUMMARY OF ARGUMENT

Contraceptives are a key component of preventive health care for women. To further the goals of bettering the health and welfare of all Americans, the Patient Protection and Affordable Care Act ("ACA") and implementing regulations require all new insurance plans to cover "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity" without cost-sharing requirements (the "contraception regulations"). Health Res. & Servs. Admin., U.S. Dep't of Health & Human Servs., *Women's Preventive Services Guidelines*, http://www.hrsa.gov/womensguidelines ("HRSA Guidelines") (last visited Jan. 21, 2014), *implemented*

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. All parties consented to the filing of this brief.

by 77 Fed. Reg. 8,725 (Feb. 15, 2012); 42 U.S.C. § 300gg-13(a)(4).

Hobby Lobby Stores, Inc. ("Hobby Lobby"), Conestoga Wood Specialties Corp. ("Conestoga Wood" and together with Hobby Lobby, the "Companies"), and their respective shareholders challenge the contraception regulations under the Religious Freedom Restoration Act ("RFRA"), which provides that the Government shall not "substantially burden a person's exercise of religion" unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.[2] The Companies claim that providing insurance that includes coverage of certain contraceptive methods, including intrauterine devices ("IUDs") and emergency contraceptives, violates rights they allege are protected by RFRA.

If this Court reaches the merits of the Companies' claims,[3] it should find that they fail. As set out by the United States, the contraception regulations pose no substantial burden on the Companies' religious exercise. Moreover, as *amici* demonstrate below, the regulations directly further at least two compelling governmental interests: promoting public health and equality for women.

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[2] The Companies also assert a violation under the Free Exercise Clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. This claim also fails because the contraception regulations are neutral regulations of general applicability. *See Employment Div., Dep't of Human Res. of Or.* v. *Smith*, 494 U.S. 872, 879 (1990). Indeed, as this brief demonstrates, the contraception regulations meet RFRA's more demanding standard; thus, the requirement also satisfies the less stringent standard under the First Amendment.

[3] This brief does not address the threshold question of whether for-profit companies are protected by RFRA. This does not mean that *amici* concede the point.

First, contraception is critical to women's health, and providing it with no cost-sharing advances the compelling governmental interest in public health. Contraception is highly effective at reducing unintended pregnancy, which, as countless studies have shown and experts agree, can have severe negative health consequences for both women and children. Yet, prior to the contraception regulations, the high costs of contraception affected whether women used contraceptives consistently and whether women used the most appropriate and effective forms of contraception for their circumstances.

Second, by addressing gender gaps in health insurance and remedying the sex disparities inherent in failing to provide health insurance coverage for contraception and related services, the contraception regulations advance the compelling governmental interest in ending gender discrimination and promoting gender equality. Indeed, in passing the ACA, Congress recognized that excluding coverage of women's preventive health services, including contraception, constituted discrimination against women. Providing contraceptive coverage without cost-sharing corrects gender gaps in the provision of health care by ensuring that women, like men, can meet their basic preventive health care needs. Before the ACA went into effect, women disproportionately bore the costs of reproductive health care, and these high costs negatively affected women's health and well-being, as women often lacked access to or forewent necessary health care to keep costs down.

The contraception regulations address this disparity and advance equal opportunity in other aspects of women's lives, thus improving women's social and economic outcomes more generally.

In these cases, precisely because the contraception regulations forward these compelling interests, the Companies' attempt to exempt themselves from the regulations threatens real harm to their employees and employees' dependents. This harm to the rights and interests of third parties must bear heavily in the analysis of the Companies' claims, as the precedents of this Court make clear that neither the Constitution nor RFRA empowers individuals to exercise their own religious beliefs to the detriment of others. Because the regulations are narrowly drawn to forward compelling interests and because allowing the Companies to abrogate their employees' rights to this coverage would harm third parties, the Companies' claims must fail.[4]

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[4] In addition, the contraception regulations are the least restrictive means of furthering the compelling interests. By guaranteeing women access to contraception without cost-sharing within the existing framework of employer-provided health insurance plans, the regulations present the only seamless, efficient, and thorough means of ensuring women access to the full range of FDA-approved contraceptive methods, thereby advancing the government's compelling interests. Requiring women to go outside of the existing framework to access this and only this form of preventive care would accomplish the very opposite of what Congress intended.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE ACA DEMONSTRATES THAT THE CONTRACEPTION REGULATIONS WERE ENACTED TO FURTHER COMPELLING GOVERNMENTAL INTERESTS.

A key component of the ACA is the preventive health services coverage provision, which is designed to enable individuals to avoid preventable conditions and improve health overall by increasing access to preventive care and screenings. *See* Inst. of Med., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS, at 16-18, 168 (2011), ***available at*** http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx ("IOM REP."). This provision requires new health insurance plans to provide coverage for certain preventive services with no cost-sharing component. 42 U.S.C. § 300gg-13(a).

The bill as originally introduced in the Senate provided coverage for: (1) items or services recommended by the U.S. Preventive Services Task Force ("USPSTF"); (2) immunizations recommended by the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention; and (3) with respect to children, preventive care and screenings recommended by the Health Resources and Services Administration ("HRSA"). *See* H.R. 3590, § 2713(a), 111th Cong. (as of Nov. 19, 2009). The USPSTF recommendations, however, "d[id] not include certain recommendations that many women's health advocates and medical professionals believe are critically important." 155 Cong. Rec. S12,021, S12,025 (daily ed. Dec. 1, 2009) (statement of Sen. Boxer).

Recognizing this limitation for what it was—a significant gap in coverage that threatened women's health and discriminated against women—Senator Mikulski sponsored the Women's Health Amendment to ensure "essential protection for women's access to preventive health care not currently covered in other prevention sections of the [ACA]." *Mikulski Amendment Improves Coverage of Women's Preventive Health Services and Lowers Costs to Women*, *available at* http://www.mikulski.senate.gov/_pdfs/Press/MikulskiAmendmentSummary.pdf.

In relevant part, the Amendment proposed a fourth category of preventive coverage:

> (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.

155 Cong. Rec. S11,985, S11,986 (daily ed. Nov. 30, 2009) (Amend. No. 2791). The Amendment "require[d] coverage of women's preventive services developed by women's health experts to meet the unique needs of women." 155 Cong. Rec. S12,265, S12,273 (daily ed. Dec. 3, 2009) (statement of Sen. Stabenow).

Congress intended the Amendment to help alleviate the "punitive practices of insurance companies that charge women more and give [them] less in a benefit" and to "end the punitive practices of the private insurance companies in their gender discrimination." 155 Cong. Rec. S12,021, S12,026 (statement of Sen. Mikulski); *id.* at S12,030 (statement of Sen. Dodd) ("I support the effort by

Senator Mikulski on her efforts to see to it that women are treated equally, and particularly in preventive care."). In enacting the Amendment, Congress recognized that the failure to cover women's preventive health services meant that women paid more in out-of-pocket costs than men for basic and necessary preventive care and in some instances were unable to obtain this care at all because of cost barriers:

> Women must shoulder the worst of the health care crisis, including *outrageous discriminatory practices in care and coverage.* Not only do we pay more for the coverage we seek . . . but in general women of childbearing age spend 68 percent more in out-of-pocket health care costs than men. . . . In America today, too many women are delaying or skipping preventive care because of the costs of copays and limited access. In fact, more than half of women delay or avoid preventive care because of its cost. *This fundamental inequity in the current system is dangerous and discriminatory and we must act.*

Id. at S12,027 (statement of Sen. Gillibrand) (emphases added).

In considering the Amendment, Congress expressed its expectation that the HRSA Guidelines would incorporate family planning services. *See, e.g.*, *id.* ("With Senator Mikulski's amendment, even more preventive screening will be covered, including . . . family planning."); 155 Cong. Rec. S12,033, S12,052 (daily ed. Dec. 1, 2009) (statement of Sen. Franken) ("[A]ffordable family planning services must be accessible to all women in our reformed health care system."); 155 Cong. Rec. S12,106, S12,114 (daily ed. Dec. 2, 2009) (statement of Sen. Feinstein) ("[The amendment] will require insurance plans to cover at no cost basic preventive services and screenings for women. This may include mammograms, Pap smears, family planning, screenings to detect postpartum depression, and other annual women's health screenings."). The Senate adopted the Women's Health Amendment by a vote of 61 to 39. *See* 155 Cong. Rec. S12,265, S12,277 (daily ed. Dec. 3, 2009); 42 U.S.C. § 300gg-13(a)(4).

To meet the Amendment's objectives, HRSA commissioned the Institute of Medicine ("IOM")[5] to "convene a diverse committee of experts in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines to review existing guidelines, identify existing coverage gaps, and recommend services and screenings for [the Department of Health and Human Services] to consider in order to fill those gaps." IOM REP. at 20-21. IOM assembled a committee of independent experts in the subject fields, which employed a rigorous methodology to analyze the relevant evidence. *See id.* at 67. The IOM panel articulated the need to focus on the distinct preventive health needs of women because "women not only have different health care needs than men (because of reproductive differences) but also manifest different symptoms and responses to treatment modalities." *Id.* at 18.

After conducting its analysis, the IOM panel recommended eight preventive services for women, including "the full range of Food and Drug Administration-approved contraception methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *Id.* at 109-10.

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[5] The IOM is an independent, nonprofit organization that provides unbiased evidence to help those in government and the private sector make informed health decisions. *See* Inst. of Med., *About the IOM*, http://www.iom.edu/About-IOM.aspx (last visited Jan. 21, 2014).

While the IOM's recommendation was significant, it was not groundbreaking. For years, "[n]umerous health care professional associations and other organizations [have] recommend[ed] the use of family planning services as part of preventive care for women . . . ." *Id.* at 104. Additionally, various state and federal laws have recognized the compelling interest in including such coverage. For example, twenty-eight states require health plans to cover contraception, and the Equal Employment Opportunity Commission ("EEOC") interprets Title VII, as amended by the Pregnancy Discrimination Act ("PDA"), to require employers that provide health coverage for preventive health services also to provide coverage for contraception. EEOC, Decision on Coverage of Contraception, at 2-4 (Dec. 14, 2000) ("EEOC Decision"). Moreover, since 1972, Medicaid has required coverage for family planning in all state programs with no cost-sharing requirements. IOM REP. at 108. The objectives of Medicaid's family planning policy were "to improve the health of the people, to strengthen the integrity of the family and to provide families the freedom of choice to determine the spacing of their children and the size of their families." U.S. Dep't of Health, Education, and Welfare, *Handbook of Public Assistance Administration*, Supplement D (June 17, 1966). The policy also recognized the importance of providing women with a range of contraceptive methods, explaining that "[t]here shall be freedom of choice of method so that individuals can choose in accordance with the dictates of their consciences." *Id.*

Therefore, various governmental and non-governmental actors have recognized that including contraceptive coverage in health insurance plans advances compelling interests. However, none of these incremental steps have been able to accomplish what the contraception regulations will—an across-the-board requirement that new insurance plans fully cover all FDA-approved contraceptive methods and related education and counseling without any cost-sharing. Comprehensive contraceptive coverage is no longer dependent on a woman's income level, the state in which she resides, or the health plan she chooses.[6] It is this fundamental shift in health insurance coverage of contraception—applicable across the nation—that makes the contraception regulations so critical to forwarding the government's compelling interests.

On August 1, 2011, HRSA adopted the recommendations set forth in the IOM Report. *See* HRSA Guidelines. The HRSA Guidelines apply to non-grandfathered health insurance plans in the first plan year beginning on or after August 1, 2012. *See* 77 Fed. Reg. 8,725, 8,725-26 (Feb. 15, 2012).

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[6] For example, twenty-two states do not have contraceptive equity laws; in the states that have them, the laws do not reach "self-funded" plans, which are considered to be employer benefit plans that are governed by federal law. In addition, Title VII and the PDA do not reach employers with fewer than 15 employees, and Medicaid is only available for low-income women; in fact, many state Medicaid programs do not reach their entire low-income population.

II. THE CONTRACEPTION REGULATIONS FURTHER COMPELLING GOVERNMENTAL INTERESTS.

A. Safeguarding Public Health Is a Compelling Governmental Interest.

"[T]he Government clearly has a compelling interest in safeguarding the public health by regulating the health care and insurance markets." *Mead* v. *Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011) (citing *Olsen* v. *Drug Enforcement Admin.*, 878 F.2d 1458, 1462 (D.C. Cir. 1989)), *aff'd Seven-Sky* v. *Holder*, 661 F.3d 1 (D.C. Cir. 2011); *see also Buchwald* v. *Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 498 (10th Cir. 1998) (noting that "public health is a compelling government interest"). As the IOM Report and HRSA Guidelines make clear, access to all FDA-approved contraceptive methods and patient education and counseling without cost-sharing are critical components of preventive care for women that have demonstrable benefits for the health of women and children. Simply put, increasing access to contraception is a matter of public health. Indeed, the health of the women who depend on their employers for comprehensive health care coverage, including the women who get health insurance from the Companies, is directly at stake in these cases.

1. Unintended Pregnancies Are Highly Prevalent in the United States and Have Serious Health Consequences for Women and Children.

Nearly half of all pregnancies in the United States each year are unintended (*i.e.*, unwanted or mistimed at the time of conception). *See* Finer & Zolna, *Unintended Pregnancy in the United States:*

Incidence and Disparities, 2006, 84 CONTRACEPTION 478, 480 (2011). Unintended pregnancy is associated with a wide range of negative health consequences for the woman and the resulting child. Addressing the high unintended pregnancy rate is of great interest to the government and has been deemed a national objective by the Department of Health and Human Services. *See* U.S. Dep't of Health & Human Servs., *Healthy People 2020: Family Planning*, http://healthypeople.gov/2020/topicsobjectives2020/overview.aspx?topicId=13 (last visited Jan. 21, 2014) ("*Healthy People 2020*").

While unintended pregnancy is highly prevalent in the United States—significantly more so than in comparably-developed countries[7]—this need not be the case. *See* IOM REP. at 104. Contraception is highly effective in preventing unintended pregnancy. Failure rates of FDA-approved contraception are negligible with proper use. IUDs, female sterilization, and contraceptive implants have the lowest failure rate at 1% or less in the first 12 months—as compared with an 85% chance of pregnancy within 12 months with no contraception. *See id.* at 105.

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[7] For example, "[w]hile 49% of pregnancies in the United States are unintended, the corresponding percentage in France is only 33%, and in Edinburgh, Scotland, it is only 28%." Trussell & Wynn, *Reducing Unintended Pregnancy in the United States*, 77 CONTRACEPTION 1, 4 (2008). Tellingly, the usage rates of IUDs (which have much lower failure rates than many other methods of contraception) in European countries is significantly higher than in the United States; in France, for instance, 17% of females who use contraception use IUDs, as compared to just two percent in the United States. *See* Sonfield, *Popularity Disparity: Attitudes About the IUD in Europe and the United States*, GUTTMACHER POL'Y REV., Fall 2007, at 20 ("Sonfield, *Popularity Disparity*") (reporting that IUD usage in the United Kingdom is at 11%, and in Norway reaches 27%).

Studies document negative health consequences of unintended pregnancy. For example, during an unintended pregnancy, a woman is more likely to receive delayed or no prenatal care, to be depressed during pregnancy, and to suffer from domestic violence during pregnancy. *See* IOM REP. at 103; *Healthy People 2020.* Moreover, some women rely on contraception to avoid pregnancy due to other medical conditions.[8] For example, it may be advisable for women with chronic medical conditions, such as diabetes and obesity, to postpone pregnancy until their health stabilizes. *See* IOM REP. at 103. Women with certain medical conditions, such as pulmonary hypertension and cyanotic heart disease, may need to avoid pregnancy altogether or risk serious medical consequences. *See id.* at 103-04.

An unintended pregnancy may also cause negative health consequences for the children resulting from unintended pregnancy. Without contraception, women are more likely to have short inter-pregnancy intervals, which are associated with preterm birth, low birth weight, and small-for-gestational-age births. *See id.* at 103. Children of unintended pregnancy are also less likely to be breastfed, which has known benefits to early development. *See id.* These children are more likely to experience poor mental and physical health during childhood, and have lower educational attainment and more behavioral issues in their teen years. *See* Logan et al., *The Consequences Of Unintended Childbearing: A White Paper*, at 11 (Child Trends, Inc., 2007), *available at* http://www.thenationalcampaign.org/resources/pdf/consequences.pdf.

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[8] Contraception can also have independent health benefits, including treating menstrual disorders; reducing risks of endometrial cancer; protecting against pelvic inflammatory disease; and, potentially, preventing ovarian cancer. *See* IOM REP. at 107.

For all these reasons, the Centers for Disease Control and Prevention identified "family planning" as one of ten great public health achievements of the twentieth century, noting:

> Family planning has provided health benefits such as smaller family size and longer interval between the birth of children; increased opportunities for preconceptional counseling and screening; fewer infant, child, and maternal deaths; and the use of barrier contraceptives to prevent pregnancy and transmission of human immunodeficiency virus and other STDs.

Ctrs. for Disease Control & Prevention, *Ten Great Public Health Achievements–United States, 1900-1999*, 48 MORBIDITY & MORTALITY WKLY. REP. 241 (1999), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00056796.htm ("*Ten Great Public Health Achievements*").

2. Providing Access to the Full Range of FDA-Approved Contraceptive Methods Without Cost-Sharing Forwards Women's Health.

By requiring coverage of the full range of FDA-approved methods without cost-sharing, the contraception regulations ensure that women can choose the contraceptive method that fits their needs "depending upon their life stage, sexual practices, and health status." IOM REP. at 105. Moreover, by covering patient education and counseling, the regulations help ensure that each woman has the information she needs to identify the form of contraception that is most appropriate for her. Women with increased cardiovascular risk, for instance, may need to use a copper IUD or other non-hormonal method to avoid the cardiovascular side effects of hormonal contraception. Sonfield, *Popularity Disparity*, at 21. In addition, women may choose an IUD over alternative forms of contraception because "IUDs and implants are more than 20 times more effective at preventing pregnancy than are [oral contraceptive pills], the contraceptive patch, and the contraceptive vaginal ring." *See* Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 OBSTETRICS & GYNECOLOGY 1291, 1292 (2012). For different reasons, emergency contraception fills a unique and critical need. It is a woman's last chance to prevent pregnancy after sexual assault, birth control failure, or unprotected sex. Coverage of the full range of FDA-approved contraceptive methods and counseling services without cost-sharing is necessary to ensure that a woman and her medical provider can choose the contraceptive method best-suited to her needs.

This coverage without cost-sharing is especially critical because many women choose less effective methods of contraception based on cost. In particular, the high up-front costs of more effective long-acting reversible contraceptives ("LARCs")—including IUDs, which cost between $500 and $1000 up-front—deter women from accessing these methods. *See* Planned Parenthood Federation of America, IUD, http://www.plannedparenthood.org/health-topics/birth-control/iud-4245.htm (last visited Jan. 21, 2014). One study notes that "[t]he out-of-pocket cost for a woman to initiate LARC methods—

recognized as most effective, but also most expensive in the short term—was 10 times higher compared with a 1-month supply of generic oral contraceptives." Dusetzina et al., *Cost of Contraceptive Methods to Privately Insured Women in the United States*, WOMEN'S HEALTH ISSUES 23-2 (2013), e70. The same study noted: "Because of their superior effectiveness, increasing the use of LARC methods has been hailed as a key strategy to reduce the high unintended pregnancy and abortion rates in the United States. Although LARC methods eventually have lower average costs of use (*e.g.*, they can remain in place for 3 to 10 years after initial placement, compared with most short term methods that require payment for each month of use), they are considerably more expensive to initiate." *Id.* at e69.

Other forms of contraception are also associated with high costs, which often lead women to misuse contraception or to fail to use it altogether. Oral contraception costs women, on average, $2,630 over five years. Trussell et al., *Erratum to "Cost Effectiveness of Contraceptives in the United States*," 80 CONTRACEPTION 229, 229 (2009). Other hormonal contraceptives—including injectable contraceptives, transdermal patches and the vaginal ring—cost women between $2,300 and $2,800 over a five-year period. *Id.* Studies show that high costs lead women to forego contraception completely, to choose less effective contraception methods, or to use contraception inconsistently or incorrectly. *See, e.g.*, Guttmacher Inst., A REAL-TIME LOOK AT THE IMPACT OF THE RECESSION ON WOMEN'S FAMILY PLANNING AND PREGNANCY DECISIONS, at 5 (2009), *available at* http://www.guttmacher.org/pubs/RecessionFP.pdf (finding that, to save money, women forewent contraception, skipped birth control pills, delayed filling prescriptions, went off the pill for at least a month, or purchased fewer birth control packs at once). Accordingly, the costs of contraception can pose significant risks of unintended pregnancy, as "even a brief gap in [contraceptive] method use can have a major impact." Gold, *The Need for and Cost of Mandating Private Insurance Coverage of Contraception*, GUTTMACHER REP. ON PUB. POL'Y, Aug. 1998, at 6 ("Gold").

Evidence shows that eliminating cost barriers to contraception can greatly reduce the incidence of unintended pregnancy. One study found a "clinically and statistically significant reduction" in unintended pregnancies when at-risk women received contraceptive counseling and reversible contraceptive methods of their choice at no cost. *See* Peipert et al., 120 OBSTETRICS & GYNECOLOGY at 1291; *see also* Ctr. for Prevention and Health Servs., Nat'l Bus. Grp. on Health, *Investing in Maternal and Child Health* (2007) Part 4, at 12, 37-38, *available at* https://www.businessgrouphealth.org/pub/f3004374-2354-d714-5186-b5bc1885758a. That same study attributed this reduction at least in part to the provision of "access to IUDs and implants that [study participants] otherwise might not have had." Peipert et al., 120 OBSTETRICS & GYNECOLOGY at 1295.

In another study, Kaiser Permanente found that when out-of-pocket costs for contraceptives were eliminated or reduced for "the most effective forms of contraception, including IUDs and injectables," as well as emergency contraceptives, their use increased and the estimated annual contraceptive failure rate decreased. *See* Postlethwaite et al., *A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change*, 76 CONTRACEPTION 360, 360, 363 (2007).

Cost barriers to consistent use of contraceptives and to use of the most effective forms of contraceptives contribute to an unplanned pregnancy rate for poor women that is five times that of higher income women. *See* Sonfield, *What Women Already Know: Documenting the Social and Economic Benefits of Family Planning*, GUTTMACHER POL'Y REV., Winter 2013, Vol. 16, No. 1, at 10 ("Sonfield, *What Women Already Know*"). Eliminating these cost barriers is critical for reducing unintended pregnancy rates. By removing cost barriers to both the full range of contraceptives and the education and counseling that help women identify the most effective methods of contraception appropriate for them, the contraception regulations forward compelling health interests, including the interests of the Companies' employees and the employees' dependents.

B. The Contraception Regulations Forward the Compelling Governmental Interest of Promoting Gender Equality.

Covering contraception and patient counseling in health insurance plans without cost-sharing serves to remedy the longstanding practice of denying insurance coverage for reproductive health care, which imposes costs primarily on women. In addition, by improving women's ability to control whether and when they will have a child, contraceptive coverage also fosters women's ability to participate in education and the workforce on equal footing with men. The regulations forward this compelling interest in women's equality both among the broader public and for the individual women covered by the Companies' insurance plans.

1. Promoting Gender Equality, Including Equal Access to Health Care, Is a Compelling Governmental Interest.

Eliminating gender discrimination and promoting women's equality are compelling state interests. *Bd. of Dirs. of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (recognizing "State's compelling interest in eliminating discrimination against women"); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609 (1984) (finding that a state law forbidding gender discrimination in public accommodations did not unconstitutionally burden First Amendment right of expressive association). Specifically, this Court has recognized "the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women," and has thus found that "[a]ssuring women equal access to . . . goods, privileges, and advantages clearly furthers compelling state interests." *Roberts*, 468 U.S. at 626; *see also id.* at 623 (holding that the state's "compelling interest in eradicating discrimination against its female citizens" justified the statute's impact on associational freedoms); *United States* v. *Virginia*, 518 U.S. 515, 532 (1996) (noting that fundamental principles are violated when "women, simply because they are women" are denied the "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities"); *Catholic Charities of Sacramento, Inc.* v. *Super. Ct. of Sacramento Cnty.*, 85 P.3d 67, 92 (Cal. 2004) ("The [contraceptive coverage law] serves the compelling state interest of eliminating gender discrimination.").

2. Excluding Health Insurance Coverage for Contraception Discriminates Against Women.

Employers that exclude women's preventive health services from their health insurance plans while covering men's preventive services discriminate against women. Such exclusion means that women are denied the comprehensive preventive health coverage provided to men. Moreover, when effective contraception is not used, and unintended pregnancy results, it is women who incur the attendant physical burdens and medical risks of pregnancy, women who disproportionately bear the health care costs of pregnancy and childbirth, and women who often face barriers to employment and educational opportunities as a result of pregnancy.

Indeed, the EEOC, in considering a Title VII challenge to an employer's failure to include contraceptive coverage in its health insurance policy that provided otherwise comprehensive coverage of prescription drugs, found that Congress, in passing the PDA, sought to "equalize employment opportunities for men and women" and to "address discrimination against female employees that was based on assumptions that they would become pregnant." EEOC Decision at 1-3. Noting that "[c]ontraception is a means by which a woman controls her ability to become pregnant," the EEOC accordingly held that "the PDA's prohibition of discrimination in connection with a woman's ability to become pregnant necessarily includes the denial of benefits for contraception." *Id.* at 2-3.[9]

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[9] Several federal courts have agreed with the EEOC. *See, e.g., Erickson* v. *Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1276

The instant cases do not present the question of the reach of the PDA (and this Court need not address this question to reject the Companies' RFRA claims). However, Congress, in passing the Women's Health Amendment, was acting on the same principle as the EEOC: that increased access to contraception promotes equality for women. By ensuring that women and men are treated equally in accessing basic preventive health care services, the contraception regulations advance the compelling interest in remedying sex discrimination.

3. Women's Disproportionate Share of Health Care Costs, Including the Cost of Contraceptives, Harms Women's Health and Economic Status.

Pervasive gender inequalities continue to infect the provision of health care. Women's different health needs and the historical failure to cover women's health needs to the same extent as men's has meant that women have paid more out-of-pocket costs and

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(W.D. Wash. 2001) (holding that "the exclusion of prescription contraceptives from a generally comprehensive insurance policy constitutes sex discrimination under Title VII."); *Mauldin* v. *Wal-Mart Stores, Inc.*, No. 01-cv-2755, 2002 WL 2022334, at *19 (N.D. Ga. Aug. 23, 2002) (certifying class of female employees alleging that a lack of coverage of prescription contraception violated Title VII and the PDA); *but see In re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d 936, 943 (8th Cir. 2007) (disagreeing with the EEOC's conclusion that the PDA requires employers to provide contraception coverage). Moreover, several states have interpreted their laws prohibiting sex discrimination to require health insurance coverage of contraception and related medical services. *See, e.g.*, Mich. Civil Rights Comm'n, *Declaratory Ruling on Contraceptive Equity*, at 1 (Aug. 21, 2006); 51 Mont. Op. Att'y Gen. 16, at 7 (Mar. 28, 2006); Office of the Wisc. Att'y Gen., OAG-1-04, 2004 WL 3078999, at 1-2 (Aug. 16, 2004).

disproportionately borne the burden of health care expenditures. *See* IOM REP. at 18-19.

Women pay substantially more to access basic health care than do men and are significantly more likely to be burdened with high medical costs. Women of childbearing age spend 68% more in out-of-pocket health care costs than men. Gold at 5; *see also* Women's Research And Educ. Inst., WOMEN'S HEALTH INSURANCE COSTS AND EXPERIENCES, at 2 (1994). A primary contributing factor to cost disparities is the high cost of contraception, because all forms of prescription contraception available today are for women. *See* IOM REP. at 18-19. As a result, while both men and women have interests in avoiding unintended pregnancy, women bear most of the associated health care costs.

The impact of these higher health care costs is magnified by women's lower incomes. Women earn, on average, just 77 cents for every dollar earned by men. *See* DeNavas-Walt et al., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011, at 7 (2012), *available at* http://www.census.gov/prod/2012pubs/p60-243.pdf. Women of color earn even less.[10] Moreover, women, particularly women of color, are more likely to be poor than men,[11] thus increasing the likelihood that women will face cost barriers to accessing needed health care.

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[10] For every dollar earned by white, non-Hispanic men, African American women earn just 64 cents, while Hispanic women earn just 54 cents. *See* Nat'l Women's Law Ctr., FAQ ABOUT THE WAGE GAP, at 2 (2013), *available at* http://www.nwlc.org/sites/default/files/pdfs/wage_gap_faqs_sept_2013.pdf.

[11] In 2011, the poverty rate for women in the U.S. was 14.6%, compared with 10.9% for men. For African American women, the rate was 25.9% and 23.9% for Hispanic women. *See* Nat'l

Indeed, one study drawing from the Commonwealth Fund 2007 Biennial Health Insurance Survey found that 62% of women surveyed, compared with 48% of men, reported trouble paying medical bills, cost barriers to needed health care, or both. *See* Rustgi et al., *Women at Risk: Why Many Women are Forgoing Needed Health Care,* ISSUE BRIEF (The Commonwealth Fund), May 2009, at 2, *available at* http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2009/May/Women%20at%20Risk/PDF_1262_Rustgi_women_at_risk_issue_brief_Final.pdf. In addition, women were more likely to spend a significant share of their income on out-of-pocket health care costs than men—35% of women surveyed, compared with 31% of men, spent 10% or more of their income on such costs. *Id.* at 3. The figures are even starker among low-income women: 55% of women earning less than $20,000 spent more than 10% of their income on out-of-pocket health care costs in 2007. *Id.* The study also showed that 32% of women who reported problems paying medical bills or medical debt—versus 24% of men—were, as a result of such medical costs, unable to pay for basic necessities, such as food, heat, or rent, or took on debt. *Id.* at 5.

Given these statistics, the disproportionately high health care costs borne by women create "financial

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Women's Law Ctr., INSECURE AND UNEQUAL: POVERTY AND INCOME AMONG WOMEN AND FAMILIES 2000-2011, at 3 (2012), *available at* http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_povertyreport.pdf.

barriers . . . that prevent women from achieving health and well-being for themselves and their families." IOM REP. at 20.

4. Promoting Women's Access to Contraception Leads to Greater Social and Economic Opportunities for Women.

Contraception puts women in control of their fertility, allowing them to decide whether, and when, to bear children. As this Court has recognized, "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 856 (1992). Similarly, the Centers for Disease Control and Prevention recognized that "[a]ccess to family planning and contraceptive services has altered social and economic roles of women." *Ten Great Public Health Achievements*.

A majority of women report the ability to better control their lives as a very important reason for using birth control. Frost & Lindberg, GUTTMACHER INST., REASONS FOR USING CONTRACEPTION: PERSPECTIVES OF U.S. WOMEN SEEKING CARE AT SPECIALIZED FAMILY PLANNING CLINICS, at 9 (2012), *available at* http://www.guttmacher.org/pubs/journals/j.contraception.2012.08.012.pdf. For example, increased control over reproductive decisions provides women with educational and professional opportunities that have advanced gender equality over the decades since birth control's effectiveness has improved and access to birth control has expanded. Indeed, "[e]conomic analyses have found clear associations between the availability and diffusion of oral contraceptives[,] particularly among young women, and increases in U.S. women's education, labor force participation, and average earnings, coupled with a narrowing in the wage gap between women and men." *Id.* at 3. One study looking at the effect of access to birth control on women's education and employment in the 1970s reports that "women in states with easier and earlier pill access were 10% to 20% more likely to be enrolled in college at age 21 and had higher earnings trajectories that persisted even into their 40s—a finding that remained robust even after netting out the influence of other factors." The Nat'l Campaign to Prevent Teen and Unplanned Pregnancy, *Getting the Facts Straight on the Benefits of Birth Control in America: Summary*, at 3, (Nov. 2013), *available at* http://www.thenationalcampaign.org/resources/pdf/briefly-facts-straight.pdf.

In addition, a number of analyses have connected the advent of oral contraception to significant augmentation of women's wages. One study found that "the Pill-induced effects on wages amount to roughly one-third of the total wage gains for women in their forties born from the mid-1940s to early 1950s." Bailey et al., *The Opt-In Revolution? Contraception and the Gender Gap in Wages* 26-27 (Nat'l Bureau of Econ. Research, Working Paper No. 17922, 2012), *available at* http://www-personal.umich.edu/~baileymj/Opt_In_Revolution.pdf. That same study estimates that approximately 10% of the narrowing of the wage gap during the 1980s and 31% during the 1990s can be attributed to access to oral contraceptives prior to age 21. *See id.* at 27. Another study concludes that the advent of oral contraceptives contributed to an increase in the number of women employed in professional occupations, including as doctors and lawyers. *See* Goldin & Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110 J. POL. ECON. 730, 758-62 (2002). In a study that specifically asked women why they use contraceptives, a "majority of women reported that, over the course of their lives, access to contraception had enabled them to better take care of themselves or their families, support themselves financially, complete their education, or get or keep a job . . . ." Sonfield, *What Women Already Know*, at 8.

In enacting the Women's Health Amendment, Congress understood that the Amendment—including its broadening of access to family planning services—would be "a huge step forward for justice and equality in our country." 155 Cong. Rec. S12,033, S12,052 (daily ed. Dec. 1, 2009) (statement of Sen. Franken); *see also supra* Sec. I.

The compelling interests forwarded by the contraception regulations would be undermined if the Companies—and other for-profit companies that could follow suit—were granted an exemption. Equally as important, the harm of such an exemption would fall squarely on those the regulations were designed to protect—female employees and dependents, including those who get their health insurance through these Companies.

III. THE RIGHTS AND INTERESTS OF THE EMPLOYEES AND DEPENDENTS COVERED BY THE CONTRACEPTION REGULATIONS BEAR HEAVILY ON THE COMPANIES' RFRA CLAIMS.

The compelling nature of the interests forwarded by the contraception regulations make clear that the exemptions the Companies seek would harm third parties—the women covered by the Companies' health plans. These women have a right under the ACA to insurance coverage of contraceptives, without cost-sharing.[12] If the Companies and similar entities are allowed to deny women that right, then cost barriers to contraception could lead to those women being unable to use the most effective and most appropriate method of contraception for them and cause them to bear costs in accessing basic preventive health care that men need not shoulder.[13] This harm to third parties is highly relevant in considering the Companies' RFRA claims.

In enacting RFRA, Congress was clear that it intended to restore the full breadth of Supreme Court Free Exercise jurisprudence as it existed prior to *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). *See, e.g.*, S. Rep. No. 103-111, at 12, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1902 ("[T]he purpose of this act is only to overturn the Supreme Court's decision in *Smith* . . ."); *id.* at 8-9 ("The committee expects that the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling governmental interest."). Thus, when applying RFRA's compelling interest test, the Court must be mindful of its previous construction of the Free Exercise clause, including the principle that "[t]he First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." *Lyng* v. *Nw. Indian Cemetery Protective Assoc.*, 485 U.S. 439, 452 (1988).

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[12] These women may also have rights to contraception coverage under the PDA and state law. *See supra* Sec. I.

[13] The Tenth Circuit, in holding that Hobby Lobby's RFRA rights were violated, erred in unreasonably dismissing both these women's need for comprehensive coverage of all FDA-approved methods of birth control and the economic burden the exemption imposes on women. *See Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1144 (10th Cir. 2013), *cert. granted* 134 S. Ct. 678 (2013).

As Supreme Court pre-*Smith* jurisprudence made clear, "[n]ot all burdens on religion are unconstitutional." *United States* v. *Lee*, 455 U.S. 252, 257 (1982); *see also Gilardi* v. *U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1231 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part) ("[T]he Free Exercise Clause does not ensure freedom from any regulation to which a party holds a religious objection."). Indeed, when applying the balancing test set out in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), that RFRA restored, this Court has routinely held that religious activities must give way to the administration of general public welfare legislation. *See Bowen* v. *Roy*, 476 U.S. 693, 708-12 (1986); *Lee*, 455 U.S. at 261; *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983); *Hernandez* v. *Comm'r*, 490 U.S. 680, 700-01 (1989). Prior to *Smith*, this Court generally protected the exercise of religion when the "sole conflict is between authority and rights of the individual" but permitted much less latitude when the plaintiff's religious practice "bring[s] them into collision with rights asserted by any other individual . . . ." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 630 (1943).

For example, in *United States* v. *Lee*, an Amish employer with Amish employees claimed that withholding social security taxes violated the employer's free exercise rights because the Amish religion requires adherents to assist each other and forbids the payment or receipt of social security benefits. The Court rejected this challenge, noting that the nationwide nature of the program made the governmental interest "apparent" and "mandatory participation is indispensable to the fiscal vitality of the social security system." 455 U.S. at 258. The Court distinguished *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), where an Amish family was exempted from a compulsory school attendance law despite the State's interest in ensuring educational opportunities for children, by noting that one employer's religious beliefs could not override a broad federal scheme to the detriment of his employees:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees.

Lee, 455 U.S. at 259-61.

Similarly, in *Prince* v. *Massachusetts*, the Court applied child labor laws to a Jehovah's Witness who gave her minor niece religious tracts to distribute in the streets, holding that despite the sincerity of the plaintiff's beliefs, the State's interest in protecting children, like the plaintiff's niece, from the harms of laboring in the streets was sufficiently compelling to outweigh any burden on the plaintiff's exercise of religion. 321 U.S. 158, 167 (1944); *see also Tony and*

Susan Alamo Found. v. *Dep't of Labor*, 471 U.S. 290, 304-05 (1985) (rejecting a free exercise challenge by a nonprofit religious organization to minimum wage and record-keeping requirements).[14] And in reviewing the religious accommodation standard set out in the Religious Land Use and Institutionalized Persons Act, this Court has emphasized that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and has warned that "an accommodation must be measured so that it does not override other significant interests." *Cutter* v. *Wilkinson*, 544 U.S. 709, 720, 722 (2005). *Cf. Estate of Thornton* v. *Caldor*, 472 U.S. 703, 710 (1984) ("The First Amendment . . . gives no one the right to insist that, in pursuit of their own interests, others must conform their conduct to his own religious necessities.") (quoting *Otten* v. *Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)).

The Court also has declined to protect discriminatory religious practices that harm others and, by extension, the public interest. For example, in *Bob Jones University*, the Court upheld the denial of tax-exempt status for a university that had racially discriminatory policies; although the university claimed that the discrimination was rooted in religious beliefs forbidding interracial marriage and dating, this Court held that the government need not accommodate religious beliefs that violate the public interest. 461 U.S. at 603-04.

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[14] In all of these cases, the Court rejected the free exercise challenge even though the individuals whose rights were threatened held *the same religious beliefs* as the objector. The Court's concerns should be even stronger where an employer seeks to impose its religious beliefs on employees of diverse faiths.

As these cases demonstrate, this Court has never held that religious exercise provides a license to harm others or violate the rights of third parties. *See Catholic Charities of Sacramento, Inc.*, 85 P.3d at 93 ("We are unaware of any decision in which . . . the United States Supreme Court, has exempted a religious objector from the operation of a neutral, generally applicable law despite the recognition that the requested exemption would detrimentally affect the rights of third parties."). RFRA did not overturn this basic principle. *See* S. Rep. No. 103-111, at 9 ("This bill is not a codification of the result reached in any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. Therefore, the compelling interest test generally should not be construed more stringently or more leniently than it was prior to *Smith*.").

Providing the exemption the Companies seek would directly affect the rights of a significant number of third parties: the female employees and dependents who are covered under the Companies' health insurance plans and the countless other women who would be harmed if other companies follow suit. Such an exemption would reinstate the gender disparities that pervaded the prior insurance scheme and undermine the "entire point" of the Women's Health Amendment: "to redress a history of gender-based inequalities in healthcare and health insurance." *Korte* v. *Sebelius*, 735 F.3d 654, 727 (7th Cir. 2013) (Rovner, J., dissenting).[15] By restoring barriers to contraception access, the exemption would threaten these individuals' health (and the health of children they might conceive) and would impose financial burdens on women seeking basic preventive health care that men do not face. And by heightening the risk of unintended pregnancy, it would threaten these female employees and dependents with long-term consequences for their economic, educational, and employment opportunities. In short, exempting the Companies would improperly "impose the employer's religious faith on the employees," to those employees' detriment. *See Lee*, 455 U.S. at 261.

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[15] In addition, granting an exemption in this case could open the door for other for-profit corporations to argue for exemptions to any number of laws based on their religious beliefs.

IV. THAT THE GOVERNMENT PROVIDES FOR CERTAIN EXEMPTIONS DOES NOT NEGATE THE COMPELLING GOVERNMENTAL INTERESTS FORWARDED BY THE REGULATIONS.

The Companies have argued that certain "exemptions" from the contraception regulations—including for employers with fewer than 50 employees, those with "grandfathered" group health plans and religious employers—undermine the government's assertion of compelling interests. The Companies' arguments are meritless.

First, there is no exemption from the contraception regulations for employers with fewer than 50 full-time employees. Instead, these employers are exempt from the shared responsibility provision of the ACA, which requires certain employers who fail to provide health insurance to pay an assessable fee. *See* 26 U.S.C. § 4980H(a), (c)(2)(A). Even employers with fewer than 50 employees who provide non-grandfathered health insurance plans must comply with the contraception regulations. *See Gilardi*, 733 F.3d at 1241 (Edwards, J., concurring in part and dissenting in part) ("Small businesses that do elect to provide health coverage—as many do in order to offer more competitive benefits to employees and to receive tax benefits—must provide coverage that complies with the" contraception regulations).

Second, the so-called exemption for grandfathered plans is not a true exemption at all. *See* 42 U.S.C. § 18011; 45 C.F.R. § 147.140. A health insurance plan relinquishes its grandfathered status if certain changes are made to the plan, such as a significant reduction in coverage or increase in co-payments. 45 C.F.R. § 147.140. Rather than providing an exemption, the grandfathering provision provides for a gradual transition to the new regulatory scheme as health plans lose their grandfathered status over time. Indeed, much like a delayed statutory effective date or building safety codes that only apply to new construction, "[t]he exemption for grandfathered plans is temporary, intended to be a means for gradually transitioning employers into mandatory coverage." *Gilardi*, 733 F.3d at 1241 (Edwards, J., concurring in part and dissenting in part); *see also Korte*, 735 F.3d at 728 (Rovner, J., dissenting) ("[G]randfathering existing workplace health plans follows a time-honored and commonsensical path in expediting the implementation of a new, complex, and potentially burdensome regulation."). In any event, worker enrollment in grandfathered plans has decreased significantly—from 56% in 2011 to just 36% in 2013. *See* Kaiser Family Found., *Employer Health Benefits 2013 Annual Survey: Grandfathered Health Plans*, at 196, *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/08/8465-employer-health-benefits-20132.pdf. Additional plans can be expected to lose their grandfathered status in each subsequent year, thus bringing those plans within the scope of the contraception regulations.

Third, the "religious employer" exemption from the contraception regulations—"[t]he *only* permanent, specific exemption from" the regulations, *Gilardi*, 733 F.3d at 1241 (Edwards, J., concurring in part and dissenting in part) (emphasis added)—is restricted "primarily to group health plans established or maintained by churches, synagogues, mosques, and other houses of worship, and religious orders." 78 Fed. Reg. 8,456, 8,461 (Feb. 6, 2013); 45 C.F.R. § 147.130(a)(1)(iv)(B). Exempting religious institutions in this way is an accepted means of accommodating religious objections while maintaining the integrity of the public scheme and promoting the compelling governmental interest. *See, e.g.*, *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 79-80 (California's contraceptive coverage law); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327, 338-39 (1987) (Title VII); *Nat'l Labor Relations Bd.* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 506 (1979) (National Labor Relations Act). This narrow exemption does not contradict the government's compelling interests and "by no means demonstrates that an exemption is required for any employer with a potential religious objection to contraception or any other type of healthcare." *Korte*, 735 F.3d at 729 (Rovner, J., dissenting); *see also Lee*, 455 U.S. at 261 (explaining that Congress was justified in "dr[awing] a line . . . exempting the self-employed Amish but not all persons working for an Amish employer"); *S. Ridge Baptist Church* v. *Indus. Comm'n of Ohio*, 911 F.2d 1203, 1209 (6th Cir. 1990) (finding that a "limited exemption" to Ohio's workers' compensation scheme did "not diminish the state's compelling interest in" the program).

Moreover, it is not uncommon for federal statutes promoting equality interests to have limited exemptions. For example, Title VII—the landmark federal statute prohibiting employment discrimination in the Civil Rights Act of 1964—exempts employers with fewer than 15 employees from its non-discrimination provisions. 42 U.S.C. § 2000e(b); *see also, e.g.*, 42 U.S.C. § 12111 (exempting employers with less than 15 employees from the Americans with Disabilities Act); 29 U.S.C. § 2611(4)(A)(i) (Family Medical Leave Act only applies to employers with "50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year"); 20 U.S.C. § 1681(a)(3) (Title IX's prohibition on sex discrimination in education not applicable to "an educational institution which is controlled by a religious organization if the application of [the prohibition] would not be consistent with the religious tenets of such organization"). Yet no court has found or suggested that, as a result of such exemptions, these federal statutes do not forward the government's compelling interest in eliminating discrimination. *See, e.g., Equal Emp't Opportunity Comm'n* v. *Fremont Christian Sch.*, 781 F.2d 1362, 1368-69 (9th Cir. 1986) (rejecting a free exercise challenge to the application of Title VII to a health insurance plan offered only to "heads of households"—defined as single persons and married men—based on the government's compelling interest in eliminating employment discrimination based on sex); *Lumpkin* v. *Brown*, 109 F.3d 1498, 1500-01 (9th Cir. 1997) (rejecting RFRA claim where government had compelling interest in anti-discrimination policies); *Equal Emp't Opportunity Comm'n* v. *Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982) (rejecting free exercise challenge to Title VII and stating that "Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."). Rather, "[i]t is left to the respective legislatures to determine whether the [government]'s compelling interest in the fiscal vitality of these programs and the underlying societal purposes would be compromised by certain selective exemptions." *S. Ridge Baptist Church*, 911 F.2d at 1209.

The Companies' argument that the contraception regulations do not advance a compelling state interest because of the scope of the "exemptions" is equally unavailing. Notwithstanding the grandfathering provision and religious exemption, the contraception regulations will have widespread effects. Over 27 million women are now covered by this benefit and are now able to get their birth control with no out-of-pocket costs.[16] The contraception regulations already protect women in non-grandfathered plans and will guarantee contraception to millions of additional women as health plans lose their grandfathered status over time. They substantially further compelling interests in public health and women's equality.

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[16] Skopec & Sommers, U.S. DEP'T OF HEALTH & HUMAN SVCS., SEVENTY-ONE MILLION ADDITIONAL AMERICANS ARE RECEIVING PREVENTIVE SERVICES COVERAGE WITHOUT COST-SHARING UNDER THE AFFORDABLE CARE ACT, at 3 (2013), ***available at*** http://aspe.hhs.gov/health/reports/2013/PreventiveServices/ib_prevention.cfm.

CONCLUSION

For the foregoing reasons, this Court should deny the Companies' challenge to the contraception regulations.

Respectfully submitted,

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APPENDIX

APPENDIX

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the protection of women's legal rights and the advancement of women's opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women, and has participated as counsel or *amicus curiae* in a range of cases before this Court.

9to5 is a national membership-based organization of women in low-wage jobs dedicated to achieving economic justice and ending discrimination. Our members and constituents are directly affected by workplace discrimination and poverty, among other issues. 9to5 is committed to protecting and advancing women's access to health care and achieving workplace equality.

The Abortion Care Network is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

Advocates for Youth is committed to protecting and advancing young people's sexual health and rights. In particular, Advocates works to ensure young women's access to affordable health services such as contraception.

In 1881, the **American Association of University Women (AAUW)** was founded by like-minded women who had defied society's conventions by earning college degrees. Since then, AAUW has worked to break through barriers for women and girls through research, advocacy, and philanthropy. Today, AAUW has approximately 170,000 bipartisan members and supporters, approximately 1000 branches, and approximately 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, and among them are reproductive rights. In adherence to our member-adopted Public Policy Program, AAUW supports choice in the determination of one's reproductive life and increased access to quality, affordable health care and family planning services, including expansion of patients' rights.

The **American Federation of State, County and Municipal Employees (AFL-CIO)** is a labor organization with 1.6 million members in hundreds of occupations who provide vital public services in 46 states, the District of Columbia, and Puerto Rico. With well over half its members being women, AFSCME has a long history of advocating for gender equality.

The **American Federation of Teachers (AFT)**, an affiliate of the AFL-CIO, represents 1.5 million members in more than 3,000 local affiliates nationwide and overseas in K-12 and high education, public employment and healthcare. AFT has a strong interest in supporting the rights of women in the area of reproductive choice. AFT considers reproductive healthcare, including contraception, as basic healthcare for women. Therefore, the AFT believes it must be covered as a preventive health service in order to provide quality healthcare for all women. Furthermore, the fair and equal treatment of a woman's right to make her own personal healthcare decisions regarding reproduction and other health issues is an important part of AFT's mission to advance the workplace rights of all its members.

The **American Sexual Health Association** has worked for almost 100 years to protect the nation's sexual health.

Animal Safehouse Incorporated is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The Asian & Pacific Islander American Health Forum is a national health justice organization committed to achieving health equity for Asian American, Native Hawaiian, and Pacific Islanders. We fully support the Affordable Care Act's investment in preventive health including access to contraceptives with no cost-sharing.

Association of Asian Pacific Community Health Organizations is committed to protecting and advancing women's health in our member centers and partner organizations, particularly to ensure that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The Black Women's Health Imperative is the only organization devoted solely to advancing the health and wellness of America's 19.5 million Black women and girls through advocacy, community health and wellness education, and leadership development.

California Women Lawyers (CWL) has represented the interests of more than 30,000 women in all facets of the legal profession since 1974. CWL's mission includes advancing women's interests, extending universal equal rights, and eliminating bias. In pursuing its values of social justice and gender equality, CWL often joins *amici* briefs challenging discrimination by private and governmental entities, weighs in on proposed California and federal legislation, and implements programs fostering the appointment of women and other qualified candidates to the bench.

The **Coalition of Labor Union Women** is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act. The Coalition of Labor Union Women is a strong advocate for the needs of women and families by educating its members and the broader labor community about the rights of all women to have access to a full range of health care, including reproductive care, which encompasses abortions and contraception.

The **Connecticut Women's Education and Legal Fund (CWEALF)** is a nonprofit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF protects the rights of individuals in the legal system, educational institutions, workplaces, and in their private lives. Since its founding in 1973, CWEALF has provided legal information and conducted public policy and advocacy to advance women's rights. Throughout our history, we have defended women's access to full reproductive health services, and are committed to protecting equality in women's health, as intended by the Affordable Care Act.

Equal Rights Advocates (ERA) is a national civil rights advocacy organization whose mission is to protect and expand economic and educational access and opportunities for women and girls. In concert with our continued commitment to obtaining women's equality in the workplace, ERA is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The **Feminist Majority Foundation (FMF)**, founded in 1987, is the largest feminist research and action organization dedicated to women's equality and reproductive health. FMF's programs focus on advancing the legal, social, and political equality of women. To carry out these aims, FMF engages in research and public policy development, public education programs, grassroots organizing projects, and leadership training and development programs. FMF has filed numerous *amicus curiae* briefs in the U.S. Supreme Court and the federal circuit courts to advance the opportunities for women and girls.

Franklin Forum is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

Gender Justice is a nonprofit advocacy organization based in the Midwest that is committed to the eradication of gender barriers through impact litigation, policy advocacy, and education. As part of its litigation program, Gender Justice represents individuals and provides legal advocacy as *amicus curiae* in cases involving issues of gender discrimination. Gender Justice has an interest in ensuring that the contraceptive coverage provisions of the Affordable Care Act are implemented to eliminate gender gaps in access to health care.

Ibis Reproductive Health aims to improve women's reproductive autonomy, choices, and health worldwide and works to expand women's access to safe, affordable abortion, the full range of contraceptive methods, and tools to prevent HIV and other sexually transmitted infections. We are committed to ensuring women receive the full benefits of no-cost-sharing contraceptive coverage as intended under the Affordable Care Act.

The Institute for Science and Human Values is committed to protecting and advancing women's full equality and health, with a particular interest in ensuring that women receive all of the benefits of access to paid contraceptive coverage, as provided in the Affordable Care Act, without regard to the religious views of their private employer.

Jewish Women International (JWI), with 50,000 members and supporters across the country, is the leading Jewish organization working to prevent the cycle of violence and empower women and girls to realize the full potential of their strength. In 1968, five years before *Roe v. Wade*, JWI (formally B'nai B'rith Women) called for laws that would protect women from having to seek often life-threatening illegal abortions, a right that the organization has reaffirmed multiple times through the years. Since the landmark 1973 Supreme Court decision in *Roe v. Wade,* we have been an unwavering Jewish voice for comprehensive reproductive health services. JWI continues to advocate for access to reproductive health information and services, which build a foundation for healthier families and communities and believes that women deserve to be able to make private health decisions according to the dictates of their own faith and conscience.

Law Students for Reproductive Justice trains and mobilizes law students and lawyers across the country to foster legal expertise and support for the realization of reproductive justice. We believe that reproductive justice will exist when all people can exercise the rights and access the resources they need to thrive and to decide whether, when, and how to have and parent children with dignity, free from discrimination, coercion, or violence.

The League of Women Voters of the United States has long standing positions in support of equal access to health care and equal rights for women.

Legal Momentum: The Women's Legal Defense Fund is a 44-year-old organization committed to the protection and improvement of women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

Legal Voice is a nonprofit public interest organization in the Pacific Northwest that works to advance the legal rights of all women through litigation, legislation, and the provision of legal information. Since its founding in 1978, Legal Voice has been involved in both litigation and legislation aimed at ending discrimination against women—including in health care services. Legal Voice has been at the forefront of advocating for comprehensive reproductive health care, including contraceptive equity and insurance coverage for women's health needs, and serves as a regional expert on reproductive health and justice. Legal Voice has a strong interest in ensuring that the Affordable Care Act's contraceptive coverage provisions are upheld and implemented so that women have access to coverage for the health care they need and deserve.

Mabel Wadsworth Women's Health Center is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The Maine Women's Health Campaign is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The **Maine Women's Lobby** is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The Maryland Women's Coalition for Health Care Reform, an alliance of individuals and 96 organizations, is committed to ensuring that all Marylanders have access to high-quality, affordable and comprehensive health care. That encompasses the need to protect and advance women's health and, in particular, to ensure that they receive full access to comprehensive contraceptive coverage without cost-sharing as intended by the Affordable Care Act.

MergerWatch is a non-profit nonpartisan organization whose mission is to protect patients' rights and access to care from the impact of religiously-based health care restrictions and provider refusals. Our primary work is assisting community residents, hospital executives, and public policymakers when nonsectarian (or non-religious) hospitals are considering business partnerships with religiously-sponsored hospitals, especially those affiliated with the Catholic Church, which prohibits the provision of some reproductive health services. Since our founding 15 years ago, MergerWatch staff have worked on more than 90 proposed religious/non-sectarian hospital mergers in 34 states. We have helped bring about a number of creative approaches to ensuring continued community access to reproductive health services threatened by the introduction of religious health care restrictions. We have also assisted state-based reproductive health advocates in securing policies that (a) require all hospitals to offer emergency contraception to rape victims; (b) require contraceptive coverage with no religious employer exemption or a very narrow one; and (c) ensure that women can fill contraceptive prescriptions at local pharmacies when individual pharmacists raise religious or moral objections.

The **Ms. Foundation for Women** has sought to advance women's equality for almost 40 years. Through our grants and program work we advance women's economic equality, reproductive health, and safety with a particular focus on eliminating the barriers women face as a result of their gender, race, class, sexual orientation, disability, or age. The Ms.

Foundation recognizes that access to affordable, quality contraception is vital to women's health and well-being and central to promoting gender equality.

NARAL Pro-Choice America is a national advocacy organization, dedicated since 1969 to supporting and protecting, as a fundamental right and value, a woman's freedom to make personal decisions regarding the full range of reproductive choices through education, organizing, and influencing public policy. NARAL works to guarantee every woman the right to make personal decisions regarding the full range of reproductive choices, and contraceptive coverage is critical to this goal.

The National Abortion Federation is the professional association of abortion providers in North America, representing nonprofit and private facilities, women's health centers, hospitals, and private physicians' offices, who together care for more than half the women who choose abortion in the United States and Canada each year. Our mission is to ensure safe, legal, and accessible abortion care, which promotes health and justice for women.

National Advocates for Pregnant Women is a nonprofit organization that works to secure the civil and human rights, health, and welfare of all women, focusing particularly on pregnant and parenting women.

The **National Association of Commissions for Women** is committed to women's equality, including protecting and advancing women's health. We believe that women should receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The **National Association of Women Lawyers** is devoted to the interests of women lawyers and women's rights and is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The **National Center for Lesbian Rights (NCLR)** is a national legal nonprofit organization founded in 1977 and committed to advancing the rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. NCLR is dedicated to protecting and advancing health care, with a particular interest in ensuring that everyone receives the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The **National Congress of Black Women** represents thousands of low-income women across the country who would benefit from free access to contraception and would be negatively impacted if their health care availability is restricted in any way.

The National Council of Women's Organizations is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The National Gay and Lesbian Task Force (The Task Force) is the oldest national organization advocating for the rights of lesbian, gay, bisexual, and transgender people and their families.

The **National Health Care for the Homeless Council** is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The National Network to End Domestic Violence (NNEDV) is a not-for-profit organization incorporated in the District of Columbia in 1994 (www.nnedv.org) to end domestic violence. As a network of the 56 state and territorial domestic violence and dual domestic violence sexual assault Coalitions and their over 2,000 member programs, NNEDV serves as the national voice of millions women, children, and men victimized by domestic violence. NNEDV was instrumental in promoting Congressional enactment and eventual implementation of the Violence Against Women Acts of 1994, 2000, 2005, and 2013 and, working with federal, state, and local policy makers and domestic violence advocates throughout the nation, NNEDV helps identify and promote policies and best practices to advance victim safety. NNEDV's work on domestic violence, as well as on our HIV/AIDS project, informs our position on sexual and reproductive health matters.

The National Partnership for Women & Families (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership has worked to advance women's health and equal employment opportunities through several means, including by challenging discriminatory employment practices in the courts.

The **North Carolina Justice Center** is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The **North Dakota Women's Network** is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

Northwest Health Law Advocates is committed to protecting and advancing access to health care and women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The **National Organization for Women (NOW) Foundation** is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. The Foundation maintains a commitment to advancing women's reproductive rights and healthcare, including access to no-cost-sharing contraceptive coverage under the Affordable Care Act. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist activist organization in the United States, with hundreds of thousands of members and contributing supporters with chapters in every state and the District of Columbia.

Planned Parenthood Federation of America is the oldest and largest provider of reproductive health care in the United States, delivering medical services through over 700 health centers operated by 68 affiliates across the United States. Its mission is to provide comprehensive reproductive health care services and education, to provide educational programs relating to reproductive and sexual health, and to advocate for public policies to ensure access to health services, including contraceptive coverage as intended by the Affordable Care Act.

Population Connection is committed to ensuring that every woman and family has access to the full range of contraceptive methods as a preventive service as intended by the Affordable Care Act.

Progressive States Network is committed to protecting and advancing women's health policy in the nation and across the states. We believe that consistent and affordable access to contraception is critical to protecting women's health and the economic security of families. This includes ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

Raising Women's Voices for the Health Care We Need is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The Reproductive Health Technologies Project (RHTP) works to advance the ability of every woman to achieve full reproductive freedom with access to the safest, most effective, and preferred methods for controlling her fertility and protecting her health. RHTP's long-term goal is to change the political and commercial climate in the United States so women have access to technologies they want to become pregnant when they are ready, end a pregnancy when they are not, and promote their health and wellbeing throughout their reproductive lives.

The **Sargent Shriver National Center on Poverty Law** advocates on behalf of low-income families and individuals, representing them in a wide range of policy and legal matters including housing, employment, public benefits, community and criminal justice, education, health care, and the manner in which these issues especially impact women.

As the only US-based, international membership organization focused on amplifying the voice, presence, and influence of non-religious women, **Secular Woman** is committed to protecting and advancing women's health. We have a particular interest, through our @AbortTheocracy project, in ensuring that women receive access to preventative care including the full range of FDA-approved contraceptives and related education and counseling without cost sharing or discriminatory employer interference, as intended by the Affordable Care Act.

The **Service Employees International Union (SEIU)** is a labor organization representing approximately two million working men and women. As the nation's largest healthcare union, with more than half of its members working as healthcare providers, SEIU is deeply committed to ensuring that all working people, men and women alike, have access to affordable healthcare, including contraceptive coverage, as intended by the Affordable Care Act.

The Sexuality Information and Education Council of the U.S. is committed to the right of all people to accurate information, comprehensive sexuality education, and sexual health services and therefore supports the protection and advancement of women's health, ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The Southwest Women's Law Center is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

UniteWomen.org ACTION is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

WV FREE is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The Wisconsin Alliance for Women's Health is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The Women Donors Network (WDN) is committed to protecting the rights and access to affordable and preventive women's healthcare, with a particular interest in ensuring that women receive the full benefits of no-cost-sharing contraceptive coverage as intended by the Affordable Care Act. WDN supports reproductive health, rights, and justice solutions that enable all women to make important life decisions for themselves and their families.

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Women Employed promotes fair employment practices and helps increase access to training and education. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The **Women's Bar Association of the District of Columbia** is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act

The **Women's Business Development Center** is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The **Women's Institute for Freedom of the Press** seeks women's full rights, and we believe this includes access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

The **Women's Law Center of Maryland, Inc.** is a nonprofit membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, sexual harassment, employment law, family law, and reproductive justice. Through its direct services and advocacy the Women's Law Center seeks to protect women's legal rights and ensure equal access to remedies and benefits, including access to no-cost sharing contraceptive coverage as intended by the Affordable Care Act.

Founded in 1974, the **Women's Law Project (WLP)** is a Pennsylvania-based nonprofit women's legal advocacy organization providing legal representation, public education, and advocacy on a wide range of legal issues related to women's health, well-being, and equality. Because access to the full range of reproductive health care is necessary to protect women's health and critical to women's ability to participate on an equal basis in civic and professional endeavors, WLP has made expanding access to contraceptive care in Pennsylvania a high priority. WLP has represented employees denied equitable health insurance coverage of contraceptive care and prescriptions; has advocated for improved contraceptive coverage for survivors of sexual assault; and has conducted extensive investigations of the availability of emergency contraception in Pennsylvania hospitals and pharmacies.

WOMEN'S WAY is a powerful voice for women and girls: creating an equitable, just, and safe future for all communities in the Greater Philadelphia region. WOMEN'S WAY is committed to protecting and advancing women's health, with a particular interest in ensuring that women receive the full benefits of access to no-cost-sharing contraceptive coverage as intended by the Affordable Care Act.

AMICUS
CURIAE
BRIEF

Nos. 13-354, 13-356

IN THE

Supreme Court of the United States

preme Court, U.S.
FILED
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KATHLEEN SEBELIUS, ET AL.,
Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,
Respondents,

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,

v.

KATHLEEN SEBELIUS, ET AL.,
Respondents.

**On Writs of Certiorari to the
United States Courts of Appeals
for the Third Circuit and Tenth Circuits**

BRIEF OF *AMICUS CURIAE* 9 ACADEMIC INSTITUTIONS AND 27 COMPARATIVE LAW AND RELIGION SCHOLARS IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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INTEREST OF *AMICI CURIAE*

This brief *amicus curiae* on behalf of the institutions and individuals listed in the appendix is respectfully submitted pursuant to Supreme Court Rule 37.[1] The institutions listed are each distinguished academic organizations that specialize in law and religion. They and the individuals—prominent academic experts in international and comparative law—have joined to share their broad international experience concerning the collective aspects of religious freedom and the role that for-profit organizations play in advancing these freedoms.

SUMMARY OF THE ARGUMENT

In our corporate age, the right to freedom of religion is vital not only in the lives of individuals, but in expressions of that freedom in community with others both in religious entities and in non-profit organizations (as acknowledged by the government, *Hobby Lobby* Pet. Br. 17-19) and additionally, as here, in for-profit corporations. There is no principle of corporate life that requires founders or owners of corporations to sacrifice their human rights in order to make use of the corporate form, and nothing that prevents them from embodying (indeed, *incorporating*) religious beliefs in the for-profit vehicles of modern corporate life. All businesses reflect the substantive goals and commitments of their owners and managers, and it is wrong to deprive religiously grounded convictions of free exercise protections under RFRA merely because they have been given corporate form.

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[1] Pursuant to Supreme Court Rule 37(3)(a), all parties have consented to the filing of this brief. Pursuant to Rule 37(6), *amici* affirm that no counsel for a party authored the brief in whole or in part and no person other than the *amici* or their counsel made a monetary contribution to this brief.

To the contrary, collective religious rights may be exercised not only through the formation of familiar associations such as churches, synagogues, mosques, but also in countless other organizations and communal structures, such as hospitals, schools, universities, orphanages, residences for the elderly, and other bodies that further religious life and religious altruism. These vital institutions can and do take both nonprofit and for-profit forms, and there is nothing about that organizational choice that should limit eligibility for freedom of religion protections. Indeed, such a limit would run counter to the trend in many jurisdictions in the United States and Europe, which are currently expanding their corporate law to make room for "hybrid" social enterprise entities such as benefit corporations, flexible-purpose corporations, and other entities that combine for-profit form with a commitment to some form of social beneficial purpose.

Religious activity often extends to types of collective action that go beyond the nonprofit sector: for example, religious bookstores, religious publishing houses, media outlets, and cemeteries. Religious organizations may also generate unrelated business income internally, or may carry out commercial activities through separately incorporated entities. Kosher and halal food companies typically operate for a profit, but serve religious needs. Islamic banks operate for profit but follow strict religious rules that forbid charging interest. Religious doctors may organize a for-profit clinic to fulfil religiously-felt obligations to serve others. In sum, religious beliefs practiced collectively may naturally require modern corporate forms, including for-profit ones. Religious rights do not evaporate the moment profit motive is added to the exercise of religious beliefs.

These realities are reflected in widely accepted norms at the international, regional, and national levels. Decisions by foreign and international tribunals reinforce the principle that government should not require collective religious rights to be checked at the gate before entering the for-profit world. The requirements of ethos organizations—both religious and secular—are widely recognized and are consistently granted exemptions from otherwise applicable laws. But the principle is broader: a corporation's eligibility for religious freedom protections turns not on status as a for-profit or non-profit corporation, but on commitment to convictions that fall within the ambit of religious freedom rights. As borne out by international experience, corporations holding such convictions need and deserve protections if full religious freedom is to be achieved in society.

Of course it is true that corporations have a separate legal existence. But the Government draws an extreme conclusion from this fact, arguing that this means there is "no basis on which to impute the individual-respondents' religious beliefs to the corporate respondents." *Hobby Lobby* Pet. Br. 25. This misrepresents the significance of separate corporate legal existence. The point is not to prevent corporations from having views or commitments (including moral or religious commitments) "imputed" to them. How else could a corporation get its values and priorities, if not from its owners and managers? Rather, the corporate form provides a mechanism for shielding owners from personal liability for the debts and obligations of the corporation—a mechanism designed to encourage entrepreneurship and risk-taking. To say that the beliefs of owners must not be "imputed" to corporations makes no sense.

Separation for liability purposes does not require separation for all purposes. In particular, corporate entities should not be stripped of all dimensions of religious conviction, and walled off from freedom of religion protections. The Government's claims to the contrary are belied not only by international precedent, but also by the overwhelming domestic and foreign commitment to principles of corporate social responsibility and corporate conscience. Even though they "use labor to make a profit" (*Hobby Lobby* Pet. Br. at 19), businesses worldwide are expected to concern themselves with their impact on the environment, social justice, or a wide range of issues of moral significance. Just as Coca-Cola may have a corporate conscience focused on saving polar bears, Hobby Lobby, Conestoga Woods, and Mardel may have a corporate conscience attuned to saving the lives of unborn children.

The doctrine of the corporate veil was intended to liberate corporate enterprise, not to hobble religion in the commercial sector. The Government's argument has a "heads we win, tails you lose" quality, arguing on the one hand that the RFRA rights of the owners of the corporations are not violated because it is only their businesses (and not they) that are subject to the contraceptive mandate, but contending on the other hand that the businesses do not have any free exercise rights, because they are separate legal entities, impervious to the convictions of their owners. In fact, restrictions on collective expression of religion by for-profit corporations substantially burden the free exercise rights of both corporations and owners.

ARGUMENT

I. International Norms and Tribunals Repeatedly Recognize that Religious Freedom has a Collective Dimension

a. International Agreements Protect Collective Aspects of Religious Freedom

International norms emphasize a collective dimension of religious freedom rights. According to the Universal Declaration of Human Rights,

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone *or in community with others* and *in public or private*, to manifest his religion or belief in teaching, practice, worship and observance.[2]

Parallel language was incorporated in the International Covenant on Civil and Political Rights, to which the US is a party.[3]

International norms that address religious rights more concretely consistently recognize the importance of legal entities to the practice of religion. Article 6 of the 1981 UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief provides that "the right to freedom of thought, conscience, religion or belief shall include" a variety of freedoms, including the right "to establish and maintain places [of worship or assembly], to "establish and maintain appropriate charitable or humanitarian institutions," to "make, acquire and use . . . articles and materials related to the rites or customs of a religion or belief;" to "disseminate relevant publications," to "solicit and receive voluntary financial and other contributions from individuals and institutions;' and so forth.[4] In contemporary legal settings, it is difficult if not impossible to carry out these functions without using corporate forms.

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[2] Universal Declaration of Human Rights, Art. 18 (emphasis added).

[3] International Covenant on Civil and Political Rights ("ICCPR"), Art. 18(1), ratified by the United States with no reservations to Article 18, 138 Cong. Rec. S4781-01 (daily ed., 2 April1992).

Similarly, in the commitments of the Organization for Security and Cooperation in Europe ("OSCE"), a number of the institutional prerequisites for religious life are spelled out. Particularly salient are Principles 16c and 16d of the 1989 Vienna Concluding Document, which provide that participating States in the OSCE will grant appropriate legal entity status to religious communities and will respect the autonomy of those communities.[5]

International norms, then, provide significant protection of the right of religious communities, in the interest of religious freedom and beyond protection of individual conscience, to form entities with autonomy to carry out their distinctive religious affairs.

b. National Courts and International Tribunals Protect the Collective Aspects of Religious Freedom

Numerous foreign courts and international tribunals have also recognized the collective aspects of religious freedom.[6] The Grand Chamber of the European Court of Human Rights ("ECtHR") recently noted: "religious communities traditionally and universally exist in the form of organised structures . . . . Were the organisational life of the community not protected by Article 9 [on religious freedom], all other aspects of the individual's freedom of religion would become vulnerable."[7]

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[4] Proclaimed by UN General Assembly Resolution 36/55 (25 November 1981).

[5] Concluding Document of the Vienna Meeting of Representatives of the Participating States of the Conference on Security and Cooperation in Europe, Principle 16, adopted in Vienna on 17 January 1989.

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[6] *See, e.g., Serif v. Greece*, No. 38178/97 (ECtHR, 1999); *Hasan and Chaush v. Bulgaria*, No. 30985/96 (ECtHR, 2000); *Obst v. Germany*, No. 425/03 (ECtHR, 2010); *Siebenhaar v. Germany*, No. 18136/02 (ECtHR, 2011); *Schüth v. Germany*, No. 1620/03 (ECtHR, 2010); *Supreme Holy Council of the Muslim Community v. Bulgaria*, No. 39023/97 (ECtHR, 2004); *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v. Bulgaria*, Nos. 412/03 and 35677/04 (ECtHR, 2009); *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, UN Doc. CCPR/C/39/D/ 195/1985 (1990); 28 March 2003, V ZR (Fed.Ct.Just.)(Germ.) 261/02; *NGK in Afrika (OVS) v. Verenigde Geref. Kerk in Suider-Afrika* 1999 (2)SA 156 (SCA)(S.Afr.) (holding that congregation of a particular church had consistently been treated by the courts as distinct juridical persons); *New Testament Church of God v. Stewart* [2008] ICR 282 (UK); *The Gay and Lesbian Clergy Anti-Discrimination Society Inc v. Bishop of Auckland* [2013] NZHRRT 36 (N.Zealand); Czech Republic Const., Arts. 15(1), 16(2); Danish Const. (1953), Art. 67; Germany Basic Law, Art. 140, incorporating Art. 137 of the Weimar Constitution; Italy Const., Arts. 7 & 8; Poland Const. (1997), Art. 25.3; Portugal Law on Religious Freedom 16/2001, Art. 15 §1; Spain Const., Art. 16, 29 December 1978, and 1980 Organic Law on Religious Freedom, Art. 6.1; James Casey, *Ireland*, 87, 89; Gianni Long, *Italy*, 319; Jiří Rajmund Tretera, *Czech Republic*, 633, 640-641, in CHURCH AUTONOMY: A COMPARATIVE STUDY (Gerhard Robbers ed., 2001); Lev Simkin, *Church and State in Russia*, in LAW AND RELIGION RELIGION IN POST-COMMUNIST EUROPE, 261, 275 (Silvio Ferrari et al. eds., 2003); Richard Puza, *Austria*, 57; Gerhard Robbers, *Germany*, 121, 122; Balázs Schanda, *Hungary*, 541, 548-549; Ingvill Thorson Plesner, *Norway*, 467; Peter Roudik, *Russian Federation*, 505, in LEGAL POSITION OF CHURCHES AND CHURCH AUTONOMY (Scripta Canonica 3)(Hildegard Warnink ed., 2001); Anthony Bradney, *United Kingdom*, 737, 741; Sophie van Bijsterveld, *Netherlands*, 524, 530-531; Carmen Garcimartín, *Ireland*, 403, 411-412; Záboj Horák, *Czech Republic*, 251, 258; Francis Lyall, *Scotland*, 593, 594; Merilin Kiviorg, *Estonia*, 261, 265; Matti Kotiranta, *Finland*, 273, 287; Jan Velaers & Marie-Claire Foblets, *Belgium*, 103, 117, in RELIGION AND THE SECULAR STATE: INTERIM REPORTS (Javier

That Court has repeatedly held that "the right of believers to freedom of religion [which] includes the right to manifest one's religion in community with others . . . . is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords."[8] Legal structures are a means of protecting "the right to manifest one's religion, especially for a religious community, in its collective dimension. . . . ."[9]

The European Commission of Human Rights ("ECmHR," a precursor to the ECtHR) has upheld organizational rights beyond those of religious communities *per se*. In *Rommelfanger v. Germany*, the Commission upheld a German decision permitting a Catholic hospital to fire an employee who spoke out

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Martínez-Torrón & W. Cole Durham, Jr. eds., 2010); Ringolds Balodis, *Latvia*, 253, 270-271; Brigitte Basdevant-Gaudemet, *France*, 157, 174-176; Lars Friedner, *Sweden*, 537, 547; Jolanta Kuznecoviene, *Lithuania*, 283, 292-293; David McClean, *United Kingdom*, 553, 568-570; Michaela Moravčíková, *Slovak Republic*, 491, 508-509; Alexis Pauly, *Luxembourg*, 305, 315-318; Balázs Schanda, *Hungary*, 323, 336-337, in STATE AND CHURCH IN THE EUROPEAN UNION (Gerhard Robbers ed., 1995).

[7] *Sindicatul "Păstorul cel Bun" v. Romania*, No. 2330/09 (ECtHR Grand Chamber, 2013) §136.

[8] *Metropolitan Orthodox Church of Bessarabia*, No. 45701/99 (ECtHR, 2001) §118.

[9] *Id.* §118.

against Catholic teachings.[10] The Commission has also characterized Article 9 religious freedom rights as having a more collective nature than other rights under the European Convention on Human Rights ("ECHR").[11]

II. Foreign Courts and Legislation Protect For-Profit Corporate Entities' Exercise of Religion

a. Numerous Courts Have Recognized That For-Profit Entities have Fundamental Rights

Numerous courts have rejected the challenge that human rights should be limited to natural persons. In South Africa, the Constitutional Court declined to rule that the term "everyone" in section 8(4) of the constitution's statement that "everyone shall enjoy all universally accepted fundamental rights and freedoms" was limited to natural persons. The court explained:

> It was argued that . . . by extending the rights to juristic persons, the rights of natural persons are thereby diminished. We cannot accept the premise: many 'universally accepted fundamental rights' will be fully recognised only if afforded to juristic persons as well as natural persons . . . .
>
> The objectors were also concerned that affording rights to powerful and wealthy corporations would result in detriment to individual rights, given that powerful corporations have greater resources to enforce their rights through litigation. But the

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[10] No. 12242/86 (ECmHR, 1989).

[11] *Church of Scientology of Paris v. France*, No. 19509/1995 (ECmHR, 1995).

> same could be said of powerful and wealthy individuals. Moreover, the objection wrongly equates juristic persons with powerful and wealthy corporations. In South Africa there are countless small companies and close corporations that need and deserve protection no less than do natural persons.[12]

The Italian Court of Cassazione has stated that juridical persons have fundamental rights,[13] relying on Article 2 of the Italian Constitution: "The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed." When personal rights rooted in the Constitution have been violated, "such damages are indemnifiable also when such violation has been suffered by a juridical person or a collective juridical person, as long as this violation is equivalent to a right that is retained by a human person and does not presuppose a human nature to exist."[14]

The German Constitutional Court, interpreting Article 19 section 3 of Germany's Basic Law, which grants fundamental rights to "domestic legal persons to the extent that the nature of such rights permits," has held that rights holders include for-profit corporations.[15] The Dutch Constitution similarly bestows

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[12] *Ex Parte Chairperson of the Constitutional Assembly* (6 September 1996)(Const'l Ct.)(S.Afr.), para. 57-58.

[13] Private law section, decision no. 12929 (4 June 2007)(Ct. of Cass.III)(Italy); Private law section, decision no. 7145 (29 March 2006)(Ct. of Cass. I)(Italy).

[14] *Id.*, para. 1.6.

[15] BVerfGE 38, 281, 303 (1974); MICHAEL SACHS, ED., GRUNDGESETZ, KOMMENTAR (5th ed. 2009), Art. 9 n.7.

"rights and claims also on corporate bodies and on groups and organizations without corporate status in so far as to do so can be meaningful with regard to the nature of the relevant basic right."[16] The British Court of Appeal upheld a corporate right to avoid self-incrimination, despite the fact that "a company cannot suffer all the pains to which a real person is subject."[17] The Supreme Court of Canada has also repeatedly recognized that corporations may claim human rights.[18]

Even the UN Human Rights Committee and American Commission on Human Rights, institutions that generally recognize only claims by individuals,[19] have permitted organizational rights to be vindicated in a few cases.[20] In *Singer v. Canada*, the Human Rights Committee rejected Canada's claim that case should be dismissed because the harm suffered was to free expression rights of the corporate entity.[21] Similarly, the American Commission determined that:

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[16] TK, 1975-1976, 13872(3) 11 (explanatory statement attached to revised version of Dutch Constitution).

[17] *Triplex Safety Glass Co., Ltd. v. Lancegaye Safety Glass (1934), Ltd.* [1939] 2KB 395, 409 (Ct.Appeal)(UK).

[18] *Quebec v. Irwin Toy Ltd.* [1989] 1 S.C.R. 927 (S.Ct.)(Canada); *Ford v. Quebec* [1988] 2 S.C.R. 712, 766-67 (S.Ct.)(Canada).

[19] In contrast to the situation in the US and Europe, the explicit language and *travaux préparatoires* of the instruments creating these bodies imposed limitations on the protection of non-physical persons. *See* Marius Emberland, *The Corporate Veil in the Jurisprudence of the Human Rights Committee and the Inter-American Court and Commission of Human Rights*, 4 HUM. RTS. L.REV. 261 (2004).

[20] *Id.* at 257-275.

[21] (455/1991), Admissibility Decision, CCPR/C/51/D/344/1994 (1994); 2 IHRR 148 (1995)(identifying the rights of the owner and business).

> although the figure of legal entities has not been expressly recognized by the American Convention . . . this does not mean that, in specific circumstances, an individual may not resort to the inter-American system for the protection of human rights to enforce his fundamental rights, even when they are encompassed in a legal figure or fiction created by the same system of law.[22]

In response to the challenge that human rights should be reserved for humans, it is significant that international human rights documents use the terms "human rights" and "fundamental freedoms" interchangeably.[23] For example, the full name of the ECHR,—the treaty interpreted by the ECtHR —is the "European Convention for the Protection of Human Rights and Fundamental Freedoms."[24]

The ECtHR has repeatedly held that corporations may invoke many of the rights protected by the ECHR,[25] and a significant though not unduly burdensome number have done so. Between 1998 and 2003, for example, 3.8% of ECtHR cases directly concerned corporate litigation.[26]

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[22] OC-85/2001, *Cantos v. Argentina*, IACtHR Series C 85 (2001), 26-9.

[23] EMBERLAND, THE HUMAN RIGHTS OF COMPANIES, 27 (2006).

[24] European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into Force 3 September 1953.

[25] *See supra* note 6. The European Court has distinguished between rights that have exclusively individualistic aspects, such as Article 3's prohibition against torture and the right of non-religious conscience under Article 9, which do not adhere to corporations, and those provisions, such as Article 9's protection of religion or the procedural guarantees under Articles 6(1) and 13, which corporations can claim. *See, e.g., Verein 'Kontakt-Information-Therapie' and Hagen v. Austria*, No. 11921/86 (ECmHR, 1988) §1(4)(organizations may not claim non-religious conscience under Article 9); *Agrotexim Hellas SA and Others v. Greece,* No. 14807/89 (ECtHR, 1995) §62 (corporations can claim

International commentators support the logic of courts' application of human rights to corporations. In response to the common argument that corporations are not human actors and are not the intended beneficiaries of human rights protection, they argue that "legal doctrine and practice are not also so literal"[27]: "corporations are comprised of, run by, and operate for the benefit of, human actors. There seems to be no prima facie reason why corporations should not be able to claim human rights protections where the benefits will be passed on or felt by the human actors associated with those corporations."[28] Commentators also argue that corporations are "recognized as legal subjects for many purposes and . . . are significant participants in social, economic and political life. If they bear these hallmarks of citizenship then why should they be denied other protections afforded to citizens, such as human rights?"[29] Moreover, reciprocity suggests that granting corporations human rights gives corporations a stake in the human rights regime

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procedural guarantees under Articles 6(1) and 13); *supra* notes 8-11 and *infra* notes 36-42 (discussion about the Court's Article 9 for-profit jurisprudence).

[26] EMBERLAND, THE HUMAN RIGHTS OF COMPANIES, 13-14.

[27] Michael K. Addo, *The Corporation as a Victim of Human Rights Violation*, in MICHAEL K. ADDO, ED., HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 193 (1999).

[28] Stephen Bottomley, *Corporations and Human Rights*, in STEPHEN BOTTOMLEY AND DAVID KINLEY, EDS., COMMERCIAL LAW AND HUMAN RIGHTS 47 (2002).

[29] *Id.*

and "sharpen[s] the claim that corporations owe human rights responsibilities to others."[30]

b. Foreign Courts Permit Commercial Entities to Claim Religious Rights

In addition to upholding the right of for-profit corporations to claim fundamental rights generally, some foreign courts have held that for-profit or commercial corporations may claim religious rights. Cases directly on point are not numerous, and many such decisions are comparatively recent.[31] The ECtHR and ECmHR demonstrate the evolving thinking on for-profit-corporations and religious rights.

In 1968, the ECmHR seemed to foreclose the possibility that any kind of organization could bring religious claims. In *Church of X v. the United Kingdom,* the Commission held that a corporation incorporated for religious and educational purposes could not claim rights under Article 9 because it was not a natural person.[32] In 1979, in *X and Church of Scientology v. Sweden,* however, the Commission reversed its holding on organizations as religious rights-bearers, stating that it was "now of the opinion that the above distinction [*in Church of X*] between the church and its members is essentially artificial . . . . It should, therefore, be accepted that a church body is capable of possessing and exercising the rights contained in Article 9(1) in its own capacity as a representative of its members."[33]

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[30] *Id.* at 62.

[31] *See, e.g.,* 2 BvR 208/76 (25 March 1980)(Const'l Ct.)(Germany); *Kustannus Oy Vapaa Ajattelija AB and Others v. Finland,* No. 20471/92 (ECmHR, 1996); 2C_71/2010 (22 September 2010) (Fed.Ct.)(Switz.).

[32] No. 3798/68 (ECmHR, 1968). The Court suggested that it an Article 9 claim could be brought by or on behalf of the individual members of the church, but rejected it in this case because no members had been named.

The Commission's thinking on for-profit corporations continued to evolve. At first, in a summary opinion in *Company X. v. Switzerland,* a case in which a LLC printing company objected to paying ecclesiastical taxes, the Commission appeared to explicitly reject without any discussion the possibility that for-profit corporations can enjoy religious freedom rights.[34] In 1979, in *X and Church of Scientology v. Sweden,* the Commission also considered that a claim about commercial advertisements offering religious objects for sale should properly fall under Article 10 (freedom of expression) rather than Article 9 (religious freedom).[35]

By1996, however, the Commission was more willing to consider religious rights of for-profit corporations. In *Kustannus Oy Vapaa Ajattelija AB and Others v. Finland,* an LLC publishing company maintained by the Freethinker's Association sought relief from ecclesiastical taxes levied by the state for the dominant religious traditions.[36] The Commission referred to the *Company X* holding, but then explained that under Article 9,

> the general right to freedom of religion includes, inter alia, freedom to manifest a religion or 'belief' either alone or 'in community with others' whether in public or in private. The Commission

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[33] No. 7805/77 (ECmHR, 1979) §2.

[34] No. 7865/77 (ECmHR, 1979).

[35] *X and Church of Scientology* §§4-5.

[36] No. 20471/92 (ECmHR, 1996).

> would therefore not exclude that the applicant association is in principle capable of possessing and exercising rights under Article 9 para. 1.[37]

However, "in the circumstances of the present case," in which the LLC challenged its tax liability, "the applicant company cannot rely on the rights referred to in Article 9 para. 1." [38]

Since *Kustannus*, a religious freedom claim by a for-profit corporation has not been squarely presented to the ECtHR. In 2000, however, the Court held that an association, found by French courts to be "essentially commercial," could bring an Article 9 religious freedom claim.[39] A Jewish association, which provided kosher meat for sale in twenty butcher's shops, nine restaurants, and five caterers in the Paris region alone and had more than eighty outlets for the sale of deep-frozen food, challenged the French limitations on its ability to certify ritual slaughter as kosher. [40] In a split Grand Chamber decision, the Court held that the French limitations on the association's ability to certify ritual slaughter were proportionate and did not unduly interfere with the association's Article 9 rights.[41] Seven of the seventeen judges dissented, arguing that the limitations were discriminatory and violated the association's Article 9 rights.[42] But importantly, neither the majority nor the dissenters questioned the association's right to bring a religious freedom claim because of its commercial character.

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[37] *Kustannus* §1(b) (iii).

[38] Cf. *Hein v. Freedom From Religion Foundation*, 551 US 587 (2007)(taxpayers cannot challenge constitutionality of expenditures ordered by the executive branch); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 US 464 (1981)(taxpayers cannot challenge conveyance of property to church-related entities).

[39] *Cha'are Shalom Ve Tsedek v. France*, No. 27417/95 (ECtHR Grand Chamber, 2000) §§38-39, 69.

[40] *Id.*, esp. §§27, 39.

[41] *Id.*, §§80-88.

Germany's Federal Constitutional Court held that "there are no doubts" that a limited-liability company that operated a religious hospital open to all could exercise religious freedom rights.[43] "Since by their goal and intended objects as an association or company [the LLC and other plaintiffs] are dedicated to the care of the sick in a religious and charitable form, it is also possible for the state, by sovereign act, to violate their fundamental right of free practice of religion . . . . The freedom to profess a religious belief comprises both the freedom of the individual . . . and also, necessarily, the freedom to form associations for the purpose of collective public profession of belief . . ."[44] The Court exempted the LLC from government regulation, holding that, even though it involved laypeople in the administration, it "shares in the realization of a part of the mandate of the church in the spirit of Christian piety, in harmony with the professed belief of the Christian church."[45] The Court emphasized that under the religious self-understanding of the corporate owners and corporate charter, "the practice of religion encompasses not only the sphere of faith and of religious service, but also the freedom to develop and be effective in the world, as its religious and social task requires."[46] The Constitutional Court also upheld religious freedom rights in the commercial context of a Muslim butcher.[47]

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[42] *Id.*, Joint Dissenting Opinion.

[43] 2 BvR 208/76 (25 March 1980)(Const'l Ct.)(Germany), English translation in 4 DECISIONS OF THE BUNDESVERFASSUNGSGERICHT—FEDERAL CONSTITUTIONAL COURT—FEDERAL REPUBLIC OF GERMANY 182, 190 (1980). Note that the Constitutional Court has distinguished non-religious conscience rights, which it has held do not apply to corporations. 1 BvR 1013/89 (18 October 1989)(Const'l Ct.)(Germany). *Cf. supra*, note 25.

[44] DECISIONS OF THE BUNDESVERFASSUNGSGERICHT, 191.

[45] *Id.* at 194.

Switzerland's Federal Court, while generally limiting for-profit corporations' religious claims for tax relief,[48] has also upheld religious tax relief claims:[49]

> Although legal persons in general and profit-making entities in particular cannot rely on the right to freedom of religion and conscience in the context of taxation, it would be by all means absurd—notwithstanding formal logic—to impose upon a legal person with religious or church stated purposes ecclesiastical taxes intended for churches of different denominations.[50]

While cases explicitly dealing with the question of religious rights of for-profit entities are fairly limited, a number of national courts have simply upheld commercial actors' religious freedom rights without engaging in discussions of the entities' corporate structuring. The Court of Appeals of Paris, for example, has held that companies may require employees to comply with their ideological or religious orientation—for example, the Court recently held that a day-care facility, as an *entreprise de conviction,*[51] could require employees to reflect its beliefs by not wearing ostentatious religious symbols.[52] Indeed, the Court has gone so far as to *require* organizations holding themselves out as religiously based to accommodate religious employees' needs: a Jewish kosher restaurant was required to deviate from the legal standard to meet Jewish law because it held itself out as Jewish and the contract reflected "an equal commitment of the parties to the Jewish law."[53]

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[46] *Id.*

[47] 1BvR 1783/99 (15 January 2002)(Const'l Ct.)(Germany) (upholding religious freedom and employment rights of Muslim butcher to exemptions from animal protection laws).

[48] *i.S. Model AG gegen Steuerverwaltung und Verwaltungsgericht des Kantons Thurgau,* BGE 126 I 122 (13 June 2000) (Fed.Ct.) (Switz.).

[49] 2C_71/2010 (22 September 2010)(Fed.Ct.)(Switz.).

[50] *i.S. Buchdruckerei Elgg AG,* 102 I 468 (6 October 1976) (Fed.Ct.)(Switz.), 477; *see also i.S. Neuapostolische Kirche in der Schweiz,* BGE 95 I 350 (9 July 1969)(Fed.Ct.)(Switz.)(holding that religious organization can challenge imposition of church taxes because of the disproportionate effect on the members' religious freedom rights).

The Spanish Constitutional Court, in addressing the rights of a private religious hospital, stated that the right to have an ethos is not exclusive of educational institutions, and other companies or associations may have such ethos. In the absence of specific legislation, there cannot be an *a priori* limitation on the type of companies or institutions that may have an ethos with an external dimension.[54] That Court also upheld the right of employees to leave media organizations without adverse legal consequences when the employer changes its "ideological orientation."[55] The Italian Constitutional Court similarly permitted religious universities and schools to fire employees that go against their values and ideological connotations.[56]

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[51] See *infra* note 72-81.

[52] *Laaouej c. Association Baby-Loup*, S 13/02981 (27 November 2013)(C.A. Paris)(France).

[53] *Brami c. Arbib,* D. 1990 (25 May 1990)(C.A. Paris)(France), 596.

[54] STC 106/1996 (12 June 1996)(Const'l Ct.)(Spain)(Catholic hospital); see also text accompanying notes 72-73 *infra.* (ethos rights of schools under Spanish law).

c. Foreign Constitutional and Legislative Norms Support For-Profit Entities' Religious Claims

In numerous civil law countries, legislation is more dispositive of the nature of constitutional rights than court cases. [57] Moreover, in many countries, the legislative branch has the ultimate say in matters of constitutional interpretation, as in the UK and the Netherlands. [58]

Given this, it is particularly significant that major legislation in many of these countries protects corporate conscientious objection rights, particularly in health care contexts. The UK National Health Service "contracts-out" medical services to independent legal entities, including for-profit ones.[59] Regulations provide that these contractors (including for-profit), may assert conscientious objection to provision of contraceptive and other medical and counseling services.[60] Italy likewise does not require any private hospitals or clinics to perform abortions, regardless of for-profit or nonprofit status.[61]

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[55] STC 225/2002(9 December 2002)(Const'l Ct.)(Spain).

[56] Decision no. 195 (29 December 1972)(Const'l Ct.)(Italy)

[57] John Henry Merryman and Rogelio Pérez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America (3d ed. 2007), 136. *See* Sourendra Pandey, Encyclopedia of World Legal, Judicial and Court Systems (2009), 3.

[58] *See, e.g.*, Const., Art. 120 (Netherlands)(banning judicial review of constitutional questions); Gustavo Fernandez de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 U. Pa. J. Const'l L. 977, 978 (May 2001),; Sophie van Bijsterveld, *Human Rights and Private Corporations: A Dutch Legal Perspective,* 6 Electronic J. Comp. L. 4 (2002).

Argentine law also contains extensive conscience-based exemptions for for-profit and other medical service providers, which may conscientiously object to the state requirement to provide contraceptives at no cost.[62] The federal administrative regulation implementing this law extends the bases for conscientious objection by private health centers: objecting institutions may not only invoke "reasons of belief" to opt out of complying with the law, but also "institutional purposes" or "the convictions of their proprietors."[63] In Buenos Aires, the provincial Minister of Health has accepted a publicly-held corporation that owns clinics as a conscientious objector under these regulations.[64]

Argentine for-profit entities may also conscientiously object to the national requirement to carry out sterilizations.[65] Schools, including for-profit ones, may also have conscientious objections: they are permitted to follow the government plan for sex education "within the framework of their convictions"[66] and to create an institutional plan "within the framework of respect for its institutional ideals and for the convictions of its members."[67]

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[59] National Health Service (General Medical Services Contracts) Regulations 2004/291 (UK), Reg. 4.

[60] *Id.*, para. 7.

[61] Law no. 194, 22 May 1978 (Italy), Art. 8.

[62] Ley (Federal) No. 25.673 (Arg.).

[63] Decreto 1282/2003 (Arg.).

[64] Resolución 4405/08 (Minister of Health, Province of Buenos Aires)(2008)(Arg.).

[65] Ley 26.130 (2006)(Arg.).

The Council of Europe, which oversees the implementation of the ECHR, has similarly resolved that "[n]o person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason."[68]

Amici are not opposed to introduction of healthcare measures (which all *amici* acknowledge as an important interest), but emphasize that comparative law suggests this can and should be done in ways that protect religious freedom and moral conscience. The Government's suggestion that the Affordable Care Act provisions at issue are the least restrictive means to advance the state's interests is belied by international practice.

Legislation in civil law countries and rules promulgated by international organizations illustrate a shared constitutional-level expectation of protection for conscience in commercial settings.[69] The European

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[66] Ley (Federal) No. 25.673 (2006)(Arg.).

[67] Ley (Federal) No. 26.150 (2006)(Arg.).

[68] Parliamentary Assembly of The Council of Europe, Resolution 1763 (7 October 2010).

[69] *See, e.g.*, Concluding Statement, Latin American Consortium for Religious Liberty (21 August 2013)("The financial motives of

Union (EU) and The Council of Europe, for example, accommodate national-level protections for religious objectors to animal rights laws in the case of Islamic *halal* or Jewish *kosher* requirements.[70] The ECtHR has recognized that such exemptions under national laws give "practical effect to a positive undertaking on the State's part intended to ensure effective respect for freedom of religion."[71]

Legislation in European countries also recognizes religious freedom protections for ethos-based commercial organizations, like the court decisions mentioned above. Spanish law permits private schools, which may be for-profits or nonprofits, to define their own

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a corporation should not be an absolute barrier for an organization contemplating an ideological objection. For-profit companies are created, directed and conducted by human beings who exercise human rights inherent in human dignity – both collective and individual rights. To restrict the rights of corporate entities is to restrict the rights of individuals who are identifiable and possess an identity defined by religion and ideology, making it possible to lift the corporate veil and protect those individuals from the State.")(statement of more than 30 Latin American law and religion academics).

[70] The European Convention for the Protection of Animals for Slaughter (10 May 1979)(Council of Europe), Art. 12-13, 17; Directive on stunning of animals before slaughter, 74/577/EEC (18 November 1974)(EU).

[71] *Cha'are Shalom Ve Tsedek*, *supra* note 39, §76.

ethos, which can include religious and moral principles.[72] All members of the school community—teachers, staff, students, and students' parents—are obliged to respect the school's ethos.[73]

Dutch law protects "the freedom of an organization or association founded on religious or ideological principles to impose requirements, which, having regard to its purpose, are necessary to actualize its foundation."[74] Organizations founded on religious or ideological principles may discriminate in employment decisions[75] and membership.[76]

German and French laws and legal practice provide for the right of employers to claim status as a "tendency organization" or business with a religious "affinity", *i.e.*, an organization with a religious or ideological dimension.[77] Germany also recognizes corporate religious exemptions in its major legislation on business co-determination, which provides employees a role in firm governance.[78] In France, "the rights and specific obligation of an employee of an enterprise with religious goals are correlated with the rights and obligations of the employer . . . . [T]he liberty of both parties must be understood within the requirements of the ideological framework of the employer."[79] The EU has also recognized this concept in its definition of an "ethos-based" organization,[80] granting them protections and flexibility in employment discrimination contexts.[81]

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[72] Ley Orgánica 2/2006, 3 May 2006, de Educación, Art. 115 (Spain); see also JAVIER MARTÍNEZ-TORRÓN, RELIGION AND LAW IN SPAIN (2014), paras. 534-37

[73] Ley Orgánica 2/2006, 3 May 2006, de Educación, Art. 84.3 (Spain); RELIGION AND LAW IN SPAIN, paras. 536-537.

[74] Equal Treatment Law §6a(2)(a)(Nether.).

[75] *Id.* §§5(1)(a), 6a(2)(a).

[76] *Id.* §6a(2)(a).

[77] *See supra* notes 51-56 (comparable cases); Isabelle Riassetto, *Droit de travail – Enterprise de tendance,* in FRANCIS MESSNER, ED., DICTIONNAIRE DE DROIT DES RELIGIONS (2010), 215-16; The French Court of Appeal has also applied this to an organization focused on a non-religious belief. *See supra* note 52.

[78] BetrVG §118 (Germany)(exempting *Tendenzbetriebe*); MitbestG § 1, Abs. 4 (Germany)(exempting "religious communities

III. International Trends Emphasize For-Profit Entities' Corporate Conscience

International experience underscores the importance of corporate conscience in for-profit entities. The Government's portrayal of for-profit entities as ineligible for RFRA protection[82] because "they use labor *to make a profit*, rather than to perpetuate a religious values-based mission"[83] demeans business corporations and is flatly inconsistent with the widespread modern insistence on corporate social responsibility. The Government's approach suggests that corporations should not be concerned with moral

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and their charitable and educational facilities, regardless of their legal form").

[79] DALLOZ RECEUIL, Note, 1990, 596 (France)(citing JEAN RIVERO AND JEAN SAVATIER, DROIT DU TRAVAIL (9th ed. 1984), 194.

[80] Directive 2000/78/CE (27 November 2000)(EU).

[81] Directive 2000/78/CE (27 November 2000)(EU); Riassetto, *Droit de travail – Enterprise de tendance*.

[82] Religious Freedom Restoration Act of 1993 in *Hobby Lobby* Pet. Brief at 19.

[83] *Id.*, *citing* 733 F.3d 1208, 1242 (D.C. Cir. 2013)(Edwards, J., concurring in part and dissenting in part), petition for cert. pending, No. 13-567 (filed 5 November 2013).

or conscientious principles, but should limit themselves to securing profits for the corporation's shareholders.

Governments and international norms, in contrast, strongly encourage exercise of corporate conscience. Though structured as distinct legal entities, corporations are not merely a limited liability shell, but regularly – indeed inevitably – reflect the beliefs and moral commitments of their owners or founders.[84] Rigorous exclusion of religious freedom from the commercial corporate sphere would substantially burden RFRA free exercise rights of those organizations that seek to assert religious claims. The result would be a significant weakening of the structures that undergird corporate social responsibility and pluralism in society.

a. International Actors and Norms Stress the Importance and Breadth of Corporate Conscience

The United Nations encourages corporate conscience through the UN Global Compact, particularly in the areas of human rights, labor, the environment, and anti-corruption.[85] The Compact's first two principles call upon businesses to "respect the protection of internationally proclaimed human rights" and "make sure that they are not complicit in human rights abuses."[86] In this regard, the Compact relies on international standards articulated in key human rights instruments such as the UDHR and multilateral human rights treaties.[87]

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[84] *See, e.g.*, Ben & Jerry's Corporate Social Responsibility (attributing corporate social attitudes to their founding partners), http://bjsocialresponsibility.weebly.com/.

[85] *See* http://www.unglobalcompact.org/.

[86] *See* http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.

In 2011, the UN Human Rights Council unanimously endorsed a set of Guiding Principles on Business and Human Rights, which further explain that businesses, like Hobby Lobby, Conestoga Woods, and Mardel, must both "avoid causing or contributing to adverse human rights impacts through their own activities" and "[s]eek to prevent or mitigate impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[88] These international norms mandate, rather than forbid, for-profit businesses to consider the moral and human rights implications of their actions.

The International Organization for Standardization (ISO) creates definitive international business management standards,[89] which explain that corporate social conscience is an integral part of business, noting that "[a]n organization's performance in relation to the society in which it operates and to its impact on the environment has become a critical part of measuring its overall performance and its ability to continue operating effectively."[90] Respect for human rights is a core subject of social responsibility, the ISO explains, and "an organization may face stakeholder expectations that it go beyond respect, or it may want to go further and contribute to the fulfillment of human rights";[91] "an organization should seek to integrate social responsibility throughout its decisions and activities."[92]

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[87] *See* United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nation's 'Protect, Respect and Remedy' Framework HR/PUB/22/04 (2011), 14, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[88] *See* UN Global Compact and UN Office of the High Commissioner for Human Rights, *The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments*, 14 (July 2011)(emphasizing that "[t]he responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions. Depending on circumstances, business enterprises may need to consider additional standards.")

[89] Int'l Org. for Standardization, *Discovering ISO 26000* (2010), 2; *Schematic Overview of ISO* 2600, http://www.iso.org/iso/sr_schematic-overview.pdf; *see also* lists of codes at http://www.business-humanrights.org/Categories/Principles.

Contrary to the Government's view, corporate conscience is a standard feature of transnational corporations. In its annual international survey of corporate social responsibility, KPMG noted that 93% of the 250 largest companies in the world report on their corporate responsibility activities.[93] Of the 100 largest companies in 34 countries, 71% of publicly traded companies conduct corporate social responsibility reporting.[94] In the United States, 86% of companies report on corporate responsibility.[95] According to the

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[90] Int'l Org. for Standardization, *Discovering ISO 26000* (2010), 2.

[91] ISO 2600 §6.3.2.2; *see* Human Rights Council, United Nations General Assembly, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, 14th Session §4 ¶¶ 62-63 (2010), http://198.170.85.29/Ruggie-report-2010.pdf.

[92] Int'l Org. for Standardization, *Discovering ISO 26000* (2010), 8.

[93] KPMG, KPMG INTERNATIONAL SURVEY OF CORPORATE RESPONSIBILITY REPORTING 2013, 10.

[94] *Id.* at 21.

[95] *Id.* at 25.

2013 KPMG report, "CR reporting appears to be standard business practice the world over."[96]

Corporate conscience is essential for contemporary businesses:[97] "Many business leaders embrace corporate social responsibility as a moral imperative and expect that a company will use its economic and political power in a socially responsible way by reducing any negative impact of corporate activities on society."[98] Some argue the inevitability of corporate conscience because a corporation's profitability and productivity are so closely tied with social approval and support:

> These simply are the facts of life for a corporation, whether it does business only in a small town in Indiana, or whether it has operations all over the world . . . [T]he obvious conclusion [is] that a 'corporate conscience' must exist whether or not it is explained to the company's employees in credos. Whatever moves the company to action, be it a Management Committee, Executive Committee, Board of Directors or even the CEO alone, there is a conscience of the corporation which of necessity must dictate ethical standards for the good of

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[96] *Id.* at 10.

[97] *See, e.g.*, CENTER FOR ETHICAL BUSINESS CULTURE, CORPORATE SOCIAL RESPONSIBILITY: THE SHAPE OF A HISTORY, 1945-2004 (2010)(listing a "preliminary bibliography" of over 250 works); *see also* CAROLE BASRI, INTERNATIONAL CORPORATE PRACTICE (October 2013 update) §7.1.1.

[98] Z. Jill Barclift, *Corporate Social Responsibility and Financial Institutions: Beyond Dodd-Frank*, 31 NO. 1 BANKING & FIN. SERVICES POL'Y REP. 13, 15 (2012).

society. It may not stem from a 'do good' mentality but more out of necessity. But it does exist.[99]

b. There is Broad Legal Support for Exercises of Corporate Conscience

Legal systems the world over recognize and protect the importance of corporate conscience in a broad array of circumstances. The EU has made this the centerpiece of multi-year policies,[100] leading to creation of multistakeholder platforms in a number of relevant industrial sectors and monitoring of the commitments of large European corporations to take account of international corporate responsibility principles.[101]

Many countries and stock exchanges have introduced requirements for reporting on corporate conscience or have created reporting guides. A survey of 45 countries identified 134 mandatory policies relating to corporate responsibility and 53 more voluntary policies.[102] The US requires such disclosures under the Securities & Exchange Commission[103] and the Dodd-

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[99] Alfred S. Farha, *The Corporate Conscience and Environmental Issues: Responsibility of the Multinational Corporation*, 10 NORTHWESTERN J. INT'L L. & BUS. 382 (1990).

[100] *See* European Commission, *Promoting a European Framework for Corporate Social Responsibility* COM (2001) 366 (2001); European Commission, *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility* COM (2006) 136 (2006); European Commission, *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility,* COM (2011) 681 (2011).

[101] *A Renewed EU Strategy 2011-14*.

[102] KPMG et al., *Carrots and Sticks: Sustainability reporting policies worldwide* (2013).

[103] 15 USC §§77a-77aa (2006).

Frank Act.[104] By executive order, US federal agencies must report on corporate responsibility performance.[105] Sustainability reporting is a required listing requirement in a number of stock exchanges, including Brazil, China, Malaysia, and South Africa.[106] India's Companies Act requires companies to establish a Board Committee on Corporate Social Responsibility, invest at least 2% of net profits on socially responsible projects, and produce an annual report.[107] Large companies are required by to report annually on corporate conscience issues in France, Norway, and Denmark, and UK requires reports from both large and medium-sized companies.[108]

Courts and legislatures actively facilitate many forms of corporate social conscience. The UK High Court held that a trust may be invested in accordance with the moral aims of its objects.[109] In the United States, virtually all states have permissive statutes that allow corporations to give to charity even when this does not benefit the corporation.[110] Even prior to the existence of state corporate philanthropy laws, the New Jersey Supreme Court rejected a shareholder's suit challenging a company's decision to donate to Princeton University,[111] reasoning that as the nation's wealth has shifted into corporate hands, citizens have reasonably "turned to corporations to assume the modern obligations of good citizenship in the same manner as humans do."[112]

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[104] Dodd-Frank Wall Street Reform and Consumer Protection Act §1502, 124 Stat. 2213 (2010)(codified as amended at 15 USC §78m(p)(2012)).

[105] Executive Order 13514, 74 Fed. Reg. 52117 (8 October 2009)

[106] KPMG INTERNATIONAL SURVEY.

[107] Companies Bill, 2012 (India), cl.135.

[108] Article L 512-17 of the Environmental Code (France); Norwegian Accounting Act (as amended in 2013), http://lovdata.no/dokument/LTI/forskrift/2013-12-19-1680; Danish Commerce & Companies Agency, Reporting on Corporate Social Responsibility (2009)(requiring large companies to report or explain why they do not); Companies Act, 1985, c. 6 §235(3), sched. 7 (UK).

[109] *Harries v. Church Commissioners for England* [1992] 1 WLR 1241, 1244-47 (trustees could invest according to "non-financial considerations deduced from Christian morality").

The US federal government also fosters corporate conscience: corporations may deduct up to 10% of their taxable income for charitable contributions, and do not require a business purpose for the contribution.[113] It has established numerous programs that permit for-profit organizations to obtain federal grants for charitable activities.[114] These grants support, *e.g.*, early childhood education,[115] rehabilitation of youthful offenders,[116] supplemental education servic[illegible][117] job training,[118] rural rental housing loans,[119] testing strategies for individuals with limited English proficiency,[120] National Institute of Health grants,[121] and rural hospitals and clinics.[122]

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[110] *See* R. Frank Balotti and James J. Hanks, Jr., *Giving at the Office: A Reappraisal of Charitable Contributions by Corporations*, 54 BUS. LAW 965 (May 1999)(citing statutes).

[111] *A.P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145, 98 A.2d 581 (1953).

[112] *Id.*

[113] 26 USC §170(b)(2)(2013).

[114] *See* White House Faith-Based and Community Initiatives: Federal Funds for Organizations that Help Those in Need (2002), http://www.in.gov/ofbci/files/GrantsCatalog.pdf.

[115] *Id.* (Headstart grants).

[116] *Id.* (Responsible Reintegration of Youthful Offender project grants).

[117] *Id.* (Supplemental Education Services grants).

c. Corporate Conscience and Business Practices May Include Religious, Spiritual, and Moral Elements

Given the broad protection for corporate conscience generally, singling out religious and moral exercises of corporate conscience for non-protection not only runs counter to the thrust of RFRA, but constitutes outright discrimination against businesses like Hobby Lobby, Mardel, and Conestoga Wood that include religious, spiritual, and moral elements in their corporate conscience. Just as Coca-Cola might express particular interest in protecting polar bears,[123] other corporations, such as Hobby Lobby, may be concerned with protecting the lives of unborn children. As noted by a Dutch government report on corporate social responsibility, the choice of goals for expressing corporate conscience may be "dictated by idealism and the personal opinions of the entrepreneur as regards what is ethical, . . . [by respect] for the natural environment [or by] . . . a deeper need for meaning, for spirituality."[124] Many jurisdictions have added new "hybrid" corporate forms such as benefit corporations and flexible-purpose corporations that explicitly allow social enterprises to have a commitment to other social values alongside its profit-making goals.[125]

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[118] *Id.* (High-Growth Job Training Initiative Grants for the Healthcare and Biotechnology Industries)

[119] *Id.* (Guaranteed Rural Rental Housing Loans)

[120] *Id.* (Grant Funds to Test Innovative Training Strategies for Individuals with Limited English Proficiency and Hispanic Americans).

[121] National Institute of Health Grants Policy Statement: Grants to For-Profit Organizations (October 2012), http://grants.nih.gov/grants/policy/nihgps_2012/nihgps_ch18.htm#_Toc271265300.

[122] US HHS, Health Resources and Services Administration, Rural Health Grants, available at http://www.hrsa.gov/ rural health/grants/.

[123] *Protecting the Polar Bear*, www.cocacola.co.uk/environment/arctic-home/protecting-the-polar-bear.html.

Moral and religious convictions have long been a part of attitudes towards business[126] and efforts to encourage responsible exercise of corporate conscience.[127] Religious British Abolitionists brought a successful boycott of sugar grown in the West Indies using slave labor, contributing to British abolition of the slave trade in 1807.[128] Religious principles led to commercial philanthropy and provision of social services during the Industrial Revolution.[129] Moral convictions fueled the movement to disinvest in corporations that did business in apartheid South Africa in the 1980s.[130] As indicated by the "whole field of study and practice around organisational culture, and mission and value statements, . . . the idea of finding meaning and value in our work is still with us."[131]

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[124] SER CORPORATE SOCIAL RESPONSIBILITY: A DUTCH APPROACH 31-31(2005).

[125] *See generally*, Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639 (2013).

[126] *See, e.g.*, MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1930), 19 (professional activities as a "calling" or "duty"); ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1893), 407 (work as a "duty"); Simon B. Brooks, *CSR and the Straight-Jacket of Economic Rationality,* 30 INT'L J. SOCIOL. & SOC. POLICY 11/12 (2010).

[127] See generally Brooks, *id.* at 606; Nicholas Eberstadt, *What History Tells Us about Corporate Responsibility*, 7 BUS. & SOC. REV. 76-81 (1973).

[128] *See, e.g.*, Clare Midgley, *Slave Sugar Boycotts, Female Activism and the Domestic Base of British Anti-Slavery Culture,* 17 SLAVERY AND ABOLITION 137-162 (1996); Lawrence B. Glickman, *Abolition and the Origins of American Consumer Activism,* 56 AM. QUART. 889-912 (2004).

The trend of "workplace spirituality," or seeking to live faith and spiritual values in the workplace, began in the 1920s and has become increasingly more prominent.[132] By the late 1990s, the Academy of Management had formed a group on management, spirituality, and religion.[133] Research has correlated workplace spirituality with greater employee engagement, creativity, authenticity, meaningful work, and emotional stability.[134] RFRA protections need to be available to protect the continuing role of religion in modern business life.

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[129] SER CORPORATE SOCIAL RESPONSIBILITY: A DUTCH APPROACH 24-26 (2005); PATRICK MACLAGAN, MANAGEMENT AND MORALITY (1998).

[130] *See, e.g., Harries v. Church Commissioners for England* [1992] 1 WLR 1241; William H. Kaempfer et al., *Divestment, Investment Sanctions, and Disinvestment: An Evaluation of Anti-Apartheid Policy Instruments* , 41 INT'L ORG. 457-473 (1987).

[131] Brooks, *CSR and the Straight-Jacket of Economic Rationality,* 609 (citation omitted).

[132] *See, e.g., Companies Hit the Road Less Traveled: Can Spirituality Enlighten the Bottom Line?* BUS. WEEK, (5 June 2002); GILBERT FAIRHOLM, CAPTURING THE HEART OF LEADERSHIP: SPIRITUAL COMMUNITY IN THE NEW AMERICAN WORKPLACE (1997); JAY CONGER, SPIRIT AT WORK: DISCOVERING THE SPIRITUALITY IN LEADERSHIP (1994).

[133] *See* Academy of Management Management, Spirituality, and Religion Interest Group, http://group.aomonline.org/msr/.

[134] Margaret Benefiel, *The Second Half of the Journey: Spiritual Leadership for our Organizational Transformation,* 16

CONCLUSION

For the foregoing reasons, the decision below in *Hobby Lobby* should be affirmed and the decision below in *Conestoga Woods* should be reversed.

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APPENDIX

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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v.

KATHLEEN SEBELIUS, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE TENTH CIRCUIT AND THE THIRD CIRCUIT

BRIEF OF 91 MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF THE GOVERNMENT

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BRIEF OF 91 MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF THE GOVERNMENT

STATEMENT OF INTEREST OF *AMICI CURIAE* *

Amici are Members of the United States House of Representatives, including Members who were in Congress when the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111–148, 124 Stat. 119,[1] was passed and who supported its passage, as well as Members who have voted repeatedly against efforts to repeal the ACA in whole or in part.[2]

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* *Amici* affirm that no counsel for a party to these proceedings authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs are on file with the Clerk.

As Members of Congress, *amici* have a substantial interest in explaining how the legislative history of the ACA supports the conclusion that the contraceptive coverage requirement of the ACA, codified at 42 U.S.C. § 300gg-13, satisfies the test applicable to a free exercise of religion challenge under the Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 103–141, 107 Stat. 1488. The ACA provision challenged here, 42 U.S.C. § 300gg-13, as well as the final rule implementing the ACA's requirements, 78 Fed. Reg. 39870 (July 2, 2012) (together, the "contraceptive coverage requirement"), should be upheld because it does not substantially burden any free exercise rights that the for-profit corporations challenging the provision may have, serves compelling governmental interests of advancing public health and welfare and promoting gender equality, and is the least restrictive means of accomplishing those compelling interests.

SUMMARY OF THE ARGUMENT

Amici believe that Hobby Lobby Stores, Inc., Mardel, Inc., and Conestoga Wood Specialties Corp. (collectively, "the Corporations") do not have any free

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[1] As amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

[2] A complete list of Members of Congress participating as *amici* appears as an Appendix to this brief.

exercise rights under RFRA that may be asserted in these actions.[3] However, if this Court were to hold that the Corporations may bring claims under RFRA challenging the contraceptive coverage requirement, those claims should be rejected for several reasons.

First, the text and legislative history of RFRA make clear that the right to free exercise of religion provides protection against the application of a generally applicable law, such as the contraceptive coverage requirement of the ACA, only if the law "substantially burden[s]" religious exercise by the person challenging the law's application. 42 U.S.C. § 2000bb-1(a). Congress added the word "substantially" to RFRA to make clear that RFRA was intended to incorporate and restore the test applied by this Court prior to its decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), under which only governmental action that places a *substantial* burden on the exercise of religion must meet the compelling interest test. Congress did not intend that RFRA would "require the Government to justify every action that has some effect on religious exercise." 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy).

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[3] Because other *amicus* briefs, as well as the brief of the Solicitor General of the United States, address why the Corporations should not be able to assert a claim under RFRA, this brief will discuss solely the application of RFRA to the ACA's contraceptive coverage requirement, in the event this Court reaches the substance of the Corporations' challenge to the ACA.

The contraceptive coverage requirement does not substantially burden any exercise of religion in which the Corporations might be found to engage because it does not compel the Corporations to administer or use the contraceptive methods to which they object, nor does it require them to adhere to, affirm, or abandon a particular belief. It merely requires the Corporations, like other employers, to provide comprehensive insurance coverage under which their employees may make their own personal decisions, in consultation with their doctors, whether to use whatever form of contraception, if any, best suits their individualized health and wellness needs.

Second, the legislative history of the ACA demonstrates that the preventive care provisions of the ACA, including the contraceptive coverage requirement, were intended to serve compelling governmental interests by advancing the public health and welfare and promoting gender equality. The contraceptive coverage requirement satisfies the least restrictive means test because Congress reasonably chose to use the existing private health insurance system to provide the types of preventive health care services that the Department of Health and Human Services determined, based on a thorough investigation and report by the Institute of Medicine, are necessary and appropriate to serve the compelling government interests of public health and gender equality.

Third, the contraceptive coverage requirement properly balances Congress' compelling interests in enacting the preventive care provision, any burden of that requirement on for-profit corporations, and the rights of such corporations' female employees. The importance of the contraceptive care requirement in serving the important governmental goals of public health and welfare, as well as gender equality, far outweighs whatever attenuated imposition this provision may place on any right to free exercise that the Corporations may possess. In addition, acceptance of the Corporations' claims would improperly restrict the rights of their employees under federal law.

ARGUMENT

I. The Contraceptive Coverage Requirement Does Not Impose a Substantial Burden on the Exercise of Religion.

RFRA reflects Congress' reasoned conclusion that the right to free exercise of religion protects against the application of a generally applicable law if and only if the law "substantially burden[s]" the religious exercise of the person challenging application of the law. 42 U.S.C. § 2000bb-1(a). Congress' original draft of RFRA did not contain the word "substantially" as a modifier to the type of burden that might exempt an individual from generally applicable law; this word was added in an amendment offered by Senators Kennedy and Hatch to clarify the intended meaning of the proposed statute. *See* 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993).

In proposing the amendment adding the word "substantially" to RFRA's text, Senator Kennedy made clear that RFRA "does not require the

Government to justify every action that has some effect on religious exercise." *Id.* (statement of Sen. Kennedy). Rather, the amendment was proposed to ensure that Congress faithfully restored the compelling interest test applied by this Court prior to its decision in *Smith*, 494 U.S. 872. Senator Kennedy explicitly referred to "[p]re-*Smith* case law which makes it clear governmental action [that] places a *substantial* burden on the exercise of religion . . . must meet the compelling interest test set out in [RFRA]." 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy) (emphasis added).

The ACA's preventive care coverage requirement, 42 U.S.C. § 300gg-13, as implemented through the relevant Department of Health and Human Services ("HHS") regulations, does not place a substantial burden on the religious exercise of for-profit corporations whose owners have religious objections to the use of certain contraceptives. Although RFRA prohibits courts from inquiring into whether a particular belief is valid or "central" to a plaintiff's "system of religious belief," 42 U.S.C. § 2000cc-5(7)(A) (thereby incorporating the rule of *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 715 (1981)), not every statute or regulation that affects religious beliefs "substantially burdens" the free exercise of religion. *See United States v. Lee*, 455 U.S. 252, 261 (1982) ("Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs.").

A. Any Connection Between the Corporations' Religious Exercise and Their Employees' Choice of Contraception Is Too Attenuated to Constitute a Substantial Burden.

The ACA's preventive care requirement does not compel the Corporations to administer or use the contraceptive methods to which they object, nor does it require them to adhere to, affirm, or abandon a particular belief. Any burden here is therefore unlike the compulsory flag salute held unconstitutional in ***West Virginia State Board of Education v. Barnette***, 319 U.S. 624, 630–633 (1943) ("[T]he compulsory flag salute and pledge requires *affirmation of a belief* and an attitude of mind." (emphasis added)).

Rather, the ACA requires only that large for-profit employers provide comprehensive insurance coverage under which their employees may decide, in private consultation with their doctors, to use the particular form of contraception that best suits their individualized health and wellness needs. That this private choice of an individual employee may differ from what the shareholders of her corporate employer would themselves choose is too tenuous a burden to meet RFRA's codification of the pre-*Smith* substantiality requirement.[4] *See generally*

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[4] Moreover, in order to accept the argument of the Corporations, this Court would have to look through the corporate form to consider the religious beliefs of a corporation's shareholders as relevant to the analysis of the corporation's free exercise interests. Unless the Court is willing to pierce the corporate veil in contravention of well-established corporate law, the religious views of

Hernandez v. Comm'r of Internal Revenue, 490 U.S. 680, 699 (1989) (upholding exclusion of the purchase of certain Scientology services from charitable tax deduction and noting that the Court had "doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one").

Any burden these employers feel as a result of paying a third party (an insurance company) to provide comprehensive insurance coverage, including coverage of contraception, to other third parties (the corporation's employees) is too attenuated to impose a substantial burden on the *employer's own* exercise of religion, which is unaffected by the provisions at issue. Indeed, for-profit corporate employers remain free to state their objections to the use of contraceptives, and they may never even know whether any of their employees uses contraception to which they object. *See* 78 Fed. Reg. 39870, 39878 (July 2, 2013) ("[N]othing in these final regulations precludes employers or others from expressing any opposition to the use of contraceptives or requires health care providers to prescribe or provide contraceptives, if doing so is against their religious beliefs."); *id.* at 39879 ("Plan participants and beneficiaries may refuse to use contraceptive services.").

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corporate owners are irrelevant to the substantial burden analysis here. *See, e.g.*, *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001).

The action the Corporations protest—providing health insurance—is also not a substantial burden on religious exercise because it results from Congress regulating "a secular activity" (employment in a for-profit business) rather than requiring or prohibiting actions grounded in a religious belief. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961).[5] The requirement to provide comprehensive insurance that includes contraception that an employee may—or may not—choose thus fails to meet the most basic requirement of a free exercise claim: the existence of "any coercion directed at the practice or exercise of [the claimant's] religious beliefs." *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (plurality opinion); *see also Abington Twp. Sch. Dist. v. Schempp*, 374 U.S. 203, 223 (1963) ("[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment *as it operates against him in the practice of his religion*." (emphasis added)).

Because requiring coverage of contraceptives imposes no obligation that the Corporations *themselves* act in a manner contrary to their religious beliefs, their religious exercise is not substantially burdened.

B. The ACA's Provisions for Non-Compliance with the Preventive Care Coverage

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[5] Some *amici* believe that the statute at issue in *Braunfeld* represented an unconstitutional establishment of religion. *See Estate of Thorton v. Caldor*, 472 U.S. 703 (1985). However, *Braunfeld* did not directly consider the Establishment Clause, and no such claim is presented here.

Requirements Do Not Impose a Substantial Burden.

As discussed above, this Court's Free Exercise Clause jurisprudence prior to *Smith*, expressly ratified and adopted by RFRA, 42 U.S.C. § 2000bb(b), was most protective of individuals' religious exercise rights when claimants sought to prevent the government from compelling adherence to or affirmance of a particular belief, and where providing an accommodation would not affect the rights of others. *See Barnette*, 319 U.S. at 630–633. But even a religious duty does not automatically provide grounds for an exemption from statutory requirements on free exercise grounds, if that duty requires conduct contrary to public welfare. In keeping with Congress' understanding that RFRA created no new rights for any religious practice or for any potential litigant, it was noted during the debates leading to its passage that "[n]ot every free exercise claim will prevail." 146 Cong. Rec. S9822 (daily ed. July 2, 1992) (statement of Sen. Kennedy).

The ACA's preventive care provision offers the Corporations the option of paying a tax penalty and not providing the otherwise required coverage. Even if such a tax penalty might be sizeable, it cannot be considered more burdensome than a criminal conviction, which this Court has previously found did not impose a substantial burden. *See Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding a statute criminalizing labor by girls under the age of 18 despite contrary religious beliefs that such labor is a religious duty); *see also Hernandez*, 490 U.S. at 699.

II. The Contraceptive Coverage Requirement Fulfills Compelling Governmental Interests in Promoting Public Health and Gender Equality, and Is the Least Restrictive Means of Doing So.

Congress enacted RFRA to reinstate the compelling interest test as it was applied before this Court's decision in *Smith*. *See* H.R. Rep. No. 103-88, at 6 (1994) ("[RFRA] restores the compelling interest test previously applicable to First Amendment Free Exercise cases."). Under the compelling interest test, courts analyzing an alleged RFRA violation should "look to free exercise of religion cases decided prior to *Smith* for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling government interest." *Id.*

This Court has repeatedly affirmed Congress' prerogative to enact comprehensive national legislation aimed at improving the public welfare, most notably in *Lee*, 455 U.S. 252, which upheld the Social Security system's imposition of a tax in the face of religious objections. The ACA's contraceptive coverage requirement, an integral part of the statute's overall emphasis on preventive care, furthers Congress' compelling interests in, *first*, addressing the public health and welfare, and *second*, promoting gender equality in the health insurance market. Therefore, this Court should hold that Congress has satisfied RFRA's requirement of furthering compelling government interests.

A. The Contraceptive Coverage Requirement Is Part of a Nationwide Program of Comprehensive Preventive Care That Furthers Compelling Government Interests in Public Health and Gender Equality.

Congress enacted the ACA to protect public health and welfare by ensuring that every American has access to affordable and high quality health care. This Court has recognized the importance of such broad public welfare programs in other contexts. For example, in *Lee*, this Court treated as obvious the fact that a national Social Security program furthered compelling interests: "[b]ecause the social security system is nation-wide, the governmental interest is apparent." 455 U.S. at 258. In language that also reflects Congress' intent in passing the ACA, the *Lee* Court went on to hold that "[t]he social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees." *Id.*

Through the ACA, Congress provided for an improved private health insurance program of which preventive care is a crucial part. The preventive services requirements, including comprehensive contraceptive coverage, not only serve the general interest of promoting public health and welfare, but also remedy what Congress recognized as widespread gender inequality in the provision and cost of health care services to women. Because Congress recognized that preventive care provides a tremendous benefit and a unique means of addressing critical health care problems, the ACA required newly issued health insurance plans to cover these health services pursuant to a set of administratively implemented regulations.

This Court has long considered the goals of advancing public health and eliminating gender inequality to be compelling governmental interests. *See, e.g.*, *Simopoulas v. Virginia*, 462 U.S. 506, 510–11 (1983) (finding a "compelling interest in maternal health"); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (finding that Minnesota had a "compelling interest in eradicating discrimination against its female citizens"); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (finding a "compelling interest in eliminating discrimination against women"); *see also Bill Johnson's Rests., Inc. v. Nat'l Labor Relations Bd.*, 461 U.S. 731, 732 (1983) (recognizing the need to balance First Amendment rights with "the States' compelling interests in maintaining domestic peace and protecting its citizens' health and welfare"). Congress articulated these interests as important goals of preventive care, and of contraceptive coverage specifically, throughout the ACA's legislative history.

1. Congress required comprehensive preventive care for women in the ACA because of the important role that prevention plays in enhancing public health.

The legislative history of the ACA emphasizes the crucial role of preventive services in a comprehensive universal health care system. As Senator Al Franken noted, "[p]revention is one of the key ways [the ACA] will transform our system of sick care into true health care." 155 Cong. Rec. S12,271 (daily ed. Dec. 3, 2009) (statement of Sen. Franken).

In particular, Congress highlighted the importance of covering *women's* preventive care, including contraception, in promoting public health and welfare. The portion of the ACA that called for women's preventive care was added through the "Mikulski Amendment" to fill gaps in existing preventive services when it came to women's health care needs. *See* 155 Cong. Rec. S12,277 (daily ed. Dec. 3, 2009). Congress recognized that increasing access to a wide range of services would remedy "a situation where many women are delaying going to a doctor, getting their preventive services . . . ." 155 Cong. Rec. S12,026 (daily ed. Dec. 1, 2009) (statement of Sen. Boxer). Senator Barbara Boxer explained that "[t]he Mikulski amendment addresses this critical issue by requiring that all health plans cover comprehensive women's preventive care and screening – and cover these recommended services at little or no cost to women. These health care services include . . . family planning services." *Id.* at 12025–26.

As Congress recognized, men and women have different needs when it comes to preventive care in the context of reproductive services. The coverage of women's preventive health services under 42 U.S.C. § 300gg-13 was considered a crucial tool for accomplishing the overall goal of providing complete preventive care, because Congress understood that inadequacy of preventive services disproportionately affects women. *See* 155 Cong. Rec. at S12,027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand) ("The prevention section of the bill before us must be amended so coverage of preventive services take into account the unique health care needs of women throughout their lifespan."); *see also* 156 Cong. Rec. H1632 (daily ed. Mar. 18, 2010) (statement of Rep. Jackson Lee) ("So I stand today to be able to say to all of the moms and nurturers who happen to be women that we have listened to your call. We have actually recognized that it is important to provide for care.").

Access to contraception, as part of a comprehensive program of preventive coverage, promotes women's general well-being. Senator Richard Durbin emphasized the importance of the ACA's preventive services for women of childbearing age, noting, "Today, there are 17 million women of reproductive age in America who are uninsured. This bill will expand health insurance coverage to the vast majority of them, which means millions more women will have access to affordable birth control and other contraceptive services. This expanded access will reduce unintended pregnancies and reduce abortions." 155 Cong. Rec. S12,671 (daily ed. Dec. 8, 2009) (statement of Sen. Durbin).

Representative Marcy Kaptur also linked the ACA's preventive care provisions for women with the health of their children, stating, "[t]his legislation will help millions of women obtain health coverage and thus reduce abortion by enhancing broad coverage options for women's and children's health.

It will vastly improve preventive care . . . ." 156 Cong. Rec. H1893 (daily ed. Mar. 21, 2010) (statement of Rep. Kaptur).

2. Congress also required comprehensive preventive care for women to address serious gender inequality in health care.

Members of Congress repeatedly stressed their intent to combat gender discrimination and promote equality through the ACA's comprehensive health insurance system generally and its preventive care provisions specifically. Representative Jackie Speier highlighted this intent when she declared, "[i]f there ever was an issue on health care that must be addressed and is addressed in [the ACA], it is gender discrimination." 156 Cong. Rec. H1711 (daily ed. Mar. 19, 2010) (statement of Rep. Speier).

Senator Franken linked gender equality and preventive care when he stated, "We will end discrimination based on health history, on gender, or history of domestic violence. We will provide access to preventive health services . . . ." 155 Cong. Rec. S12,611 (daily ed. Dec. 7, 2009) (statement of Sen. Franken). Senator Kirsten Gillibrand also focused on gender inequalities in the health care system while advocating for the ACA and its preventive care provisions in particular, stating that "[t]his fundamental inequity in the current system is dangerous and discriminatory and we must act." 155 Cong. Rec. S12,027 (daily ed. Dec. 1, 2009) (statement of Sen. Gillibrand).

Congress explicitly set out to change the health insurance system in which "women have been discriminated against for decades," 156 Cong. Rec. H1711 (daily ed. Mar. 19, 2010) (statement of Rep. Speier), by providing "access to preventive care, mammograms and other screenings and a *full range of reproductive services*." *Id.* at 1709 (statement of Rep. Edwards) (emphasis added). Congress focused particular attention on women's disproportionate share of out-of-pocket costs for health care, including preventive care. In noting the need for change, Representative Judy Chu stated, "Today, women are forced to settle for less health care at a higher price. We pay as much as 50 percent more than men, a practice of discrimination that is legal in 38 states." 155 Cong. Rec. H12,209 (daily ed. Nov. 3, 2009) (statement of Rep. Chu); *see also* 155 Cong. Rec. S12,274 (daily ed. Dec. 3, 2009) (statement of Sen. Murray) ("In fact we know that in 2007, a quarter of women reported delaying or skipping their health care because of cost. In May of 2009, just 2 years later, a report by the Commonwealth Foundation found that more than half of women today are delaying or avoiding preventive care because of its cost."); 155 Cong. Rec. S11,985 (daily ed. Nov. 30, 2009) (statement of Sen. Mikulski) ("Women are more likely than men to neglect care or treatment because of cost. Fourteen percent of women report they delay or go without health care. Women of childbearing age incur 68 percent more out-of-pocket health care costs than men . . . ."); 155 Cong. Rec. S10,263 (daily ed. Oct. 8, 2009) (statement of Sen. Murray) ("[M]illions of women across this country [] open the mail each month to see their premiums rising dramatically, [and] cannot get preventive care . . . .").

Senator Jeanne Shaheen argued that the insurance system needed regulation to end its discriminatory practices, noting, "[I]t is unacceptable that women are not treated fairly by the system and do not always receive the care they require and deserve . . . We must come together to pass comprehensive health reform to help all the women of our Nation who are facing high insurance costs just because they are women." 155 Cong. Rec. S10,262–64 (daily ed. Oct. 8, 2009) (statement of Sen. Shaheen).

Congress sought to end this harmful inequality by ensuring complete health care coverage, including preventive care, for women. Because of obvious biological differences, women have medical needs that differ from men. All prescription contraceptives on the market today, such as the Pill, diaphragms, and IUDs, are for women alone. Before the ACA, insurance companies often charged women high rates or refused to cover necessary, but uniquely female, services.

Senator Barbara Mikulksi summarized this compelling interest to be served by the ACA as follows: "What you heard loudly and clearly today is that health care is a women's issue, health care reform is a must-do women's issue, and health insurance reform is a must-change women's issue because what we demonstrated is that when it comes to health insurance, we women pay more and get less." 155 Cong. Rec. S10,265 (daily ed. Oct. 8, 2009) (statement of Sen. Mikulski).

3. The contraceptive coverage requirement is a critical part of the preventive services required by Congress in the ACA.

The Mikulski Amendment required that HSS identify those preventive health services for women that should be covered and provided to patients at no cost. *See* 42 U.S.C. § 300gg-13. HHS requested that the Institute of Medicine ("IOM"), a part of the National Academy of Sciences, provide recommendations as to the appropriate scope of required coverage.

The IOM "convened a committee of 16 members—including specialists in disease prevention, women's health issues, adolescent health issues, and evidence-based guidelines—to develop a set of recommendations for consideration by the ASPE of HHS." Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 2 (2011) ("IOM Report"). After extensive study, including several public hearings, the IOM issued its report to HHS on July 19, 2011. *See id.*

The IOM Report identified eight categories of treatment that should be covered as part of preventive care, including access to the "full range" of contraceptive methods approved by the Food and Drug Administration ("FDA"). *Id.* at 10, 102–10. As the IOM Report makes clear, access to contraception plays a key role in safeguarding women's health and the health of their children by, among other things, reducing the likelihood of preterm birth and low birth weight, both of which are associated with unintended pregnancies. *See* IOM Report at 102–03. Access to contraception helps prevent unwanted pregnancies, which can have negative physical and psychological effects on women and children. *Id.* at 103 ("[M]others who have experienced any unwanted birth report higher levels of depression and lower levels of happiness."). In February 2012, HHS adopted all eight of the IOM Report's recommended preventive services for women in its implementing final rule. 77 Fed. Reg. 8725–26 (Feb. 15, 2012).

Dr. Linda Rosenstock, Dean of the UCLA School of Public Health and Chair of the IOM Committee on Preventative Services for Women, testified before the House Judiciary Committee in February 2012 about the findings of the IOM Report. Testimony of Linda Rosenstock before the House Judiciary Committee, 2012 WL 624905 (Feb. 28, 2012). She noted:

> The report addressed concerns that the current guidelines on preventive services contain gaps when it comes to women's needs. Women suffer disproportionate rates of chronic disease and disability from some conditions. Because they need to use more preventive care than men on average due to reproductive and gender-specific conditions, women face higher out-of-pocket costs. *Id.*

HHS' final recommendations and the IOM Report are fully consistent with, and critical to carrying out, Congress' intent in passing the ACA: not only to provide treatment for existing illnesses, but also to improve the health of Americans by ensuring the complete coverage of preventive care. The preventive services provisions of the ACA—including the contraceptive coverage requirement challenged by the Corporations—thus further a compelling government interest in improving and sustaining public health and welfare by increasing access to preventive care and thereby eliminating many medical problems before they arise.

B. The ACA's Preventive Coverage Requirements and the Final Rule Issued by HHS Embody the Least Restrictive Means of Achieving Congress' Intent.

Congress chose to accomplish its goal of improving health care through a comprehensive national insurance program utilizing the existing system of private health insurance. This method was the most effective and the simplest means by which Congress could achieve its objective of instituting comprehensive care. H.R. Rep. No. 111-443, pt. 2, at 984–88 (2010). The final preventive services rule issued by the Departments of the Treasury, Labor and HHS noted that the government examined various alternatives but found that these methods would not advance the government's compelling interest in the same sufficiently tailored way as the final regulations. *See* 78 Fed. Reg. 39870 (July 2, 2013) ("[T]he Affordable Care Act contemplates providing coverage of recommended preventive services through the existing employer-based system of health coverage so that women face minimal logistical and administrative obstacles. Imposing additional barriers to women receiving the intended coverage (and its attendant benefits), by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women.").

To permit for-profit employers to opt out of including insurance coverage for particular services required under the ACA, and then requiring the government to provide that care separately, would undermine the comprehensive system that Congress envisioned. Forcing individual employees to obtain financing of certain types of care from different sources, rather than the comprehensive insurance plans envisioned by the ACA, would add unnecessary complication and confusion. Moreover, requiring the government to devise and implement a new system through which it distributes certain preventive services would be far more burdensome than the ACA's strategy of building upon the preexisting private system. Such an imposition on the federal government would be unprecedented and cannot be reconciled with the applicable case law under RFRA. *See, e.g.*, *Braunfeld*, 366 U.S. at 608–09.

As in *Lee*, the Court should conclude that the administratively created exemptions for private individuals and religious organizations reflect sufficient accommodation of religious exercise rights in light of the interference with compelling governmental interests that would result if all potentially similarly situated for-profit employers could unilaterally exempt themselves from this comprehensive national program.

III. The Contraceptive Coverage Requirement Meets RFRA's Standard Because It Appropriately Balances All Relevant Interests.

This Court and others have acknowledged the problems that would arise if broad, *ad hoc* religious accommodations were permitted to undermine the compelling governmental interest that led Congress to pass a statute. Thus, prior to *Smith*, this Court subjected laws purportedly burdening the free exercise of religion to a balancing test, weighing the government's stated compelling interests, the claimant's free exercise right and the rights of third parties that might be affected by the requested accommodation. RFRA reinstated this delicate balancing test.

In *Lee*, for example, this Court balanced the government's interest in "providing a comprehensive insurance system with a variety of benefits available to all participants" against the burden that system placed on an individual's right to free exercise. 455 U.S. at 258. The Court noted, "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept *on their own conduct* as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.* at 261 (emphasis added). The *Lee* Court balanced the countervailing interests of recognizing individual religious beliefs and the need for those engaged in commercial enterprises to "yield to the common good," *id.* at 259, and concluded that the public interest furthered by the Social Security system was of such a high order that conflicting religious beliefs "afford[ed] no basis for resisting the tax." *Id.* at 260.

In balancing the competing interests in *Lee*, this Court noted that Congress had already "accommodated [religion], to the extent compatible with a comprehensive national program." *Id.* Such accommodations indicated the intent of Congress not to interfere unduly with religious exercise while simultaneously not allowing that private exercise to interfere unduly with matters of public concern. As the Court explained, "[r]eligious beliefs can be accommodated, but there is a point at which accommodation would radically restrict the operating latitude of the legislature." *Id.* at 259 (internal citations and quotations omitted); *see also United States v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987) (considering, in the free exercise context, "the extent to which accommodation of defendant would impede the state's objectives," and upholding the conviction at issue).

Here, the statutory scheme enacted by Congress and implemented through administrative regulations requires employers to provide—along with coverage for a vast array of other forms of medical care—comprehensive contraceptive coverage so that women can access the care they and their doctors believe best. The implementing regulations have provided certain exceptions for non-profit religious groups that object to the contraceptive coverage requirement. *See* 45 C.F.R. § 147.131(a). These exemptions ensure that the regulation is narrowly tailored while still serving Congress' goal of providing comprehensive preventive coverage to as many American women as possible.

Such exemptions do not undermine the compelling nature of the governmental interests in comprehensive health care. Rather, they reflect a careful effort to accommodate free exercise rights and religious beliefs.

Acceptance of the Corporations' argument would allow any employer to use its religious beliefs (including those that would undermine large portions of federal law, like the religious belief that taking *any* medicine violates religious duties) to circumscribe the rights of its employees—a result squarely at odds with this Court's well-established jurisprudence and therefore with RFRA. Pre-*Smith* case law treated free exercise claims that were inherently personal and affected no other parties, as in *Barnette*, 319 U.S. at 630, as more viable than claims that would deny others access to their rights under federal law.

Because the Corporations seek to upset the balance crafted by Congress—a balance that appropriately respects religious exercise while promoting the rights of women to necessary and appropriate health care—they should not be granted a judicial exception to the contraceptive coverage requirement.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reject the challenges of the

Corporations to the ACA's contraceptive coverage requirement.

Respectfully submitted,

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APPENDIX

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House Democratic Whip Steny Hoyer
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Louise Slaughter, Ranking Member, Committee on Rules
John Conyers, Jr., Ranking Member, House Committee on the Judiciary
Charles B. Rangel
George Miller, Ranking Member, House Committee on Education and the Workforce
Henry Waxman, Ranking Member, House Committee on Energy and Commerce
Marcy Kaptur
Sander Levin, Ranking Member, House Committee on Ways and Means
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Nita Lowey
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Rosa DeLauro
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Jerrold Nadler, Ranking Member, Subcommittee on the Constitution and Civil Justice, House Committee on the Judiciary
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Carolyn Maloney
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Lloyd Doggett
Chaka Fattah
Sheila Jackson-Lee
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AMICUS
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BRIEF

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No. 13-354

In the Supreme Court of the United States

KATHLEEN SEBELIUS, Secretary of Health and Human Services, *et al.*
Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE STATE OF OKLAHOMA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF THE IDENTITY, INTEREST, AND AUTHORITY OF *AMICUS* TO FILE

The State of Oklahoma is interested in this case because Respondents Hobby Lobby Stores, Inc., and Mardel, Inc. ("Hobby Lobby" and "Mardel") are corporations organized under the laws of the State of Oklahoma. Both Hobby Lobby and Mardel, and Respondents David Green, Barbara Green, Mart Green, Steve Green and Darsee Lett (collectively, "the Green Family"), are citizens of the State of Oklahoma whose right to practice their religious faith has been violated. The actions of the Petitioners substantially burden the undisputed, sincere, and deeply held religious faith of these citizens of Oklahoma that are otherwise fully protected by the Constitution and laws of the State of Oklahoma, and forcibly require them to personally undertake actions that are contrary to the undisputed, sincere, and deeply held religious faith of these citizens.

SUMMARY OF THE ARGUMENT

Petitioners ask the Court to exclude from RFRA protection certain corporations merely because they are "for-profit". This interpretation of RFRA and the Free Exercise Clause is inconsistent with clearly established Oklahoma and federal law. Oklahoma law allows corporations like the Respondents here to operate for any lawful purpose, including religious purposes. State law also broadly protects the religious freedom of all "persons," and the law plainly defines "person" to include corporations. The Federal Government's narrow view of RFRA and Free Exercise protections, on the other hand, would exclude from protection even unquestionably religious organizations—such as churches—formed under Oklahoma's General Corporation Act. That narrow view hinges, however, on the fact of incorporation under state law, yet there simply is no basis in Oklahoma law for concluding that taking advantage of the corporate form strips Oklahoma businesses of the strong religious freedoms afforded to all Oklahoma citizens. To the contrary, Oklahoma has a longstanding tradition of using its laws to *protect* religious freedom rather than to deprive it.

The Tenth Circuit accordingly held that Respondents' utilization of Oklahoma corporate law does not abrogate protections under RFRA and the Free Exercise Clause. Nor did the Tenth Circuit find any evidence that Congress intended to preempt state law by defining "person" more narrowly in the context of RFRA: "the government has given us no persuasive reason to think that Congress meant 'person' in RFRA to mean anything other than its default meaning in the Dictionary Act—which includes corporations regardless of their profit-making status." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1132 (10th Cir. 2013).

Having found that Hobby Lobby and Mardel are persons deserving of RFRA protection, the court below had little trouble finding that the contraceptive mandate at issue here substantially burdens Respondents' exercise of their religion. Rightly so. The Federal Government has on the one hand threatened Respondents with astronomical fines for failing to violate their religious beliefs and comply with the mandate for not complying with the mandate, while on the other hand it has all but admitted that the mandate burdens the exercise of religion, by doling out exemptions from the mandate to certain favored religious entities. This type of coercive federal infringement on religious practice is exactly what RFRA and the Free Exercise Clause were meant to prevent.

ARGUMENT

I. The Tenth Circuit correctly concluded that incorporation under Oklahoma law does not automatically result in a loss of religious freedom.

The Tenth Circuit found no distinction between non-profit, religious corporations and for-profit, secular corporations. Instead, the appeals court correctly concluded that had Congress intended to narrow the scope of protection under RFRA to non-profit, religious corporations only, it would have said so. The court also found that no explicit distinction exists in other statutes or case law to support the Federal Government's contention that protection is limited to only non-profit, religious corporations. *Hobby Lobby*, 723 F.3d at 1129.

A. Under Oklahoma law, any organization may incorporate as a "general business corporation," including churches and others with religious purposes.

Corporations in Oklahoma are most often organized under the Oklahoma General Corporation Act. OKLA. STAT. tit. 18, §§ 1001 – 1144 (2011).[1] In Oklahoma, corporations may be created for "any lawful purpose:"

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[1] Corporations may also be organized in Oklahoma under special provisions: Savings and Loan corporations, OKLA. STAT. tit. 18, §§

> B. A corporation may be incorporated or organized pursuant to the provisions of the Oklahoma General Corporation Act to conduct or promote any lawful business or purposes, except as may otherwise be provided by the Constitution or other law of this state.

Id. at § 1005(B).

The "lawful purpose" need not be stated with any particularity in its certificate of incorporation.

> A. The certificate of incorporation shall set forth:
>
> ***
>
> 3. The nature of the business or purposes to be conducted or promoted. It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the general corporation law of Oklahoma, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for express limitations, if any[.]

Id. at § 1006(A)(3). Both of the Hobby Lobby corporations declare the above general corporate

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381.1 381.86 (2011); Cooperative corporations, *Id*. at §§ 421 439.2; Educational corporations, *Id*. at §§ 571 575; Charitable, and Fraternal Corporations, *Id*. at §§ 581 - 594; Professional corporations, *Id*. at §§ 801 - 819; Business Development corporations, *Id*. at § 912; and Farming or Ranching Business corporations, *Id*. at §§ 951 - 956.

purpose of "any lawful act or activity" to be the purpose of the corporations.

Similarly, Oklahoma corporations may describe their lawful purposes and activities in their bylaws:

> B. The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its shareholders, directors, officers or employees.

Id. at § 1013(B).

Additionally, every Oklahoma corporation organized under the Oklahoma General Corporation Act is specifically authorized to use its assets for charity:

> Every corporation created pursuant to the provisions of the Oklahoma General Corporation Act shall have power to:
>
> ***
>
> 9. Make donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof[.]

Id. at § 1016(9). And perhaps most notably, every Oklahoma corporation organized under the Oklahoma General Corporation Act may restrict itself from undertaking particular types of otherwise lawful conduct:

> 17. Renounce in its certificate of incorporation or by action of its board of directors any interest

> or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specified classes or categories of business opportunities that are presented to the corporation or one or more of its officers, directors or shareholders.

Id. at § 1016(17). Plainly, Oklahoma's laws do not restrict corporations from running their businesses in accordance with their owners' faith. Indeed, Oklahoma law favors corporations undertaking "any lawful act or activity," which clearly includes religious expression and practice. *Id.* at § 1006(A)(3). Accordingly, a lawful purpose of any corporation organized under the Oklahoma General Corporation Act may be to express the views and even the religious beliefs and actions of its owners and the persons who operate it.

Religious corporations in Oklahoma have the option of incorporating under a separate statutory provision:

> The members of any church or religious society, not less than three, who by its rules, usage and general discipline, or otherwise, do not desire to organize and become incorporated under the foregoing provisions relating to corporations may organize and become corporate...by adopting and signing articles containing:
>
> First. The name of the church, society, association or corporation, its general purpose and plan of operation and its place of location.
>
> Second. The terms of admission and qualifications of membership, and the selection of officers and the filling of vacancies, and the

> manner in which the same is to be governed and managed.

Id. at § 562. But although this alternative procedure exists for the creation of religious corporations, the scope of authorized powers of corporations created thereunder is far more limited than a corporation created under the Oklahoma General Corporation Act. Because of this, a church may choose to incorporate as a non-profit corporation under these same general corporation laws and enjoy all of the lawful rights and powers of any other corporation provided by those laws. *See id.* at § 1006(A)(7). And yet under the Federal Government's rigid, categorical view of incorporation (*i.e.* "religious corporation" as distinct from every other kind of corporation), it is not clear that even a church that chose to organize under the Oklahoma General Corporation Act would be entitled to Free Exercise and RFRA protections. The Tenth Circuit recognized that Oklahoma law provides such protection for all corporations. And instead of relying on the Federal Government's inflexible and unrealistic rule, the court looked beyond the mere choice of corporate form to determine whether Hobby Lobby and Mardel were religious organizations deserving of those protections.

B. Just as a church is in the eyes of the law nothing more than a collection of people acting to further a certain religious purpose, a corporation is nothing more than a collection of people acting to further certain purposes—purposes that can be religious.

In Oklahoma, corporations are what they do. When a church organizes itself as an Oklahoma non-profit corporation, the corporation's speech or acts express the faith and religious values of its congregants and undertakes its corporate acts through the congregants who operate and manage the corporation. In this sense, the corporation is a direct extension of the congregants. "General" corporations are no different. A corporation cannot do or say or act except through the natural persons who control it. Corporations will conduct themselves consistently with the purposes and goals of the natural persons who created them and control them, and who undertake actions on their behalf.

And if an Oklahoma corporation organized for-profit chooses to speak and act consistently with the religious faith and beliefs of its corporate directors and owners, those expressions and acts are no less lawful—and no less valid—than the expressions of faith and religious values of non-profit businesses.

Importantly, the "for-profit"/"non-profit" distinction is not one created by religion, but rather by federal tax laws. Indeed, the non-profit status of corporations is not dependent upon the sincerity or active devotion of its members' religious faith or their practice of religious faith, but instead depends upon government-made factors. As a result, whether actions undertaken for religious reasons are within the context of a closely held and operated corporation operating "for- profit" or within the context of a corporation operating "not-for-profit" should not be determinative of the rights of the corporation to claim a religious liberty.

C. Oklahoma has a long tradition of protecting religious liberty through its laws.

Corporations under Oklahoma law can be managed consistently with its creators', operators', and owners' religious faith, as evidenced by Oklahoma's long tradition of protecting and preserving religious liberty. Oklahoma's Constitution provides extensive protection of religious beliefs:

> ***Perfect toleration of religious sentiment shall be secured***, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights.

OKLA. CONST. art. I, § 2 (emphasis added). That constitutional guarantee of religious liberty is hardly a hollow promise. Indeed, those that infringe on the religious liberty of any "person" in Oklahoma are subject to criminal sanctions:

> Any willful attempt, by means of threats or violence to compel any person to adopt, practice or profess any particular form of religious belief, is a misdemeanor.

OKLA. STAT. tit. 21, § 913 (2011).

> Every person who willfully prevents, by threats or violence, another person from performing any lawful act enjoined upon or recommended to such person by the religion which he professes, is guilty of a misdemeanor.

Id. at § 1914. The word "person" as used within the State's Penal Code is specially defined to *include* corporations. *Id.* at § 105 ("The word 'person' includes corporations, as well as natural persons."). As a result, Oklahoma's criminal laws both punish and protect corporations.

Further, Oklahoma undertaken to restrain both itself and all of its branches, departments, agencies, officers and employees, together with its political subdivisions, from interfering with religious liberties through the Oklahoma Religious Freedom Act:

> A. Except as provided in subsection B of this section, no governmental entity shall substantially burden a person's free exercise of religion even if the burden results from a rule of general applicability.
>
> B. No governmental entity shall substantially burden a person's free exercise of religion unless it demonstrates that application of the burden to the person is:
>
> > 1. Essential to further a compelling governmental interest; and
> >
> > 2. The least restrictive means of furthering that compelling governmental interest.[2]

---

[2] OKLA. STAT. tit. 51, § 253 (2011). This statute is substantially the same as the statute included within the federal RFRA, compare, 42 U.S.C. § 2000bb-1, specifically and generally, 42 U.S.C. § 2000bb et seq. Under the State law quoted above, "'Government entity' means any branch, department, agency, or instrumentality of state government, or any official or other person acting under color of state law, or any political subdivision of this

These laws illustrate that Oklahoma law does not treat election of a corporate form offered under the Oklahoma General Corporation Act as a waiver of religious liberty.

D. Hobby Lobby and Mardel are corporations deserving of protection under the Free Exercise Clause and RFRA.

By promulgating and putting into effect the following exception to the contraception mandate, the Federal Government has admitted through its conduct that certain corporations, as "religious organizations," should be completely exempt from the operation of the mandate:

> (A) In developing the binding health plan coverage guidelines specified in this paragraph (a)(1)(iv), the Health Resources and Services Administration shall be informed by evidence and may establish exemptions from such guidelines with respect to group health plans established or maintained by religious employers and health insurance coverage provided in connection with group health plans established or maintained by religious employers with respect to any requirement to cover contraceptive services under such guidelines.
>
> (B) For purposes of this subsection, a 'religious employer' is an organization that meets all of the following criteria:

---

state[.]" and "'Substantially burden' means to inhibit or curtail religiously motivated practice." *Id.* at § 252.

> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended.

45 C.F.R. § 147.130 (eff. August 3, 2011).

By creating this exemption for "religious employers," the Federal Government has acknowledged that both individual and corporate religious rights are implicated by the mandate. And while the Federal Government allows certain corporations, as "religious organizations," to be completely exempt from the operation of the mandate it disallows a similar organization merely because it is organized as "for-profit." The error in not allowing "for-profit" corporations to claim these exemptions is in concluding that the religious views of persons operating those corporations are somehow impacted differently, or in a manner that deserves less respect and protection, than those corporations that meet the necessary exemption criteria.

And remarkably, Hobby Lobby and Mardel do not seek to avoid providing *all* contraceptives through their insurance plan. Instead, they only seek to be relieved from that limited portion of contraceptives they believe are analogues to abortion. Consequently, the relief they seek from the mandate is much narrower and of much less impact upon the public policy sought to be promoted by the Federal Government than the wholesale exemption granted to some others.

In seeking this narrow relief, the record shows that the Green Family made a strong showing of their operation of their family's corporations in a manner consistent with their religious faith. The showing made by the Green Family in this regard does not appear to have been substantially, if at all, contested by the Federal Government. David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett have all declared that their personal religious faith is "Christian" and that as corporate officers and management trustees they have sought to operate the family's corporations "in harmony with God's laws and in a manner which brings Glory to God." The Green Family serves as trustees of the management trust that owns all of the voting stock of both corporations. Mardel specializes in the sale of Christian materials such as Bibles, books, movies, apparel, church and educational supplies. Hobby Lobby is a craft store selling art and craft supplies, home decor, and holiday decorations. In fact both Hobby Lobby's and Mardel's publically proclaimed purpose is built on their religious beliefs. Hobby Lobby's publically proclaimed purpose is:

> In order to effectively serve our owners, employees, and customers the Board of Directors is committed to:

> Honoring the Lord in all we do by operating the company in a manner consistent with Biblical principles.
>
> Offering our customers an exceptional selection and value.
>
> Serving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families.
>
> Providing a return on the owners' investment, sharing the Lord's blessings with our employees, and investing in our community.
>
> We believe that it is by God's grace and provision that Hobby Lobby has endured. He has been faithful in the past, and we trust Him for our future.[3]

Similarly, Mardel's publically proclaimed purpose is:

> Mardel Christian & Education is a faith-based company dedicated to renewing minds and transforming lives through the products we sell and the ministries we support. To this end, we provide a large selection of Bibles, books, movies, gifts, music, kid products, apparel, church and educational supplies, and homeschool curriculum. We offer quality products at the best prices on Mardel.com and across our 35 stores located in the central region of the United States. Our products share truth,

---

[3] *See* http://www.hobbylobby.com/our_ company/purpose.cfm.

> teach knowledge, offer encouragement, inspire worship, and bring joy by fulfilling the vision of Mardel to make a difference and give hope. Furthering our mission, we faithfully give 10% of our net profits to help print Bibles translated by Wycliffe Bible Translators. Wycliffe Bible Translators is a ministry dedicated to translating the Bible into the language of every people group around the World. We are a resource center equipping the whole person specializing in the provision of all your spiritual and intellectual needs.[4]

The Green Family described in specific detail the numerous actions they have undertaken to operate their family businesses consistently with their professed faith. For instance, they provide health insurance to their companies' employees through a self-insured plan that is administered conscientiously and consistently with their religious beliefs. And while the Green Family's religious beliefs do not prevent them from providing health insurance coverage for contraceptives generally, their religious beliefs do prohibit them from deliberately providing insurance coverage for prescription drugs or devices that are inconsistent with their faith, particularly abortion-causing drugs and devices. The Green Family believes that the prevention of the implantation of a human embryo into the wall of the uterus by the use of drugs or devices amounts to abortion and have a religious objection to providing coverage for such items in their companies' health plans. The Federal Government's regulations require all employers of fifty or more employees whose group health care plans were not "grandfathered" or made eligible for exemption under the regulations to provide coverage "without cost sharing, for [a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity as prescribed by a provider." 77 Fed. Reg. 8725-01 (February 15, 2012). These regulations require the Green Family to provide medication and devices that they believe cause the abortion and death of human embryos.

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[4] *See* http://www.mardel.com/about/.

As shown above, the Oklahoma General Corporation Act allows a general corporation to pursue any lawful purpose—including the religious purposes and practices the Green Family further in the operation of their companies. These are all lawful corporate purposes and practices for a general corporation organized under Oklahoma law. Religious purposes furthered by the Green Family are no less lawful or valid than similar purposes and practices reflected in the operation of non-profit "religious" corporations that also may be organized under Oklahoma laws, and who may be exempt from the Federal Government's broad contraceptives mandate. As outlined above, the Green Family showed the appeals court that they regulate the operation and mission of their corporations as a witness to the existence of their faith. Certainly, no one from the Federal Government will undertake to personally include the contraception drugs, devices and services in the Green Family corporations' self-insurance plans. The Federal Government will instead force the Green Family to do so. The mandate violates the Green

Family's faith by forcing them to undertake to provide in their self-insurance coverage what the Green Family believes to be abortion-causing drugs and devices.

Religious faith is more than mere belief. It is practice. Even the district court recognized the sincere religious faith the Green Family professes as much more than a mere intellectual exercise. The Green Family plainly wants to avoid being complicit in what they believe is the destruction of unborn human life. Forcing them to personally undertake to include certain abortion-causing drugs, devices and educational services into their companies' self-insurance plans does direct violence to their sincerely held religious faith. Operation of the Green Family's corporations in a manner consistent with the Green Family's religious faith is no less worthy of respect and protection than is the religious faith practiced by church members through a church also organized as a corporation under Oklahoma General Corporation Act.

In short, if any corporations organized under the Oklahoma General Corporation Act are deserving of religious liberty, these corporations are. A categorical denial of protection such as the Federal Government is suggesting is erroneous, and will lead to a result that is wholly inconsistent with Oklahoma's tradition of protecting religious liberty.

CONCLUSION

For these reasons, the judgment below should be affirmed.

Respectfully Submitted,

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BRIEF

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AND
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On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF AMICI CURIAE THE OVARIAN CANCER NATIONAL ALLIANCE AND ITS PARTNER MEMBERS IN SUPPORT OF THE GOVERNMENT

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QUESTIONS PRESENTED

1. Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq*., allows a for-profit corporation to deny its employees the health coverage of contraceptives to which the employees are otherwise entitled by federal law, based on the religious objections of the corporation's owners.

2. Whether the requirement that non-exempted, non-grandfathered group health plans include coverage of contraceptives violates the Free Exercise Clause of the First Amendment.

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BRIEF OF AMICI CURIAE THE OVARIAN CANCER NATIONAL ALLIANCE AND ITS PARTNER MEMBERS IN SUPPORT OF THE GOVERNMENT

STATEMENT OF INTEREST[1]

The Ovarian Cancer National Alliance and its partner members (collectively, the "Alliance") are leading the nationwide effort to save the lives of women with ovarian cancer. Toward that end, the Alliance advocates for increased research funding for the development of an early detection test, improved health care practices, and life-saving treatment protocols. The Alliance has filed amicus briefs in other cases involving the Affordable Care Act's contraceptive-coverage provision in the courts of appeals. *See* Br. of the Ovarian Cancer Nat'l Alliance, *et al.*, as *Amici Curiae* in Support of Appellees, *Eden Foods, Inc.* v. *Sebelius*, No. 13-1677 (6th Cir. July 30, 2013); Br. of the Ovarian Cancer Nat'l Alliance, *et al.*, as *Amici Curiae* in Support of Appellees, *Gilardi* v. *Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir. June 14, 2013). It is participating here because the contraceptive-coverage provision takes an important step toward increasing access to treatments that reduce the risk of ovarian and other deadly gynecologic cancers, but the position of the companies and shareholders challenging that provision jeopardizes that access for thousands of women nationwide.

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[1] No party or counsel for a party authored or paid for this brief in whole or in part, or made a monetary contribution to fund the brief's preparation or submission. No one other than the *amici curiae* or their counsel made a monetary contribution to the brief. All parties have consented to the filing of this brief in letters lodged with the Clerk.

Research shows that for many women at higher risk of developing ovarian cancer, oral contraceptive use can be the difference between developing ovarian cancer and not developing it. Although Plaintiffs in these two cases do not expressly object to most oral contraceptives (as opposed to certain other contraceptives), a decision by this Court in Plaintiffs' favor would allow employers to claim entitlement to exemption from the contraceptive-coverage provision as to *all* FDA-approved contraceptives, including oral contraceptives. That is the conclusion at least two courts of appeals have already reached in cases involving plaintiffs similar to the ones here. *See*

Gilardi v. *Dep't of Health & Human Servs.*, 733 F.3d 1208, 1224 (D.C. Cir. 2013); *Korte* v. *Sebelius*, 735 F.3d 654, 687 (7th Cir. 2013). And at least two petitions for certiorari addressing that broader question remain pending in this Court. *See Eden Foods, Inc.* v. *Sebelius*, No. 13-591 (Nov. 12, 2013); *Gilardi* v. *Dep't of Health & Human Servs.*, No. 13-567 (Nov. 5, 2013). The Alliance accordingly believes that its unique insight into the cancer-preventive benefit of oral and other contraceptives may aid this Court in addressing the far-reaching implications of the questions presented.

Ovarian cancer is deadly; it kills over half the women diagnosed with it within five years, amounting to thousands of American women each year. And because there is currently no way to reliably detect ovarian cancer at an early stage, prevention remains the primary weapon against this devastating disease. The contraceptive-coverage provision ensures that women nationwide have access, without cost-sharing, to this important preventive treatment in the battle against ovarian and other gynecologic cancers. Under Plaintiffs' interpretation of the Religious Freedom Restoration Act (RFRA), that access would be subject to veto based solely on the religious views of the owners or controlling shareholders of a woman's for-profit employer. That outcome is neither sound as a matter of health policy nor compelled by RFRA.

SUMMARY OF ARGUMENT

1. The medical practice of prescribing contraceptives to reduce a woman's risk of developing ovarian and other gynecologic cancers played a key role in the government's decision-

making when it implemented the women's preventive-services provision of the Affordable Care Act. The contraceptive-coverage provision is thus based, in part, on the government's compelling interest in ensuring that women have cost-free access to this important medical treatment.

Plaintiffs' RFRA theory jeopardizes access to this critical preventive care. Oral contraceptives and intrauterine devices (IUDs) are widely recognized preventive therapies for reducing the risk of ovarian, endometrial, and other gynecologic cancers. These cancers are particularly deadly. Ovarian cancer kills thousands of American women each year. More than half of the women diagnosed with the disease will die within five years, and with no effective way to detect ovarian cancer at an early stage, prevention remains the most effective tool to combat the disease. Endometrial cancer—which forms in the tissue lining of the uterus—likewise kills thousands of American women every year. For these women contraceptives are a potentially life-saving cancer-preventive treatment. Affordable access to such treatment—to which employees in most employer-sponsored health plans are entitled under federal law—should not be subject to veto by a for-profit corporation's owners or controlling shareholders. The claims of entitlement to a religious exemption from the contraceptive-coverage provision made by Hobby Lobby Stores, Inc., Mardel, Inc., and Conestoga Wood Specialties Corp. (collectively the "Corporate-Plaintiffs")—as well as by the individual owners of these for-profit corporations (collectively the "Individual-Plaintiffs")—should accordingly be rejected.

2. The RFRA claims in these cases require the Individual-Plaintiffs to prove that their exercise of religion is "substantially burdened." In addition to the reasons explained by the government, *see* Hobby Lobby Petrs' Br. 31-37, there is an independent reason why any burden on the Individual-Plaintiffs' exercise of religion—allegedly caused by owning a business that complies with federal law requiring employee health coverage for the full range of preventive care—is too attenuated to be "substantial" within the meaning of RFRA. The individual owners of a for-profit company are "separated by multiple steps from both the coverage that the company health plan provides and from the decisions that individual employees make in consultation with their physicians as to what covered services they will use." *Grote* v. *Sebelius*, 708 F.3d 850, 858 (7th Cir. 2013) (Rovner, J., dissenting). And because contraceptives are often prescribed and taken for non-contraceptive purposes—including to reduce the risk of ovarian, endometrial, and other deadly gynecologic cancers—their use in many situations will not result in the so-called "abortifacient" effect that individuals who own for-profit corporations like Hobby Lobby, Mardel, and Conestoga Wood object to on religious grounds. In those circumstances, the companies' coverage of the drug in their employee health plans would not facilitate a practice to which the individual owners religiously object, further attenuating any burden on any individual's exercise of religion. Indeed, under patient privacy laws, an employer is barred from knowing what medical treatment its employees undertake, let alone the purpose for any course of treatment. These additional layers of attenuation mean that any burden on any individual's religious

exercise is a hypothetical one, which dooms the RFRA claims in these cases.

ARGUMENT

I. THE CONTRACEPTIVE-COVERAGE PROVISION FURTHERS A COMPELLING GOVERNMENTAL INTEREST IN EXPANDING ACCESS TO TREATMENTS THAT REDUCE THE RISK OF OVARIAN AND OTHER GYNECOLOGIC CANCERS

The requirement that most health plans provide their female members with access to contraception is based, in part, on the scientific reality that, for many women, contraceptives provide significant medical benefits wholly unrelated to preventing pregnancy. The Health Resources and Services Administration (HRSA) took into account these "non-contraceptive" benefits that contraceptives have for many women, including reducing their risk of cancer and other serious medical conditions. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,872 (July 2, 2013) (noting that "there are demonstrated preventive health benefits from contraceptives relating to conditions other than pregnancy"). Indeed, the Institute of Medicine (IOM) report relied upon by HRSA specifically explained that the "[l]ong-term use of oral contraceptives has been shown to reduce a woman's risk of endometrial cancer."[2] As the IOM report makes clear, the contraceptive-coverage provision is based, in part, on the government's compelling interest in ensuring that women have cost-free access to this important preventive treatment.

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[2] *See* IOM, *Clinical Preventive Services for Women: Closing the Gaps* at 107 (2011), *available at* http://www.iom.edu/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx.

Myriad studies confirm that the use of oral contraceptives and intrauterine devices (IUDs) corresponds to a lower risk of certain deadly cancers in women, including ovarian, endometrial, and other gynecologic cancers. Requiring most health plans to provide coverage for contraceptives thus promotes women's health by ensuring that all women, regardless of their employer, have access to medical treatments that effectively reduce the risk of some of the most lethal cancers. That access—to which women are entitled as a matter of federal law—should not be subject to a religion-based veto by the owners or controlling shareholders of the arts-and-crafts store, kitchen-cabinet manufacturer, or other for-profit corporation for which a woman works.

1. Oral contraceptives offer life-saving preventive health benefits by reducing the risk of ovarian cancer—a disease that kills more American women each year than any other gynecologic malignancy[3] and kills more than half of the women it afflicts within five years of diagnosis.[4] In 2013 alone, the National Cancer Institute (NCI) estimates that 22,240 women will be diagnosed with the disease and

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[3] American Cancer Soc'y, *Cancer Facts & Figures 2013*, *available at* http://www.cancer.org/acs/groups/content/@epidemiologysurveilance/documents/document/acspc-036845.pdf.

[4] National Cancer Inst., *Surveillance Epidemiology and End Results, Stat Fact Sheet: Ovary Cancer*, http://seer.cancer.gov/statfacts/html/ovary.html (last visited Jan. 27, 2014).

14,030 more will die from it.[5] And since there is presently no reliable way to detect ovarian cancer at an early stage, most women learn they have the disease only once it is far too late for treatment to have a high probability of success.[6]

Because this form of cancer is so lethal and evades early detection, prevention is the best weapon to combat the disease. Yet few preventive treatments exist. And among those that do exist, some have drastic consequences. Prophylactic oophorectomy (the preventive removal of the ovaries) and tubal ligation, for example, are invasive surgeries that irreversibly prevent a woman from ever conceiving a child.[7]

A far less invasive option is the use of oral contraceptives, which remain one of the few effective non-invasive preventive options.[8] Indeed, study after study has confirmed the significant protective association between oral contraceptive use and the risk of ovarian cancer. As a 1999 literature survey concluded, the scientific consensus is that "[t]he protection offered by oral contraceptives against ovarian cancer risk is one of the most consistent epidemiological findings * * *."[9] That significant protective association between oral contraceptive use and the risk of ovarian cancer has been replicated in both retrospective "case-control" studies (which compare women diagnosed with ovarian cancer to women who did not develop the disease) and prospective "cohort" studies (which follow a sample group of women over time and later evaluate whether they develop ovarian cancer).[10]

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[5] NCI, *Ovarian Cancer*, http:// www.cancer.gov/cancertopics/ types/ovarian (last visited Jan. 27, 2014).

[6] NCI, *A Snapshot of Ovarian Cancer*, http:// www.cancer.gov/ researchandfunding/snapshots/ovarian (last visited Jan. 27, 2014).

[7] NCI, *Ovarian Cancer Prevention*, http://www.cancer.gov/ cancertopics/pdq/prevention/ovarian/Patient/page3 (last visited Jan. 27, 2014).

[8] Francesmary Modugno *et al.*, *Oral Contraceptive Use, Reproductive History, and Risk of Epithelial Ovarian Cancer in Women With and Without Endometriosis*, 191 Am. J. Obstet. Gynecol. 733, 738 (2004); *see also* Roberta B. Ness *et al.*, *Risk of Ovarian Cancer in Relation to Estrogen and Progestin Dose and Use Characteristics of Oral Contraceptives*, 152 Am. J. Epidemiol. 233, 233 (2000) ("Oral contraceptives are thought to be the most powerful known chemopreventive agents for ovarian cancer.").

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[9] Carlo La Vecchia & Silvia Franceschi, *Oral Contraceptives and Ovarian Cancer*, 8 Eur. J. Cancer Prev. 297, 297 (1999).

[10] *See, e.g.*, Mette Tuxin Faber *et al.*, *Oral Contraceptive Use and Impact of Cumulative Intake of Estrogen and Progestin on Risk of Ovarian Cancer*, 24 Cancer Causes Control 2197 (2013); Laura J. Havrilesky *et al.*, *Oral Contraceptive Pills as Primary Prevention for Ovarian Cancer*, Am. Coll. of Obstet. & Gynecol. 1 (2013); Valerie Beral *et al.*, *Ovarian Cancer and Oral Contraceptives: Collaborative Reanalysis of Data from 45 Epidemiological Studies Including 23,257 Women with Ovarian Cancer and 87,303 Controls*, 371 Lancet 303, 307-12 (2008); Julia B. Greer *et al.*, *Androgenic Progestins in Oral Contraceptives and the Risk of Epithelial Ovarian Cancer*, 105 Am. Coll. Obstet. & Gynecol. 731, 735 (2005); Ness *et al.*, *supra*, at 239; Harvey A. Risch *et al.*, *Parity, Contraception, Infertility, and the Risk of Epithelial Ovarian Cancer*, 140 Am. J. Epidemiol. 585, 589 (1994); Susan E. Hankinson *et al.*, *A Quantitative Assessment of Oral Contraceptive Use and Risk of Ovarian Cancer*, 80 Am. J. Obstet. Gynecol. 708, 712-14 (1992); Alice S. Whittemore *et al.*, *Characteristics Relating to Ovarian Cancer Risk: Collaborative Analysis of 12 US Case-Control*

This research demonstrates that oral contraceptives play an important role in medical treatment wholly apart from preventing pregnancy. The real-world results are profound for families throughout the country: Contraceptive use has saved thousands of lives. A 2008 study, for example, concluded that oral contraceptives have prevented some 200,000 cases of ovarian cancer worldwide since the drugs were first approved, saving 100,000 women who otherwise would have died from the disease.[11] That number is "likely to increase substantially in the future, with the further ageing of past users of oral contraceptives and the increasing numbers of new users * * * ."[12]

Accordingly, it is critical that women—particularly those at a high risk for ovarian cancer—have access to affordable oral contraceptives. Absent the contraceptive-coverage provision, the out-of-pocket costs for a ten-year course of oral contraceptives can reach thousands of dollars, even when a woman's

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Studies – II. Invasive Epithelial Ovarian Cancers in White Women, 136 Am. J. Epidemiol. 1184, 1192 (1992); The Cancer and Steroid Hormone Study of the Ctrs. for Disease Control and the Nat'l Inst. of Child Health and Human Dev., *The Reduction in Risk of Ovarian Cancer Associated with Oral-Contraceptive Use*, 316 N.E. J. Med. 650, 654 (1987). *But see* Xiao Ou Shu *et al.*, *Population-Based Case-Control Study of Ovarian Cancer in Shanghai*, 49 Cancer Res. 3670, 3673 (1989) (finding a slight increase in ovarian cancer risk associated with oral contraceptive use, although the increase was not significant).

[11] Beral *et al.*, *supra*, at 307, 312.

[12] *Id.*

health insurance plan covers these drugs.[13] The amounts paid by individuals whose insurance does not cover contraceptives at all are even higher.[14] Such substantial out-of-pocket costs may prevent women from maintaining a course of oral contraceptive use, denying these women access to an effective, minimally invasive, chemopreventive agent to reduce their risk of ovarian cancer.

That access is even more important for women at higher risk for ovarian cancer, including women with a family history of the disease and women with endometriosis. Like some breast cancers, some ovarian cancers are caused in part by a familial component,[15] and a history of ovarian cancer in two or more first-degree relatives is associated with a significant increase in the risk of the disease.[16]

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[13] *See* Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 Guttmacher Pol. Rev 7, 9-10 (2011) (providing monthly out-of-pocket costs for contraceptives with insurance coverage); James Trussell *et al.*, *Cost-Effectiveness of Contraceptives in the United States*, 79 Contraception 5, 10 (2009) (noting the portion of the cost of contraceptives paid by insurers).

[14] *See* Sonfield, *supra*, at 9-10 (noting that the out-of-pocket costs for individuals with insurance coverage of contraceptives averages $14 per month, whereas the out-of-pocket costs for individuals without such coverage averages $60 per month, not including the cost of the visit to the healthcare provider).

[15] NCI, *Genetics of Breast and Ovarian Cancer (PDQ®)*, http://www.cancer.gov/cancertopics/pdq/genetics/breast-and-ovarian/HealthProfessional/page1 (last visited Jan. 27, 2014).

[16] NCI, *BRCA1 and BRCA2: Cancer Risk and Genetic Testing*, http://www.cancer.gov/cancertopics/factsheet/Risk/BRCA (last visited Jan. 27, 2014).

Moreover, there is clear evidence that mutations in the *BRCA1* and *BRCA2* genes account for a large proportion of familial ovarian cancer, conferring a very high lifetime risk of developing the disease.[17] By age 70, *BRCA1* mutation carriers face a 16 to 66 percent chance of developing ovarian cancer, and BRCA2 mutation carriers face an 11 to 27 percent chance of developing the disease.[18] Several studies demonstrate that oral contraceptive use reduces the risk among women with these genetic mutations,[19] potentially more so than in the general population.[20]

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[17] *See* S. Iodice *et al.*, *Oral Contraceptive Use and Breast or Ovarian Cancer Risk in BRCA1/2 Carriers: A Meta-Analysis*, 46 Euro. J. of Cancer 2275, 2276 (2010) (discussing strong evidence supporting association between BRCA1 and BRCA2 mutations and an increased risk for ovarian cancer); Baruch Modan *et al.*, *Parity, Oral Contraceptives, and the Risk of Ovarian Cancer Among Carriers and Noncarriers of a BRCA1 or BRCA2 Mutation*, 345 N.E. J. Med. 235, 235 (2001) (same).

[18] Antonis C. Antoniou *et al.*, *Reproductive and Hormonal Factors, and Ovarian Cancer Risk for BRCA1 and BRCA2 Mutation Carriers: Results from the International BRCA1/2 Carrier Cohort Study*, 18 Cancer Epidemiol. Markers 601, 601 (2009).

[19] John R. McLaughlin *et al.*, *Reproductive Risk Factors for Ovarian Cancer in Carriers of BRCA1 and BRCA1 Mutations: A Case-Control Study*, 8 Lancet 26, 31 (2007); Steven A. Narod, *Oral Contraceptives and the Risk of Hereditary Ovarian Cancer*, 339 N.E. J. Med. 424, 426 (1998). *But see* Modan *et al.*, *supra*, at 238 (finding oral contraceptive use had no protective effect in a study of Israeli women with *BRCA1* and *BRCA2* mutations).

[20] Iodice *et al.*, *supra*, at 2282 (finding a 50 percent reduction in risk); Jacek Gronwald *et al.*, *Influence of Selected Lifestyle Factors on Breast and Ovarian Cancer Risk in BRCA1 Mutation Carriers from Poland*, 95 Breast Cancer Res. &

For these women, oral contraceptives may be the only viable option to reduce their risk of ovarian cancer while still allowing them to someday conceive.

2. Oral contraceptives also play a critical role for women at risk of endometrial cancer. A deadly cancer that forms in the tissue lining the uterus, endometrial cancer is the most common invasive gynecologic cancer among U.S. women. Approximately 49,560 new cases are expected in 2013,[21] and more than 8,000 women are expected to die of endometrial cancer this year.[22] Endometrial cancer typically occurs in post-menopausal women, with an average age of 60 at diagnosis. There are currently no effective screening or detection methods for endometrial cancer.[23] Use of combination oral

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Treatment 105, 107 (2006) (finding an 80 percent reduction in risk); Beatrice Godard *et al.*, *Risk Factors for Familial and Sporadic Ovarian Cancer Among French Canadians: A Case-Control Study*, 170 Am. J. Obstet. Gynecol. 403, 406 (1998). *But see* Alice S. Whittemore *et al.*, *Oral Contraceptive Use and Ovarian Cancer Risk Among Carriers of BRCA1 or BRCA2 Mutations*, 91 Br. J. Cancer 1911, 1913 (2004) (finding the reduction in risk among carriers to be consistent with, but somewhat weaker than, reductions observed in the general population).

[20] Modugno *et al.*, *supra*, at 736.

[21] NCI, *Endometrial Cancer Screening: Significance*, http://www.cancer.gov/cancertopics/pdq/screening/endometrial/HealthProfessional/page2 (last visited Jan. 27, 2014).

[22] NCI, *Surveillance Epidemiology and End Results, Stat Fact Sheet: Endometrial Cancer*, http://seer.cancer.gov/statfacts/html/corp.html (last visited Jan. 27, 2014).

[23] NCI, *Endometrial Cancer Screening: Evidence of Benefit*, http://www.cancer.gov/cancertopics/pdq/screening/endometrial/HealthProfessional/page3 (last visited Jan. 27, 2014).

contraceptives (containing estrogen and progestin) is thus an important part of the fight against endometrial cancer.[24]

3. Intrauterine devices (IUDs) are also used to help reduce the risk of deadly gynecologic cancers. In particular, several studies have linked IUD use with a reduced risk of endometrial cancer.[25] Other studies show that women who have at some point used an IUD experience a significant protective effect—i.e., a reduction in risk of developing endometrial cancer by one-third to one-half—compared to women who have never used an IUD,

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[24] The Cancer and Steroid Hormone Study of the Ctrs. for Disease Control and the Nat'l Inst. of Child Health and Human Dev., *Combination Oral Contraceptive Use and the Risk of Endometrial Cancer*, 257 J. Am. Med. Ass'n 796, 796-797 (1987); M.P. Vessey & R. Painter, *Endometrial and Ovarian Cancer and Oral Contraceptives—Findings in a Large Cohort Study*, 71 Br. J. Cancer 1340, 1340 (1995).

[25] Abraham Benshushan *et al.*, *IUD Use and the Risk of Endometrial Cancer*, 105 Euro. J. Obstet. & Gynecol. & Reprod. Biology 166, 167 (2002); Deirdre A. Hill *et al.*, *Endometrial Cancer in Relation to Intra-Uterine Device Use*, 70 Int'l J. Cancer 278, 279 (1997); Susan Sturgeon *et al.*, *Intrauterine Device Use and Endometrial Cancer Risk*, 26 Int'l J. Epid. 496, 498 (1997); F. Parazzini *et al.*, *Intrauterine Device Use and Risk of Endometrial Cancer*, 70 Br. J. Cancer 672, 673 (1994); Xavier Castellsague *et al.*, *Intra-uterine Contraception and the Risk of Endometrial Cancer*, 54 Int'l J. Cancer 911, 915 (1993). *But see* Karin A. Rosenblatt *et al.*, *Intrauterine Devices and Endometrial Cancer*, 54 Contraception 329, 330-31 (1996) (finding an association between IUD use and reduced risk of endometrial cancer that was not statistically significant, but that was stronger for copper IUDs than other types of IUDs); Risch *et al.*, *supra*, at 591 (observing "essentially no" association with use of an IUD).

even after controlling for factors such as age, childbearing, and family history.[26]

In addition, IUDs may help prevent cervical cancer. A recent analysis of several international studies, for example, consistently found that women who used an IUD for at least one year reduced their risk of cervical cancer by one half, compared to women who had never used an IUD.[27]

4. As the foregoing research demonstrates, contraceptives provide significant medical benefits that help save women's lives. These medical benefits have nothing to do with the prevention of pregnancy. This preventive-health effect is—beyond dispute—a compelling governmental interest. *See Gilardi*, 733 F.3d at 1240 (Edwards, J., concurring in part and dissenting in part). The contraceptive-coverage provision furthers that interest by ensuring women covered by most health plans have access to these life-saving treatments without cost sharing. Yet under Plaintiffs' interpretation of RFRA, women (and their families) may lose this access basely solely on the religious objections of the owners or controlling shareholders of their for-profit employers. This Court should reject that interpretation and ensure that access to life-saving preventive medical care turns on the health risks of the patient, not the

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[26] Benshushan *et al.*, *supra*, at 167; Castellsague *et al.*, *supra*, at 912.

[27] Xavier Castellsague *et al.*, *Intrauterine Device Use, Cervical Infection with Human Papillomavirus, and Risk of Cervical Cancer: A Pooled Analysis of 26 Epidemiological Studies*, 12 Lancet Oncol. 1023, 1028 (2011).

religious views of the owner or controlling shareholder of the patient's employer.

II. BECAUSE CONTRACEPTIVES ARE TAKEN FOR NON-CONTRACEPTIVE REASONS—INCLUDING FOR THEIR CANCER-PREVENTIVE EFFECT—ANY BURDEN ON THE INDIVIDUAL-PLAINTIFFS' EXERCISE OF RELIGION IS TOO ATTENUATED TO BE SUBSTANTIAL WITHIN THE MEANING OF RFRA

To the extent this Court perceives any burden on the Individual-Plaintiffs' exercise of religion, that burden does not constitute a "substantial[] burden" within the meaning of RFRA. 42 U.S.C. § 2000bb-1(a); *see id.* § 2000bb-1(b). At bottom, the Individual-Plaintiffs' complaint "is that funds, which [the companies they own] will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [the] plan, subsidize *someone else's* participation in an activity that is condemned by [the Individual-Plaintiffs'] religion." *Hobby Lobby Stores, Inc.* v. *Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012) (internal quotation marks omitted). The health plan "covers many medical services, not just contraception," and the Individual-Plaintiffs are "separated by multiple steps from both the coverage that the company health plan provides and from the decisions that individual employees make in consultation with their physicians as to what covered services they will use." *Grote*, 708 F.3d at 858, 865 (Rovner, J., dissenting). Indeed, federal privacy regulations prohibit employers from learning "whether individual employees purchase contraceptive products, or about any other information regarding employees' health care decisions." *Gilardi*, 733 F.3d at 1238 (Edwards, J., concurring in part and dissenting in part) (citing 45 C.F.R. §§ 164.508 & 164.510). The Alliance accordingly agrees that any impact on the Individual-Plaintiffs is too indirect and attenuated to qualify as a "substantial burden" on their exercise of religion. *See* Hobby Lobby Petrs' Br. 31-37.

Yet the incidental burden on the Individual-Plaintiffs' exercise of religion is even more attenuated than the government points out. Because contraceptives are used for preventive and medical reasons aside from pregnancy-prevention, that burden is entirely hypothetical. When the contraceptives to which the Individual-Plaintiffs object are prescribed and taken for non-contraceptive purposes—including, as discussed, to reduce the risk of ovarian, endometrial, and other deadly gynecologic cancers—their use often does not result in the so-called "abortifacient" effect forbidden by the Individual-Plaintiffs' religious beliefs. Put another way, when a woman, in consultation with her doctor, decides to take a contraceptive for its chemopreventive or other non-contraceptive benefit, the coverage of the drug in the Corporate-Plaintiffs' employee health plans does not facilitate contraception in any fashion, "abortifacient" or otherwise. In those circumstances, the Individual-Plaintiffs are not complicit, through the corporations they own, with activity their religion deems wrong, so the Individual-Plaintiffs' exercise of religion is not burdened at all, let alone substantially. That additional layer of attenuation dooms their RFRA claims.

A contrary holding would strip the word "substantial" of any meaning, "because the slightest obstacle to religious exercise * * *—however minor the burden it were to impose—could then constitute a burden sufficient to trigger [the] requirement that the regulation advance a compelling governmental interest by the least restrictive means." *Civil Liberties for Urban Believers* v. *City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003). Accordingly, the Court need not accept the Individual-Plaintiffs' "legal conclusion, cast as a factual allegation, that [their] religious exercise is substantially burdened." *Kammerling* v. *Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008). Doing so would lead to countless RFRA claims, with the potential for "myriad exceptions flowing from a wide variety of religious beliefs." *United States* v. *Lee*, 455 U.S. 252, 260 (1982). And in this context, such exceptions would allow private employers to veto women's affordable access to an important medical benefit to which they are otherwise entitled under federal law. Congress could not have intended for RFRA to sweep so far.

Indeed, an examination of RFRA's drafting history demonstrates that Congress intended to circumscribe RFRA's reach. As Senator Kennedy explained when he introduced the amendment adding "substantially" to what originally was only "burden": "this amendment * * * is intended to make it clear that the compelling interest standards set forth in the act provides only to Government actions to place a substantial burden on the [exercise of religion]." 139 Cong. Rec. S14,352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy). Senator Hatch, a sponsor of RFRA, further added that RFRA "does not require the Government to justify every action that has some effect on religious exercise." *Id.* (statement of Sen. Hatch). Congress's inclusion of "substantially" thus reflects its expectation that RFRA "would not require [justification pursuant to the compelling-interest test] for every government action that may have some incidental effect on [religion]." S. Rep. No. 103-111, at 9 (1993); *see also Gilardi*, 733 F.3d at 1235-36 (Edwards, J., concurring in part and dissenting in part) (discussing RFRA's drafting history). To give "substantially" some independent meaning beyond what "burden" already conveys, this Court should conduct "a qualitative assessment of the burden that a challenged statute or other government action imposes on an individual's exercise of religion." *Korte*, 735 F.3d at 705 (Rovner, J., dissenting). Conducting that inquiry here, it is plain that the burden on the Individual-Plaintiffs' exercise of religion is, at most, incidental. And an incidental burden is, as a matter of law, insufficient to trigger a RFRA claim.

CONCLUSION

The judgment of the court of appeals in No. 13-354 should be reversed, and the judgment of the court appeals in No. 13-356 should be affirmed.

Respectfully submitted,

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Counsel for Amici Curiae

January 2014

APPENDIX

LIST OF AMICI PARTNER MEMBERS OF THE OVARIAN CANCER NATIONAL ALLIANCE

4th Angel Mentoring Program: The Scott Hamilton CARES Initiative

Arkansas Ovarian Cancer Coalition

Betty Allen Ovarian Cancer Foundation

Bluegrass Ovarian Cancer Support Inc.

Bright Pink

Cancer Support Community

CancerDancer

Capital Ovarian Cancer Organization

Caring Together, Inc.

CCare Lynch Syndrome

Celma Mastry Foundation for Ovarian Cancer Research Inc.

Colorado Ovarian Cancer Alliance

Dancing for a Cure

Diane's Voice

Feel Teal Club

FORCE: Facing Our Risk of Cancer Empowered

Georgia Ovarian Cancer Alliance

GRACE'S

HERA Women's Cancer Foundation

Hope for Heather

J's Hope-Ovarian Cancer Awareness, Julianne Guidry Benefit Inc.

JLR Foundation

Kaleidoscope of Hope Foundation

Karene C Pace Ovarian Cancer Foundation Inc.

Michigan Ovarian Cancer Alliance

Midwest Ovarian Cancer Association

Minnesota Ovarian Cancer Alliance, Inc.

Nine Girls Ask for a Cure for Ovarian Cancer

No To O

Norma Leah Foundation

Norma Livingston Ovarian Cancer Foundation

OASIS of Southern California

Ovacome Ovarian Cancer Support and Advocacy of Tampa Bay

Ovar'Coming Together

Ovarcome

Ovarian and Breast Cancer Alliance

Ovarian Awareness of Kentucky

Ovarian Cancer Advocacy Alliance of San Diego

Ovarian Cancer Alliance of Arizona

Ovarian Cancer Alliance of California

Ovarian Cancer Alliance of Florida

Ovarian Cancer Alliance of Greater Cincinnati

Ovarian Cancer Alliance of Ohio

Ovarian Cancer Alliance of Oregon and Southwest Washington

Ovarian Cancer Awareness Foundation of the MidSouth

Ovarian Cancer Circle (Inspired by Robin Babbini)

Ovarian Cancer Coalition of Greater California

Ovarian Cancer Education and Research Network, Inc. (OCERN)

Ovarian Cancer Orange County Alliance

Ovarian Cancer TOGETHER!

Perspectives

Promises of Hope

Ribbons to Remember Foundation, Inc.

Rose Mary Flanagan Ovarian Cancer Foundation

Sandy Rollman Ovarian Cancer Foundation, Inc.

SHARE: Self-Help for Women with Breast or Ovarian Cancer

Sherie Hildreth Ovarian Cancer (SHOC)

Small Cell Ovarian Cancer Foundation

South Carolina Ovarian Cancer Foundation

Space Coast Ovarian/Gynecologic Cancer Alliance

St. Louis Ovarian Cancer Awareness

Stop GCT

Teal Divas

Teal Tea Foundation

Teal Toes

The Sacred Sisterhood of Wonderful Wacky Women Redneck Riviera Chapter, Inc.

The University of Texas MD Anderson Cancer Center

Turn the Towns Teal

Western New York Ovarian Cancer Project

Wisconsin Ovarian Cancer Alliance

You'll Never Walk Alone

AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
FILED
JAN 23 2014
OFFICE OF THE CLERK

Nos. 13-354 and 13-356

In the
Supreme Court of the United States

◆

KATHLEEN SEBELIUS,
Secretary of Health and Human Services, et al.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., et al.,
Respondents.
and
CONESTOGA WOOD
SPECIALTIES CORPORATION, et al.,
Petitioners,
v.
KATHLEEN SEBELIUS,
Secretary of Health and Human Services, et al.,
Respondents.

◆

**On Writ of Certiorari
to the United States Court of Appeals
for the Tenth and Third Circuits**

◆

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, REASON FOUNDATION, AND INDIVIDUAL RIGHTS FOUNDATION IN SUPPORT OF NON-GOVERNMENT PARTIES

◆

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QUESTION PRESENTED

Whether a for-profit business corporation can assert rights under the Free Exercise Clause of the First Amendment or under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq*.

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF), Reason Foundation (Reason), and Individual Rights Foundation (IRF) respectfully submit this brief amicus curiae in support of Hobby Lobby Stores, Inc., and Conestoga Wood Specialties Corporation.[1]

PLF is widely recognized as the largest and most experienced non-profit legal foundation representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and federalism. PLF has litigated cases and appeared as amicus curiae in many lawsuits involving the constitutional rights of people who choose to do business in the corporate form—including *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 133 S. Ct. 1723 (2013); *Citizens United v. FEC*, 558 U.S. 310 (2010), *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), and *Mercer, Fraser Co. v. County of Humboldt*, No. C 08-4098 SI, 2008 WL 4344523 (N.D. Cal. Sept. 22, 2008). PLF attorneys have also published scholarly research on issues relating to corporate personhood and the interface of economic and personal freedom. *See, e.g.*, Timothy Sandefur, *The Right to Earn a Living* 32-36

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

(2010); Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004).

Reason is a nonpartisan nonprofit public policy thinktank, founded in 1978. Reason's Mission is to promote free markets, individual liberty, equality of rights, and the rule of law. To further Reason's commitment to "free minds and free markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

IRF was founded in 1993. IRF opposes attempts by those on any point of the legal spectrum to undermine freedom of speech and equality of rights and it combats overreaching government activity that impairs individual rights.

PLF, Reason, and IRF believe their public policy experience will assist this Court in its consideration of the merits of this case.

SUMMARY OF ARGUMENT

"Corporate personhood" is a long-standing doctrine in American law, and one critical to protecting the individual rights of natural persons and securing the foundations for economic and social progress. Although this doctrine has come under assault in recent years—thanks largely to misunderstandings and misrepresentations of this Court's holding in *Citizens United*, 558 U.S. 310 (2010)—it rests on sound legal foundations and is strongly supported by policy considerations. Nor should courts resort to ad hoc distinctions between "for-profit" and "non-profit" corporations when recognizing and protecting constitutional rights in the corporate context.

In its decision below, the Third Circuit Court of Appeals declared that it "simply [could] not understand how a for-profit, secular corporation—apart from its owners—can exercise religion." *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 385 (3d Cir. 2013). But in fact corporations regularly exercise religion in precisely the same manner that they exercise freedom of speech, private property rights, or other constitutional freedoms. Americans routinely exercise their constitutional rights in the corporate form, and discriminating against those who choose to do so in the for-profit context has no constitutional foundation.

ARGUMENT

I

THE DOCTRINE OF CORPORATE PERSONHOOD IS DEEPLY ROOTED IN THIS NATION'S HISTORY AND TRADITION

A. Corporate "Personhood" Is Simply Shorthand for the Rights of Individuals

Despite the superficial appeal of arguments that corporations are not real persons and should not be treated as such for constitutional purposes, such contentions ignore the history and context of the doctrine known as "corporate personhood."

Anglo-American law has treated corporations as persons since long before the Constitution was written. In the seventeenth century, Lord Coke wrote that a legal prohibition applying to "persons" included "persons politicke and incorporate, as to naturall persons," 2 Edward Coke, *Institutes* *736, and William Blackstone—who traced their origin to the ancient Romans—referred to corporations as "artificial persons," which exist "to preserve entire and for ever those rights and immunities" which would "be utterly lost" when the corporators died. 1 William Blackstone, *Commentaries* *467. The first edition of the Encyclopedia Britannica defined corporation as "a body politic, or incorporate, so-called, because the persons or members are joined into one body, and are qualified to take and grant, &c." 2 *Encyclopedia Britannica* 281 (1771).

Thus—as its etymological roots suggest—the term "corporation" refers to any collective entity treated by the law as a single body. This includes even governments; many cities are referred to as "municipal corporations" to this day, and are treated like corporations by the law. *See, e.g., Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 664-90 (1978). Thus the phrase "corporate personhood" is redundant, since to "incorporate" something means to regard the thing as a distinct body or entity. As early as 1826, this Court regarded the principle of corporate personhood as "unquestionable." *United States v. Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826); *see also Beaston v. Farmers' Bank of Delaware*, 37 U.S. 102, 134 (1838) (regarding corporation as a person was so commonplace that "authorities need not be cited" to support it).

Of course, the modern concept of a "corporation" is relatively new, a creation of the early nineteenth century. In the 1760s, Blackstone wrote that the English had "considerably refined and improved upon" the ancient Roman idea of a corporation, 1 William Blackstone, *Commentaries* *469, and antebellum

Americans further refined and improved it. Before the 1830s, profit-making corporate enterprises were often government-created franchises enjoying chartered privileges to exercise a sovereign prerogative (such as constructing roads or canals) or monopoly status. *See* Robert Hessen, *In Defense of the Corporation* 3-11, 26-27 (1979). But beginning in the early nineteenth century, private companies began using the corporate form to conduct purely private business. Legislatures soon enacted private incorporation statutes so that by the time this Court decided *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), the concept of a corporation had been "radically transformed." *See* Gordon S. Wood, *Empire of Liberty* 462 (2009). That transformation meant—as explained below, part I.B.—that corporations were no longer "creatures of the state."

Charles River Bridge's holding that corporations are not inherent monopolies marked the climax of this rapid transformation.

> All private corporations, not just the four dozen or so educational institutions existing in 1819, but the hundreds of business corporations that had been created since the Revolution, had become different from their monarchical predecessors: most were no longer exclusive monopolies, and most were no longer public. They became private property belonging to individuals, not the state.

Id. at 466. *See also* Lawrence M. Friedman, *A History of American Law* 137 (3d ed. 2005) ("Old decisions and doctrines, from the time when most corporations were academies, churches, charities, and cities, had little to say . . . that was germane to the [new] world of business corporations.").

Yet this change did not alter the idea that corporations are legal "persons." On the contrary, it provided a firmer foundation for the notion of corporate personhood, because it made clearer that a corporation's rights are the rights of the individuals who comprise it, rather than the arbitrary fiat of a government-granted charter. Corporate "personhood" in the modern era is therefore akin to "sovereignty" in a democratic society: just as democracy replaced the monarchical concept that the sovereign is an irreducible and arbitrary entity with the idea that sovereignty is ordained and established by the people, so the modern corporation enjoys personhood not at the pleasure of the state but because it is an aggregation of individuals who choose representatives to act on their behalf as a unit. *See* Roger Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 Ga. L. Rev. 1245, 1321 (1979).

By the time the Fourteenth Amendment was written, American law had for decades recognized that private corporations were protected by the Due Process or Law of the Land Clauses of state and federal constitutions. *See, e.g.*, *Trustees of the Univ. of N. Carolina v. Foy*, 5 N.C. (1 Mur.) 58, 67 (N.C. 1805); *Terrett v. Taylor*, 13 U.S. (9 Cranch.) 43, 52 (1815); *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 561-67 (1819) (argument of Mr. Webster); *Soc'y for the Propagation of the Gospel in Foreign Parts v. Town of New Haven*, 21 U.S. (8 Wheat.) 464, 481-82 (1823); *Slee v. Bloom*, 5 Johns. Ch. 366, 387 (N.Y. Ch. 1821), *rev'd on other grounds*, 19 Johns. 456 (N.Y. 1822); *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 260, 269-70 (Tenn. 1829); *Gowen v. Penobscot R.R. Co.*, 44 Me. 140, 145 (1857). Later decisions by federal courts holding that corporations were entitled to constitutional protections under the Fourteenth Amendment were hardly novelties; it is unsurprising that this Court did not require argument to establish such a well-settled point in *County of Santa Clara v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).[2]

Because corporations were no longer public entities, courts soon recognized that they could assert the constitutional rights of the individuals whose interests they comprised. As Justice Field explained in *Railroad Tax Cases*, 13 F. 722 (C.C.D. Cal. 1882), corporate personhood is simply shorthand for the constitutional rights of the persons who choose to come together to do business in the corporate form. "[T]he property of a corporation is in fact the property of the corporators," he wrote. "To deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value." *Id.* at 747. For instance, if a banking corporation buys land or other assets, no stockholder could claim ownership of any specific part of that property,

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[2] Howard Jay Graham famously argued that the Fourteenth Amendment's drafters did not mean to include corporations as "persons" entitled to the Amendment's protections. *See The "Conspiracy Theory" of the Fourteenth Amendment*, 47 Yale L.J. 371 (1938) (part 1), 48 Yale L.J. 171 (1938) (part 2). Graham, however, only claimed to show that the congressional drafters of the Amendment had not intentionally used the word "persons" so as to include corporations. He did not show that they intended to exclude corporations; on the contrary, he acknowledged that "corporate personality, as a constitutional doctrine, antedated the Fourteenth Amendment," and was "vital and natural" to post-war jurisprudence. 48 Yale L.J. at 194. Neither Graham nor any other scholar has provided any evidence warranting the conclusion that "business-friendly Justices [on] the Supreme Court . . . invented concepts such as corporate personhood and equal corporate constitutional rights." David H. Gans & Douglas T. Kendall, *A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law*, 44 J. Marshall L. Rev. 643, 673 (2011). In any event, this case does not involve the Fourteenth Amendment.

> but he owns an interest in the whole of it which the courts will protect . . . . Now, if a . . . state takes the entire property, who suffers loss by the legislation? Whose property is taken? Certainly, the corporation is deprived of its property; but at the same time, in every just sense of the constitutional guaranty, [shareholders] are also deprived of their property.

Id.

The notion that corporations can exercise rights is the corollary of the proposition that corporations can suffer entity-specific harms and are obligated to discharge entity-specific legal duties. The corporation as an entity can suffer losses which cannot be ascribed to any particular stockholder—as when an office photocopier is broken or a company car is vandalized. The corporation must therefore be free to act as an entity to prevent or mend these injuries. Government also imposes a wide array of restrictions on corporations *qua* corporations, and consequently corporations must have the right to defend their interests. *Citizens United*, 558 U.S. at 354-55;

Chamber of Commerce of the U.S. v. Brown, 554 U.S. 60, 67-68 (2008).[3]

Although Justice Field appeared to deny that a corporation could also exercise the liberties of the individuals who comprise it, *Railroad Tax Cases*, 13 F. at 747, this Court later made clear that corporations are an important means by which individuals exercise liberties other than property rights. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court acknowledged that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause," and "it is immaterial whether the beliefs sought to be advanced by association pertain to political, *economic*, religious or cultural matters." *Id.* at 460 (emphasis added). Although in that case the corporation was primarily in the business of political advocacy, people also employ their freedom of association when acting in the corporate form for commercial purposes. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (The Constitution protects the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."). And corporations undertake a variety of overlapping pursuits: commercial entities often need to engage in political advocacy to protect their rights and reputations, *see, e.g., Nike Inc. v. Kasky*, 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 539 U.S. 654 (2003) (commercial entity engaging in speech to defend its reputation in political debate), while non-commercial corporations often engage in commercial transactions to further their larger purposes. *See, e.g., Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (private school engaging in contracts as part of its mission to teach).

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[3] In the post-World War II era, corporations can even be held liable for violations of constitutional and natural rights—a principle made meaningful only through corporate personhood. If corporations are not persons for purposes of rights, they would also not be persons for purposes of obligations, and could not be held responsible for violating human rights. Lucien J. Dhooge, *Human Rights for Transnational Corporations*, 16 J. Transnat'l L. & Pol'y 197, 204-05 (2007) ("Obligations and rights accrue only to those who are recognized subjects of international law . . . . To the extent individuals may benefit from . . . compulsory obligations and voluntary undertakings, society at large has a stake in the recognition of corporate personality.").

Because corporations are groups of people acting voluntarily in concert—exchanging rights that they possess and undertaking obligations that they are free to undertake—the corporate entity they create can be regarded as an entity in itself, and for convenience should be. The rights it exercises are the rights of the individuals who comprise it. Pilon, *supra*, at 1321.

B. Corporations Are Not Creatures of the State, and Corporate Status Does Not Entitle Government to Treat Them as Such

Among the most common arguments advanced by people who would strip constitutional protections from those who act under the corporate form is that corporations are "creatures of the state"—that they are privileges granted by the government, and that the government may therefore control or limit their activities more than it could with regard to natural persons. This argument, however, is fallacious. Hessen, *supra*, at 25-33.

While ancient corporations on the government-charter model may have been essentially public entities, and thus "created by the state," the modern for-profit business corporation is not created by the state, and does not enjoy privileges under the type of "charter" that ancient corporations enjoyed. Under today's private incorporation statutes, anyone meeting basic, formal requirements can apply for and receive authority to operate as a corporation. Hessen, *supra*, at 25-33. Many, if not most, states provide that the issuance of a corporate charter is a ministerial function, so that the state *cannot* deny corporate status to one who meets the criteria. *See, e.g.*, Cal. Corp. Code § 200(c) ("the corporate existence begins upon the filing of the articles"). The government does not *choose* to grant corporations their existence—it simply recognizes the fact of their existence. Arthur W. Machen, Jr., *Corporate Personality*, 24 Harv. L. Rev. 253, 260-61 (1911). *See also* Larry E. Ribstein, *The Constitutional Conception of the Corporation*, 4 Sup. Ct. Econ. Rev. 95, 100 (1995) ("Government 'creates' corporations only in the sense that it 'creates' other types of contractual relationships—by enforcing them."). Corporations are therefore no more "creatures of the state" than are marriages—which are also private agreements recognized in the form of a government license issued when specified criteria are proven.

It is often argued that the corporate form consists of certain privileges—*e.g.*, perpetual duration and limited liability—which natural persons do not enjoy, and therefore the government may restrict corporations' rights in exchange for these privileges. But this, too, is incorrect. As this Court recognized in *Dartmouth College*, a corporation's immortality "no more confers on it . . . a political character, than immortality would confer such power or character on a natural person." 17 U.S. (4 Wheat.) at 636.

Nor is limited liability a state-created privilege. First, shareholders cannot be justly charged with corporate wrongdoing over which they have no control. Pilon, *supra*, at 1309-12. Principles of justice—not any favor from the state—require that their personal liability be limited to their actual blame for acts they can control. Second, even if that were not the case, limited liability for torts is a contractual arrangement, not a state-vested privilege. "A clause could be put into every contract by which the apposite party limited his right of recovery to the common fund: the incorporation act may fairly be construed as legislating into all corporate contracts an implied clause to that effect." Adolf A. Berle & Gardiner C. Means, *The Modern Corporation & Private Property* 120 n.2 (Transaction Publ'ns 1991) (1932).

As Berle and Means write, the entire "quality of 'privilege'" in the corporate form is "elusive, to say the least," *id.*, because incorporation is simply a shorthand for a bundle of rights which could be established with equal validity, but less efficiency, through voluntary private contracts. Hessen, *supra*, at 17.

The analogy to marriage is again instructive: although two people could validly subscribe to a series of contracts governing their joint property, the distribution of their income, the raising of any children they might have, and so forth, the legal concept of "marriage" simply groups these voluntary agreements together under one convenient label. So, too, the concept of "corporation" does nothing more than aggregate a series of legal principles, including limited liability, perpetual duration, the right to do business under a single name, and so forth—all of which rest on the contractual rights of those who participate. To take another analogy, when the government recognizes a group of people as a church, it does not *create* their right to worship or to call themselves a congregation; it simply recognizes that they have chosen that particular arrangement for the exercise of their rights.

Since corporations are not "creatures of the state," there is no merit to the contention that corporate rights "exist[] at state discretion," Gans & Kendall, *supra*, at 681, or that the government "create[s] corporations and . . . provide[s] them with special privileges." *Id.* at 699.

C. Treating Corporations Differently from Other Entities in Constitutional Cases Would Create Dangerous Anomalies in the Law

As Justice Field observed, it would be anomalous to hold that corporations cannot assert rights as persons under the Constitution. "[A] constitutional provision intended for the protection of every person against partial and discriminating legislation" should not "cease to exert such protection the moment the person becomes a member of a corporation." *Railroad Tax Cases*, 13 F. at 744. Indeed, were courts to cease regarding corporations as persons entitled to constitutional protection, the result would be that citizens could exercise the right at issue, could delegate their rights to each other, could join in groups to exercise that right, and could establish by contract all of the rights that make up the corporate form—such as limited liability and permanent duration—but would lose protection for those rights if they chose to call their association a corporation. Were this the law, the

New York Times or the NAACP would lose constitutional protections for their First Amendment rights—yet the persons who comprise these institutions could organize limited liability partnerships or trusts exercising exactly the same "privileges" that they currently enjoy under the corporate form, and assert those same rights. This would make this critical area of the law a semantic game. Ilya Shapiro & Caitlyn W. McCarthy, *So What If Corporations Aren't People?*, 44 J. Marshall L. Rev. 701, 708 (2011) ("individuals standing together as a group should not be stripped of rights that would be constitutionally guaranteed to them standing alone").

But if incorporation is regarded as a state-created privilege, or as something other than the rights of the individuals who comprise it, then a rule of law treating corporations differently from other business forms would raise even more constitutional concerns. In that case, restricting constitutional protections for corporations would implicate the unconstitutional conditions doctrine, because the issuing of a corporate charter—or the recognition of an entity as a de facto corporation or a corporation by estoppel—would require citizens to waive constitutional protections. Yet government may not condition the receipt of a benefit on a relinquishment of constitutional rights. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596 (2013).

In *Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922), this Court held that states may not require foreign corporations to give up their constitutional rights in order to do business in the state. "[This] principle does not depend for its application on the character of the business the corporation does," the

Court wrote. "It rests on the ground that the federal Constitution confers upon citizens of one state the right to resort to federal courts in another, [and] that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured is void." Yet if corporations were to be barred from status as persons under the Constitution, states could force citizens to waive constitutional rights in exchange for corporate existence. People would be compelled to sign away rights such as speech, religious exercise, or the right to just compensation for takings of property, in order to exercise their associational rights, or to obtain benefits, by forming a corporation. *See further* Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right That Big Corporations Should Have But Do Not Want*, 34 Harv. J.L. & Pub. Pol'y 639, 647-48 (2011) ("[T]o assert that the decision to take advantage of limited liability forces individuals who incorporate to suffer restrictions on their [rights] that would be unconstitutional if imposed on them in their individual capacities" would violate the unconstitutional conditions doctrine).

II

"FOR-PROFIT" AND "NON-PROFIT" CORPORATIONS CAN EXERCISE RELIGIOUS FREEDOM RIGHTS

The Third Circuit, in *Conestoga*, 724 F.3d at 385, as well as the D.C. Circuit Court of Appeals in *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1214-15 (D.C. Cir. 2013), drew a distinction between non-profit and for-profit corporations, by which the former could assert Free Exercise rights, but the latter could not. This distinction is unworkable and has no basis in constitutional law or the theory of corporate rights.

The Free Exercise Clause protects persons and corporate entities regardless of whether they are categorized as "for profit" or "non-profit." Corporations engage in such a wide variety of activities, including religious acts, which do not align with the Internal Revenue Code's distinction between for-profit and non-profit entities. Attempting to draw such a distinction would cause hardship and chill the exercise of widely recognized corporate rights.

A. Corporations Can Exercise Religious Freedom Rights

The rights of corporations are obviously not identical to those of natural persons. They can only exercise rights that the individuals comprising it possess, and which they can and do authorize the corporation to exercise. Pilon, *supra*, at 1322. Corporations cannot marry or exercise other rights that are non-delegable. But they can exercise various "intangible" rights, Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L.J. 577, 662 (1990), including speech, petition, or freedom from unreasonable searches.

As the Tenth Circuit recognized, the free exercise of religion is not a "purely personal" right. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1133-34 (10th Cir. 2013). On the contrary, people frequently exercise religion by using the corporate form to express their moral values, or to seek to influence the moral conduct of others. In the early nineteenth century, for example, the Tappan brothers founded a for-profit credit reporting agency called The Mercantile Agency, now Dun & Bradstreet, partly to promote their religious values of frugality and honesty, and partly to subsidize their wide-ranging anti-slavery activities. Bertram Wyatt-Brown, *Lewis Tappan and the Evangelical War Against Slavery* ch. 12 (1969).

The collective exercise of religious freedom is not only a practice dating from time immemorial, but is mandatory in some religious traditions.[4] The exercise of religious freedom in the corporate form may be the oldest of all corporate rights. Edmund Bayly Seymour, Jr., *Historical Development of the Common-Law Conception of a Corporation*, 51 Am. L. Reg. 529, 531 (1903) ("religious corporations existed in Athens as early as the time of Solon"). Today, corporate officers and shareholders regularly seek to exercise their moral values by influencing corporate behavior. The *2013 Global Responsibility Report* of the Wal-Mart Corporation, for example, devoted some 174 pages to describing its "corporate social, environmental and company responsibility efforts."[5] Sociologists have argued that the past quarter century has seen a dramatic increase in the religious service ethos of corporations such as Wal-Mart, which—ever since its founding by the devout Christian Sam Walton—has expressed an "animating spirit of Christian free enterprise" which sees "[f]amily values" as "an indispensable element in the global service economy."

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[4] Certain Jewish rituals, for example, including the reading of the Torah, require a minyan—a quorum of at least 10 Jewish male adults. 1 Gersion Appel, *The Concise Code of Jewish Law* 62 (2d ed. 1991).

[5] *Available at* http://cdn.corporate.walmart.com/39/97/81c4b26546b3913979b260ea0a74/updated-2013-global-responsibility-report_130113953638624649.pdf (last visited Jan. 14, 2014).

Bethany Moreton, *To Serve God and Wal-Mart: The Making of Christian Free Enterprise* 5 (2009); *see also* Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 Tul. L. Rev. 337 (2009) ("Social entrepreneurs . . . reject the traditional boundaries between the non profit and for-profit sectors and carry out their plans through so-called hybrid social enterprises, which combine the soul of nonprofit organizations with the discipline and business savvy of for-profits.").

Shareholders often use shareholder meetings as forums for debates over moral and social values. Elizabeth Glass Geltman & Andrew E. Skroback, *Environmental Activism and the Ethical Investor*, 22 J. Corp. L. 465, 475-80 (1997). The Interfaith Center on Corporate Responsibility (ICCR) is particularly active in coordinating and encouraging religious corporate shareholders in their efforts to influence corporations' activities in directions they believe express religious values. "ICCR members believe that as responsible stewards they must invest their saved resources . . . in ways that are consistent with their faith values."[6] The ICCR reports that more than $2 trillion in corporate assets—"one out of every nine dollars under professional management in the United States today"—are dedicated to what the ICCR considers "socially responsible investing." These investors view their participation in for-profit corporate enterprises as expressing their religious beliefs.

The Third Circuit acknowledged that individual shareholders could exercise religious freedoms, but found it difficult to see how corporations *qua* corporations could do so, given that corporations do not pray, observe sacraments, or otherwise act apart from the individuals who comprise them. *Conestoga*, 724 F.3d at 385. But this argument proves too much: non-profit corporations, such as churches, also do not pray, observe sacraments, or act apart from their individual members, yet they are undeniably covered by the Free Exercise Clause. This is because the members of these institutions see value in having organizations take a stand as an institution, over and above their own personal acts. The same is true of the for-profit business corporation. It "is not merely an economic institution. It is also a moral institution and a political institution." Michael Novak, *Toward a Theology of the Corporation* 56 (rev. ed. 1990). Corporate shareholders and directors consider it important for the corporation to as an institution act in accordance with their moral values, just as they find a value in the institution expressing an opinion or owning property in its own name. This concept—sometimes called "institutional conscience"—explains why most major corporations express some form of moral value in their institutional mission statements. Edmund D. Pellegrino, *The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 Fordham Urb. L.J. 221, 235 (2002).

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[6] *Available at* http://www.iccr.org/about/faq.php (last visited Jan. 14, 2014).

This Court has frequently acknowledged that businesses that engage in expressive activity as part of their profit-making enterprise are protected under the First Amendment. In *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), a for-profit publisher was allowed to assert a First Amendment challenge to the censorship of a book. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), an unincorporated group of 36 persons bought an advertisement from the New York Times—a for-profit corporation engaged in commercial publishing. The Court never doubted that the *Times* could assert its own First Amendment rights. *See id.* at 266-67. Yet the expressive rights of these corporations really consist of the aggregated expressive rights of the people who make up the corporations; censoring the corporations would be censoring them.

In precisely the same way, people can exercise their First Amendment religious freedom in concert with others in the corporate form. In *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002), corporate plaintiffs who published and distributed Bibles and tracts challenged the constitutionality of an ordinance requiring permits for door-to-door canvassers. The Court had no difficulty concluding that the ordinance violated the First Amendment. *Id.* at 164-69. Although the Court regarded these corporate entities as units exercising religious liberty and expression rights, they were in reality large groups of people acting in concert—*i.e.*, acting through their corporations in accordance with their First Amendment rights, just as the owners of publishing companies do.

The Tenth Circuit was correct: free exercise is not a "purely personal" right, and it can be vested in a corporation.

B. There Is No Principled Basis for Creating a First Amendment Distinction Between "For-Profit" and "Non-Profit" Corporations

The "non-profit"/"for-profit" distinction is not a legitimate ground for distinguishing between entities that can and that cannot assert Free Exercise rights.

That distinction is rooted in government tax policy, and it confers only a privilege of tax-exemption, not any rights of constitutional standing. *Nationalist Movement v. C.I.R.*, 102 T.C. 558, 584 (1994), *aff'd*, 37 F.3d 216 (5th Cir. 1994). Moreover, as this Court has repeatedly recognized, it is not possible cleanly to distinguish between the for-profit and non-profit operations of religiously affiliated entities.

Although "eleemosynary corporations" were well known in early America, their legal status was "ambiguous," because they were considered quasi-public institutions until well after the Civil War. Peter Dobkin Hall, *Inventing the Nonprofit Sector* 24, 38 (2001). Many such corporations, particularly religiously affiliated ones, enjoyed exemptions from taxation—exemptions that long antedate the Constitution. Erika King, *Tax Exemptions and the Establishment Clause*, 49 Syracuse L. Rev. 971, 973-75 (1999). But these exemptions were based on policies of limiting state interference in religion and fostering charitable activities. *Walz v. Tax Comm'n of the City of New York*, 397 U.S. 664, 687-89 (1970). They were not meant to differentiate between the types of constitutional rights exercised by for-profit as opposed to non-profit institutions.

Nor could any such difference be maintained. Corporations often intertwine for-profit and non-profit activities. Non-profit entities often make substantial income, for instance, by licensing their names for use on products, which raise money for non-profit activities. *See, e.g.*, *Sierra Club Inc. v. C.I.R.*, 86 F.3d 1526 (9th Cir. 1996). For-profit entities often engage in humanitarian, expressive, and religious activities on their own, not always through non-profit subsidiaries.

Design firm IDEO, for example, participated for years in charitable activities before it even started a non-profit adjunct. Linda Tischler, *Looking to Do More Social Good, IDEO Launches a Non-Profit Arm*, Fast Company & Inc., Mar. 4, 2011.[7] And for-profit corporations can be operated solely for non-profit purposes. *Kirtland Country Club Co. v. Bowers*, 186 N.E.2d 851, 852 (Ohio 1962).

Religious societies have frequently operated as corporations combining commercial and charitable activities. Massachusetts Bay Colony, Plymouth Colony, Rhode Island and Providence Plantations, and other colonial enterprises, which brought religious "pilgrims" to the New World, were organized as for-profit joint-stock companies (predecessor to the modern corporation) that combined religious and profit-making missions. William Pencak, *Historical Dictionary of Colonial America* 116 (2011). The nineteenth century Amana Colonies were founded as a business corporation in 1859 in Iowa, operating initially as agricultural companies but expanding into a variety of profitable industrial pursuits. *See* Charles Nordhoff, *The Communistic Societies of the United States* 29-41 (Dover Publ'ns, Inc. 1966) (1875). Only in 1932 did they separate into for-profit and non-profit branches. The Shaker church likewise operated as a corporation "not solely organized for purposes of religion," but also for commercial purposes. *White v. Miller*, 71 N.Y. 118, 123 (N.Y. 1877); *see also United Soc'y of Shakers v. Underwood*, 72 Ky. (9 Bush) 609 (Ky. 1873).

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[7] *Available at* http://www.fastcodesign.com/1663355/looking-to-do-more-social-good-ideo-launches-a-non-profit-arm (last visited Jan. 15, 2014).

In some theologies, commercial activity cannot be separated from religious obligation. Scientologists, for example, adhere to a "doctrine of exchange" according to which church members must pay for certain obligatory religious services. *Hernandez v. C.I.R.*, 490 U.S. 680, 685 (1989). Other religious traditions, such as Mormonism, draw no rigid distinction between profitable and charitable pursuits. Corporate entities owned by the LDS church, such as AgReserves, Inc., Utah Property Management Associates, and Deseret Management Corporation and its subsidiary corporations, serve as commercial components of the LDS Church's broader religious mission. One of the petitioners in this case, Mardel, is a Christian bookstore chain with 35 locations, which includes among its corporate objectives "[t]o be a profitable organization, thus allowing the continuation of the ministry we perform."[8]

One common form of for-profit free-exercise is the production of kosher meats, an activity often undertaken by for-profit corporations. Hebrew National, a brand of ConAgra Foods, Inc., has for a century produced kosher meats to the specifications of Orthodox Jewish law. Courts have specifically held that Hebrew National's for-profit kosher operations are protected by the Free Exercise Clause. *See, e.g.*, *Wallace v. ConAgra Foods, Inc.*, 920 F. Supp. 2d 995, 997-99 (D. Minn. 2013). Likewise, in *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 800 F. Supp. 2d 405, 407 (E.D.N.Y. 2011), *aff'd*, 680 F.3d 194 (2d Cir. 2012), and *Ran-Dav's County Kosher, Inc. v. New*

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[8] Mardel Christian & Education Stores, Inc., *Mission Statement*, http://www.mardel.com/about/mission.aspx (last visited Jan. 15, 2014).

Jersey, 608 A.2d 1353 (N.J. 1992), *cert. denied sub nom. Nat'l Jewish Comm'n on Law & Pub. Affairs v. Ran-Dav's County Kosher, Inc.*, 507 U.S. 952 (1993), for-profit corporations were allowed to raise Free Exercise challenges to state regulations of kosher meats. Given this inextricable connection between the religious activities and profit-making activities of many corporations, any attempt to distinguish between for-profit and non-profit entities for Free Exercise purposes would cause confusion and chill the exercise of rights such as speech, which for-profit corporations incontrovertibly possess.

Corporations—whether eleemosynary or commercial—can and do engage in religious expression. For example, the hamburger chain In-N-Out Burger prints Biblical citations on all of its hamburger wrappers and soda cups. Mark Oppenheimer, *At Christian Companies, Religious Principles Complement Business Practices*, N.Y. Times, Aug. 2, 2013.[9] The clothier Forever 21 prints "John 3:16" on its shopping bags. Jena McGregor, *Forever 21's Leaked Memo: Faith At Work?*, Wash. Post, Aug. 19, 2013.[10] This Court has already recognized that corporations have the right of free expression, and may therefore print "Vote for Candidate X" on their receipts. *Cf. Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 8 (1986). Thus, a decision holding that for-profit corporations cannot assert Free Exercise rights would make it unclear whether these same companies had a constitutional right to print "John 3:16" on their receipts or shopping bags. And while a kosher butcher would have the right to advertise that its products meet religious standards, *see, e.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-73 (1976), that same butcher would have no right to challenge the constitutionality of a law requiring the inclusion of non-kosher ingredients or otherwise interfering with kosher observance.

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[9] *Available at* http://www.nytimes.com/2013/08/03/us/at-christian-companies-religious-principles-complement-business-practices.html?_r=0 (last visited Jan. 15, 2014).

[10] *Available at* http://www.washingtonpost.com/blogs/on-leadership/wp/2013/08/19/forever-21s-leaked-memo-faith-at-work/ (last visited Jan. 15, 2014).

Any effort to distinguish between those corporations that can and those that cannot assert Free Exercise rights is unsupportable. The better conclusion is that for-profit corporations, like non-profit corporations, consist of individuals who can and do vest their constitutionally protected rights in the businesses in which they take part. As the Tenth Circuit observed, there is no reason "why an individual operating for-profit retains Free Exercise protections but an individual who incorporates . . . does not, even though he engages in the exact same activities as before." *Hobby Lobby*, 723 F.3d at 1135. Individuals who participate in a corporation often direct their business conduct—or seek to influence corporate conduct—in accordance with their religious values. In doing so, they and their corporations exercise First Amendment rights.

◆

CONCLUSION

For-profit business corporations can and often do exercise freedom of religion. The decision of the Third Circuit should be *reversed*, the decision of the Tenth Circuit should be *affirmed*.

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IN THE
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KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Respondents.

On Writs of Certiorari to the United States
Courts of Appeals for the Third and Tenth Circuits

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INTERESTS OF *AMICI CURIAE*

Amici are religious organizations representing a variety of faith traditions.[1]

The **Anti-Defamation League** (ADL) was organized in 1913 with a dual mission to stop the defamation of the Jewish people and to secure justice and fair treatment to all. Today, it is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism, and safeguarding individual religious liberty. A staunch supporter of the religious rights and liberties guaranteed by both the Establishment and Free Exercise clauses, ADL vigorously supported the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, as a means to protect individual religious exercise, but not as a vehicle to enable some Americans to impose their religious beliefs on others.

Bend the Arc: A Jewish Partnership for Justice is the nation's leading progressive Jewish voice empowering Jewish Americans to advocate for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

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[1] Letters of consent to the filing of *amicus* briefs in support of either party or neither party have been lodged with the Clerk of the Court by the government and Conestoga. Counsel for Hobby Lobby has also consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state the following: (1) no party's counsel authored this brief in whole or in part, and (2) no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money intended to fund the brief's preparation or submission.

Catholics for Choice (CFC) represents the majority of Catholics on issues of sexual and reproductive rights and health, and is the leading voice in debates at the intersection of faith, women's health, reproductive choice and religious liberty. Founded in 1973, CFC seeks to shape and advance sexual and reproductive ethics that are based on justice, reflect a commitment to women's well-being, and respect and affirm the capacity of women and men to make moral decisions about their lives. CFC's work promotes respect for the moral autonomy of every person, based on the foundational Catholic teaching that every individual must follow his or her own conscience and respect others' right to do the same.

CORPUS is a faith community affirming an inclusive priesthood rooted in a reformed and renewed Church. It provides not only a ministry of service open to the diverse ways that people are authentically called by God, but also seeks sacramental ecumenical collaboration. The community and ministry are defined not only in traditional and canonical categories, but also in terms of the needs requiring autonomy and pastoral service.

DignityUSA was founded in 1969 and is an organization of lesbian, gay, bisexual, and transgender (LGBT) Catholics and supporters. Among the areas of concern outlined in its Statement of Position and Purpose is the promotion of "equal access and justice in all areas of health care and healing." DignityUSA is concerned that LGBT people could be denied equal access to health care services if employers are allowed to restrict health coverage on the basis of the religious belief of the owners.

Disciples for Choice is a pro-choice organization within the Christian Church (Disciples of Christ). Disciples for Choice believes that a woman should have full control over her own body and decisions related to reproduction, and that restrictions on these rights violate the religious liberty and God-given agency of women. Disciples for Choice stands alongside people of faith and conscience who work to defend and preserve these rights.

Disciples Justice Action Network is a network of individuals, congregations, and organizations within the Christian Church (Disciples of Christ), all working together to promote greater justice, peace, freedom, and inclusion in both church and society. Its mission is to promote a passion for justice in our churches, provide prophetic Disciples leadership to ecumenical and interfaith coalitions, and work together with all people of goodwill to build the Beloved Community envisioned by Dr. Martin Luther King, Jr.

The **Global Justice Institute** was founded by Metropolitan Community Churches in 2006 and is an independent 501(c)(3) organization dedicated to supporting the work of LGBT and human-rights activists around the globe. Together with The Fellowship of Affirming Ministries, the Institute offers support for programs fostering theological reconciliation, economic development, and the creation of positive media.

Hadassah, The Women's Zionist Organization of America, Inc. was founded in 1912, and has over 330,000 Members, Associates, and supporters nationwide. While traditionally known for its role in developing and supporting health care and other initiatives in Israel, Hadassah has longstanding commitments to improving health care access in the United States and supporting the free exercise of religion.

The Hindu American Foundation is an advocacy group providing a Hindu American voice. The Foundation addresses global and domestic issues concerning Hindus, such as religious liberty, hate crimes, and human rights.

The Interfaith Alliance Foundation is a 501(c)(3) organization that celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance has members across the country belonging to 75 different faith traditions as well as to no faith tradition.

Jewish Women International (JWI) has 50,000 members and supporters across the country and is the leading Jewish organization working to prevent the cycle of violence and empower women and girls to realize their full potential. JWI has been an unwavering Jewish voice for comprehensive reproductive health services, and continues to advocate for access to reproductive health information and services, which build a foundation for healthier families and communities. JWI believes that women should be able to make private health decisions according to the dictates of their own faith and conscience.

The **Methodist Federation for Social Action** (MFSA) was founded in 1907 and is dedicated to mobilizing the moral power of the faith community for social justice through education, organizing, and advocacy. MFSA believes that every child should be a wanted child and that access to affordable family planning should be readily available to all people and not restricted by the government or employers.

Metropolitan Community Church (MCC) was founded in 1968 to combat the rejection of and discrimination against persons within religious life based upon their sexual orientation or gender identity. MCC has been at the vanguard of civil and human rights movements and addresses the important issues of racism, sexism, homophobia, ageism, and other forms of oppression. MCC is a movement that faithfully proclaims God's inclusive love for all people and proudly bears witness to the holy integration of spirituality and sexuality.

The **National Coalition of American Nuns** (NCAN) began in 1969 to study and speak out on issues of justice in church and society. Among other things, NCAN calls on the Vatican to recognize and work for women's equality in civil and ecclesial matters, to support gay and lesbian rights, and to promote the right of every woman to exercise her primacy of conscience in matters of reproductive justice.

The **National Council of Jewish Women** (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "comprehensive, confidential, accessible family planning and reproductive health services, regardless of age or ability to pay." NCJW's principles provide that "religious liberty and the separation of religion and state are constitutional principles that must be protected and preserved in order to maintain our democratic society."

New Ways Ministry represents Catholic lay people, priests, and nuns who work to ensure that the human dignity, freedom of conscience, and civil rights of LGBT people are protected in all circumstances, including in making decisions about healthcare. New Ways Ministry is a national Catholic ministry of justice and reconciliation for people and the wider Catholic Church. Through education and advocacy, New Ways Ministry promotes the full equality of LGBT people in church and society. New Ways Ministry's network includes Catholic parishes and college campuses throughout the United States.

The **Reconstructionist Rabbinical College** (RRC) is a progressive rabbinical school where people of all backgrounds engage intensively with Jewish texts, thought and practice. In 2012, the RRC also became the center of the **Jewish Reconstructionist Communities**, which are rooted in Jewish tradition and committed to egalitarianism and inclusion. There are over 100 Reconstructionist Communities in the United States committed to Jewish learning, ethics, and social justice. The RRC and the Jewish Reconstructionist Communities believe both in the importance of the separation of church and state and that the reproductive rights of women must be preserved and protected.

The **Religious Coalition for Reproductive Choice** (RCRC) was founded in 1973 and is dedicated to mobilizing faith support for reproductive health, rights and justice. With organizational members from the Catholic, Protestant, Jewish, and Unitarian Universalist traditions, RCRC seeks to change culture and policy in accordance with its shared religious commitment to compassion, equality, respect, and justice. RCRC's members hold varying views on theology and contemporary life, including human reproduction, yet agree that all people deserve access to the full range of reproductive health services, unencumbered by religious doctrines or government coercion. RCRC affirms birth control as morally good for individuals, families, and society.

The Religious Institute is a multifaith organization advocating for sexuality education, reproductive justice, and the full inclusion of women and LGBT people in faith communities and society.

The **Society for Humanistic Judaism** (SHJ) is the congregational arm of Humanistic Judaism. The SHJ mobilizes people to celebrate Jewish identity and culture, consistent with Humanistic ethics and a nontheistic philosophy of life. The SHJ is concerned with protecting religious freedom for all, and especially for religious, ethnic, and cultural minorities such as Jews. SHJ members seek to ensure that they, as well as people of all faiths and viewpoints, will continue to have the ability to make their own decisions about health care, including contraceptive care, based on their personal religious beliefs.

The **Union for Reform Judaism**, whose 900 congregations across North America include 1.3 million Reform Jews; the **Central Conference of American Rabbis**, whose membership includes more than 2000 Reform rabbis; and the **Women of Reform Judaism** that represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue as longtime supporters of religious liberty. The United States' commitment to principles of religious liberty has allowed religious freedom to thrive throughout its history. At the same time, these organizations strongly support women's ability to make their own reproductive health decisions. They are inspired by Jewish tradition, which teaches that health care is the most important communal service, and therefore should be available to all.

The **Unitarian Universalist Association** (UUA) comprises more than 1,000 Unitarian Universalist congregations nationwide. The UUA is dedicated to the principle of separation of church and state, and believes that the federal contraceptive rule does not substantially burden religious exercise under the Religious Freedom Restoration Act.

The **Unitarian Universalist Women's Federation** has had an abiding interest in the protection of reproductive rights and access to reproductive health services since its formation nearly 50 years ago. It has consistently lifted up the right to have children, to not have children, and to parent children in safe and healthy environments as basic human rights.

The **Women's Alliance for Theology, Ethics and Ritual** (WATER) is a non-profit educational organization made up of justice-seeking people, from a variety of faith perspectives and backgrounds, who promote the use of feminist religious values to make social change. WATER believes that women's health decisions are private, and that the community's responsibility is to make health care available for everyone. WATER participates in this amicus brief because a just society both respects privacy and promotes health.

Women's Ordination Conference (WOC), founded in 1975, is the world's oldest and largest national organization working for the ordination of women as priests, deacons, and bishops into an inclusive and accountable Catholic Church. WOC supports the notion that all Catholics should participate in making the decisions that affect their personal lives. To this end, WOC works to renew church governance to be inclusive, accountable and transparent, bring about justice and equality for Catholic women in all aspects of their lives, and incorporate women-centered theologies into everyday Catholicism.

INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiffs are secular, for-profit corporations (and the individual owners of these corporations) that sell goods—including arts-and-crafts supplies, books, and wooden parts for kitchen cabinets—for financial profit. As part of their employment compensation, employees of the Plaintiff corporations receive health insurance coverage through self-funded group health plans. *See* Hobby Lobby Resp. to Pet. 3; Conestoga C.A. App. 48.

These group health plans currently exclude coverage for certain contraceptives, including emergency contraception and the IUD, that Plaintiffs' owners believe act as "abortifacients" because they may inhibit the implantation of an embryo into the uterus. Conestoga Br. 4; *but see* Julie Rovner, *Morning-After Pills Don't Cause Abortion, Studies Say*, All Things Considered (Feb. 21, 2013), http://www.npr.org/blogs/health/2013/02/22/172595689/morning-after-pills-dont-cause-abortion-studies-say (all websites last visited Jan. 28, 2014). Plaintiffs argue that the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1, exempts them from the requirement that employers who choose to provide health insurance include coverage for contraception.

Amici are faith-based organizations representing a variety of religious traditions. They support a robust interpretation of RFRA that safeguards the deeply personal right to the free exercise of religion. But *amici* also believe that if accepted, Plaintiffs' arguments would undermine—not promote—religious liberty, by allowing employers to impose their owners' religious beliefs on employees, many of whom will hold different moral and religious views on the use of contraception. This result would be especially unwelcome as the United States and its workforce become more religiously diverse.

Nor is there any good reason to allow this result: application of the contraception regulations to Plaintiffs would not substantially burden religious exercise. First, Plaintiffs are under no obligation to provide their employees with health insurance. If they object to certain types of coverage that must be included in employee health policies, they may stop offering insurance and pay a modest tax to the government instead; this tax is likely to be much cheaper than the cost of buying health insurance. Plaintiffs could pass along the savings to their employees in the form of higher salary, and Plaintiffs' employees would be eligible to obtain health insurance—including coverage for contraception—on the public exchanges, often with government subsidies. What Plaintiffs may not do is hold their employees hostage: refusing to include coverage for contraception, but also blocking their employees from obtaining comprehensive, subsidized insurance elsewhere.

Second, even if Plaintiffs wish to continue offering insurance to their employees as part of their compensation, the contraception regulations do not substantially burden religious exercise. For several reasons, any connection between Plaintiffs and contraception is incidental and attenuated—and thus fails to produce a burden that is "substantial" as a matter of law. The contraception regulations fall on secular, for-profit corporations, which are legally and practically distinct from the individual owners who hold religious beliefs about contraception. Contraception coverage is just one of many types of medical coverage that must be included in a comprehensive group health plan. And contraception is used only after the independent decision of the employee, often in consultation with her physician. This analysis requires no second-guessing of Plaintiffs' religious views or moral calculus; rather, it requires a judgment about the types of burdens that RFRA recognizes as a matter of law.

Plaintiffs have no legal interest in restricting the manner in which their employees choose to use their compensation, including their health benefits. Many of Plaintiffs' employees do not share their employers' owners' religious beliefs about contraception, and should retain the freedom to make their own healthcare decisions, consistent with "their culture, faith tradition, religious beliefs, conscience, and community." Open Letter on Family Planning from The Religious Institute to Religious Leaders 2 (Feb. 25, 2013) ("Religious Institute, *Letter on Family Planning*"), *available at* http://www.religiousinstitute.org/wp-content/uploads/2012/09/Open-Letter-on-Family-Planning-with-endorsers.pdf.

ARGUMENT

I. RFRA Should Be Interpreted To Preserve The Religious Liberty Of Both Employers And Employees.

A. The United States and its workforce are becoming more religiously diverse.

RFRA should be interpreted in a manner that respects religious diversity, including the religious diversity of the nation's workforce. The United States is a pluralistic society with an "increasingly diverse religious landscape." Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey* 2 (2008) ("*Religious Landscape Survey*"), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf. Less than half (48%) of Americans identify as Protestant, and less than a quarter (22%) identify as Catholic; six percent identify as Jewish, Buddhist, Muslim, or another faith, and nearly one in five (19.6%) do not affiliate with any religion. Pew Forum on Religion & Public Life, *"Nones" on the Rise: One-in-Five Adults Have No Religious Affiliation* 13 (2012), *available at* http://www.pewforum.org/files/2012/10/Noneson theRise-full.pdf.

This diversity exists not only across religious traditions, but within them. The Protestant population, for example, "is characterized by significant internal diversity and fragmentation, encompassing hundreds of different denominations"; minority religions, such as Judaism and Buddhism, also "reflect considerable internal diversity." *Religious Landscape Survey, supra,* at 5, 6. Moreover, the religious affiliations of American adults are "extremely fluid," with twenty-eight percent "hav[ing] left the faith in which they were raised in favor of another religion—or no religion at all." *Id.* at 5.

In addition, "[r]eligious diversity is a fact of the American workplace." Tanenbaum Center for Interreligious Understanding, *What American Workers Really Think About Religion: Tanenbaum's 2013 Survey of American Workers and Religion* 6 (2013), *available at* http://op.bna.com/dlrcases.nsf/id/bpen-9b7pks/$File/2013TanenbaumWorkplaceAndReligionSurveyEmail.pdf. Approximately half of American workers "ha[ve] contact with people from diverse beliefs and identities at work—often with considerable frequency." *Id.* As the country becomes more religiously diverse, workplaces will become more diverse as well.

This diversity of religious belief extends to views about contraception. No single religious leader or group can speak for all faith traditions on this issue. Indeed, "[m]illions of people ground their moral commitment to family planning in their religious beliefs. Most faith traditions accept modern methods of contraception, and support it as a means of saving lives, improving reproductive and public health, enhancing sexuality, and encouraging intentional parenthood." Religious Institute, *Letter on Family Planning*, *supra*, at 1. Other religions take the position that contraception is a decision for individuals to make according to their own consciences.[2]

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[2] *See, e.g.*, *Sikhism and Birth Control*, BBC Ethics Guide, Contraception (2009), http://www.bbc.co.uk/religion/religions/sikhism/sikhethics/contraception.shtml (according to Sikh religion, use and form of contraception "is a matter for the couple concerned"); Amirrtha Srikanthan & Robert L. Reid, *Religious and Cultural Influences on Contraception*, 30 J. Obstetrics &

Not only do different religious leaders have different views about contraception, but attitudes about contraception vary even within individual religious denominations. "Within every major religion there are sects or traditions with diametrically opposed views on each of the major areas of bioethics," including contraception. Dominic J. Campisi et al., *Heirs in the Freezer: Bronze Age Biology Confronts Biotechnology*, 36 ACTEC J. 179, 202–03 (2010).

- Among Catholic women who have had sex, 98% have used a contraceptive method prohibited by the Vatican.[3]
- The leadership of most mainline Protestant denominations believes that decisions about contraception are properly committed to the consciences of the individual woman and her partner, though other denominations oppose the use of contraception.[4]
- Most Reform and Conservative Jews fully embrace contraception, and even Orthodox Judaism

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Gynaecology Can. 129, 133 (2008) ("Hinduism regards the decision to use contraception as a personal matter for women that is not usually within the scope of religious injunction.").

[3] *See* Rachel K. Jones & Joerg Dreweke, Guttmacher Institute, *Countering Conventional Wisdom: New Evidence on Religion and Contraceptive Use* 4 (2011), *available at* www.guttmacher.org/pubs/Religion-and-Contraceptive-Use.pdf.

[4] *See* Joseph G. Schenker, *Assisted Reproductive Practice: Religious Perspectives*, 10 Reprod. BioMedicine Online 310, 310 (2005); *see also* Srikanthan & Reid, *supra*, at 131 (although biblical literalism "has resulted in disapproval of contraception among conservative Protestants," "[v]irtually all liberal Christian communities accept the use of contraception within marriage for the purpose of exercising responsible parenthood, enhancing marital love, and protecting women's health").

> permits the use of oral contraception in some circumstances.[5]

Nationwide, contraception is viewed as morally acceptable by 89% of adults. Gallup News Service, *Gallup Poll Social Series: Values and Beliefs* 10 (2012), *available at* http://www.gallup.com/poll/154799/americans-including-catholics-say-birth-control-morally.aspx (click on link at bottom of page).

Many employees, then, will have different religious beliefs about contraception than their employers' owners. If Plaintiffs' arguments were to prevail, however, employees would find it more difficult to make personal decisions about healthcare and contraception in accordance with their own consciences. Those effects would be especially pervasive because most Americans receive their health insurance as part of their employment compensation. *See* Hubert Janicki, U.S. Census Bureau, *Employment-Based Health Insurance: 2010* 1 (2013), *available at* http://www.census.gov/prod/2013pubs/p70-134.pdf.

As the country becomes more diverse, a regime that allows a corporation's owner to limit the healthcare options of employees will inevitably lead to the withholding of coverage for healthcare other than contraception. Some companies might wish to exclude coverage for blood transfusions. *See, e.g.*, *Robidoux v. O'Brien*, 643 F.3d 334, 341 (1st Cir. 2011) ("Jehovah's Witnesses may oppose blood transfusions even where doctors say this is essential."). Others might refuse to include coverage for psychiatric care. *See, e.g.*, Emily Berntsen, Note, *The Child Medication Safety Act: Special Treatment for the Parents of Children with ADHD?*, 83 Wash. U. L.Q. 1567, 1583 (2005) ("[T]he Church of Scientology holds a disbelief in psychiatry and in treating mental disorders with pharmaceuticals."). Others might deny coverage for routine medical care associated with stem-cell trials for disorders such as Parkinson's Disease. *See, e.g.*, Southern Baptist Convention, *Resolution on Human Embryonic and Stem Cell Research* (1999), http://www.sbc.net/resolutions/amResolution.asp?ID=620. Yet others might withhold coverage for medically necessary hysterectomies, or vaccinations against chicken pox, Hepatitis A, and Rubella. *See, e.g.*, Mathew D. Staver, Liberty Counsel, *Compulsory Vaccinations Threaten Religious Freedom*, *available at* http://www.lc.org/media/9980/attachments/memo_vaccination.pdf. Still others might refuse to provide coverage for prescription drugs or surgical procedures using medical devices that contain pig or cow products—including anesthesia, intravenous fluids, prostheses, sutures, and pills coated with gelatin. *See* Catherine Easterbrook & Guy Maddern, *Porcine and Bovine Surgical Products*, 143 Archives of Surgery 366, 367–68 (2008); S. Pirzada Sattar, Letter to the Editor, *When Taking Medications Is a Sin*, 53 Psychiatric Services 213, 213 (2002).

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[5] Mary K. Collins, *Conscience Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction?*, 15 Annals Health L. 37, 44–45 (2006); William W. Bassett, *Private Religious Hospitals: Limitations Upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. Contemp. Health L. & Pol'y 455, 510 (2001).

If employers were permitted to withhold, from employees' compensation, insurance coverage for these or other medical treatments—based on the religious views of the companies' owners—it would "operate[ ] to impose the employer's religious faith on the employees." *United States v. Lee*, 455 U.S. 252, 261 (1982). That result is untenable in the commercial marketplace, especially as the workplace becomes more and more diverse. Ultimately, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *Id.*

B. RFRA does not apply to all asserted burdens, especially when the requested exemptions would interfere with the rights of third parties.

Because unfettered application of RFRA would interfere with the religious freedom and free exercise of others, a RFRA plaintiff does not establish a substantial burden on religious exercise merely by alleging one. Rather, the Court must make an independent legal determination about whether the asserted burden, even if sincerely held and intensely felt, is "substantial" as a matter of law.

1. Congress and the Court have made clear that not all asserted burdens are substantial burdens. The statute prohibits the federal government from "substantially burden[ing] a person's exercise of religion" unless the government demonstrates that the burden is justified by a compelling interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b).

The use of the word "substantially" was no accident. While RFRA's first draft prohibited the government from imposing any burden whatsoever, Congress added "substantially" to make clear that "the compelling interest required by the Religious Freedom Act applies only where there is a substantial burden placed on the individual free exercise of religion," and that RFRA "does not require the Government to justify every action that has some effect on religious exercise." 139 Cong. Rec. S14350–01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch). Congress reiterated that RFRA "would not require [a compelling governmental interest] for every government action that may have some incidental effect on religious institutions." S. Rep. No. 103-111, at 9 (1993), *reprinted* in 1993 U.S.C.C.A.N. 1892, 1898.

Without a rigorous inquiry into whether a burden is "substantial" as a matter of law, strict scrutiny would apply to even the slightest asserted burden on religious exercise, however minor or incidental. Lest the entire federal code submit to strict scrutiny, Plaintiffs must establish that the challenged federal requirement burdens religious exercise in a manner that the law recognizes as substantial, rather than incidental and attenuated.

2. A decision exempting Plaintiffs from the contraception regulations would impose significant costs on Plaintiffs' employees. These employees would be required to compromise their own medical care—or to pay substantially more for it—to accommodate the religious preference of their employers' owners. RFRA does not authorize, let alone require, exemptions that harm the interests and burden the religious exercise of third parties.

During debates over RFRA, the accommodations contemplated by Congress would not have imposed substantial costs or burdens on third parties. In addition to concerns about the impact of zoning and historical-preservation regulations on houses of worship, "much of the discussion centered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs." *City of Boerne v. Flores*, 521 U.S. 507, 530–31 (1997); *see also, e.g.*, 139 Cong. Rec. E1234-01 (daily ed. May 12, 1993) (statement of Rep. Cardin) (allowing burial of veterans in "veterans' cemeteries on Saturday and Sunday ... if their religious beliefs required it"); *id.* (precluding autopsies "on individuals whose religious beliefs prohibit autopsies"); 139 Cong. Rec. S14350–01 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch) (allowing parents to home school their children); *id.* (allowing individuals to volunteer at nursing homes). None of those accommodations would have required third parties to forfeit federal protections, including those governing employment compensation.

The Court has long taken the same approach. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court granted the requested accommodation because it would not "abridge any other person's religious liberties." *Id.* at 409. In *Lee*, the Court rejected an employer's request for a religious exemption from paying social-security taxes; the requested exemption, the Court explained, would "operate[ ] to impose the employer's religious faith on the employees." 455 U.S. at 261. In *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), the Court invalidated a statute requiring employers to accommodate sabbatarians in all instances, because "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." *Id.* at 709. In rejecting an Establishment Clause challenge to accommodations for prisoners' religious exercise, the Court observed that prison officials would need to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). And in the context of Title VII of the Civil Rights Act, the Court held that the statute's reasonable-accommodation requirement did not authorize an exemption that would have burdened other employees, including "the senior employee [who] would ... have been deprived of his contractual rights under the collective-bargaining agreement." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80 (1977).

The only exception to these rules protecting third-parties' interests has arisen in the context of laws affecting church autonomy and the selection of church representatives. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). But that concern about church autonomy is not implicated in these cases brought by for-profit corporations.

By declining to interpret RFRA in a manner that would allow for-profit corporations to shift the costs of their owners' religious beliefs onto third parties, the Court would vindicate not only congressional intent, but the concerns of the Founding Fathers, who themselves recognized the need to cabin religious exemptions that would harm third parties. In the words of James Madison, "I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction, *in every case where it does not trespass on private rights* or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), *reprinted in* 9 The Writings of James Madison 98, 100 (Gaillard Hunt ed. 1910), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions66.html (emphasis added). At a time of even greater religious diversity, Madison's concerns carry even greater weight.

II. The Contraception Regulations Do Not Substantially Burden Plaintiffs' Religious Exercise.

Plaintiffs' arguments, if accepted, would enable even for-profit, corporate employers to impose on workers the costs of their employers' owners' religious beliefs. Conversely, application of the contraception regulations to Plaintiffs would not substantially burden the exercise of religion.

A. Plaintiffs are not required to provide any health-insurance plan at all.

Plaintiffs mistakenly assert that they must either violate their religious convictions or incur "ruinous fines." Conestoga Br. 3; *see also* Hobby Lobby Resp. to Pet. 5. But Plaintiffs are not required to provide employees with *any* health-insurance plan. They may choose instead to pay a modest tax, which for virtually all employers will be cheaper than sponsoring an insurance plan. Plaintiffs could pass those savings along to their employees in the form of higher wages, and their employees would be able to obtain coverage, often heavily subsidized, on the public exchanges. This coverage would be comprehensive—employees would not have to forfeit coverage for contraception, or other vital care, due to the religious beliefs of their employers' owners.

1. Large employers like Plaintiffs were offered two alternatives: (1) they can provide, as part of their

employees' compensation, an insurance plan with minimum essential coverage, as defined by 26 U.S.C. § 5000A(f), or (2) they can pay a tax to assist in subsidizing the provision of healthcare on the government exchanges. In other words, employers have a "choice for complying with the law—provide adequate, affordable health coverage to employees or pay a tax." *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 98 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 683 (2013).

Employers who choose the latter option must make a modest "shared responsibility" payment to the Internal Revenue Service. 26 U.S.C. § 4980H(a). The regulations describe this payment as a tax, *id.* § 4980H(c)(7), and it helps to finance subsidies for workers who are not receiving the required comprehensive coverage from their employers. As a result of this system, employees are able to obtain comprehensive coverage in one of two ways: either as part of their employment compensation, or on the exchanges.

The shared responsibility payment will almost always be cheaper than sponsoring a health insurance plan. An employer who does not offer coverage to workers is required to make an annual payment of $2,000 per full-time employee (minus the first 30 employees). *See id.* §§ 4980H(c)(1), 4980H(c)(2)(D). On the other hand, in 2013 the average health insurance premium was $5,884 for single employees and $16,351 for families. Kaiser Family Foundation & Health Research & Educational Trust, *Employer Health Benefits: 2013 Annual Survey* 12 (2013), *available at* http://kaiserfamilyfoundation.files.wordpress.com/2013/08/8465-employer-health-benefits-20131.pdf. Even after subtracting premium contributions from employees, employers paid an average of $4,885 for coverage of each single employees and $11,786 for coverage of each family. *See id.* at 72, 73.

Because the shared responsibility payment will inevitably cost "far less than the price of insurance," "[i]t may often be a reasonable financial decision to make the payment rather than [provide] insurance." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2595–96 (2012). And if Hobby Lobby and Conestoga declined to offer coverage and made the shared responsibility payments instead, their employees could buy comprehensive health insurance policies—including coverage for contraception—on the exchanges, often with significant subsidies.

2. Plaintiffs have not alleged any specific facts establishing that they are substantially pressured to continue including health insurance in their employees' compensation. Hobby Lobby's complaint is conclusory, asserting only that "[t]he Mandate exposes Plaintiffs to substantial competitive disadvantages, in that they may no longer be permitted to offer health insurance." Hobby Lobby C.A. App. 42a. Although Conestoga suggests in its brief that declining to offer coverage would "violate[ ] [its] religious principles," Conestoga Br. 9, it alleged no such thing in its complaint. *See* Conestoga C.A. App. 38a–70a. Even in its brief, Conestoga relies on a conclusory assertion that if the company refrained from providing coverage, it would face "a competitive disadvantage in the marketplace." Conestoga Br. 39–40. Far from establishing a likelihood of success on the merits necessary to support a preliminary injunction, "the conclusory nature of [Plaintiffs'] allegations ... disentitles them to the presumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009).

Indeed, Plaintiffs are fully able to increase salaries and other benefits, to defray the cost for employees of purchasing insurance on the exchanges, without incurring costs above those necessary to sponsor an insurance plan. Many employers "would gain economically from dropping coverage even if they completely compensated employees for the change through other benefit offerings or higher salaries." Shubham Singhal et al., McKinsey & Co., *How US Health Care Reform Will Affect Employee Benefits*, (2011), http://www.mckinsey.com/insights/health_systems_and_services/how_us_health_care_reform_will_affect_employee_benefits. Although most employees would expect an increase in salary, "more than 85 percent—and almost 90 percent of higher-income ones—say they would remain with an employer that dropped [employer-sponsored insurance]." *Id.*

Even if Plaintiffs had alleged in sufficient detail that replacing health insurance with higher salaries would hurt their ability to recruit certain employees, that type of indirect competitive effect does not constitute a "substantial burden" within the meaning of RFRA. In *Braunfeld v. Brown*, 366 U.S. 599 (1961), the Court rejected a free exercise challenge to a regulation prohibiting businesses from operating on Sundays. Because the plaintiff was an observant Jew, he could not operate his business on Saturday either, and the plurality observed that business owners in his shoes might face "some financial sacrifice in order to observe their religious beliefs." *Id.* at 606. But the option to keep his job and "incur[ ] economic disadvantage" was "wholly different than when ... legislation attempts to make a religious practice itself unlawful." *Id.* Here, any competitive disadvantage—even if one had been properly alleged and actually substantiated—would pale in comparison to the burden at issue in *Braunfeld*.

Plaintiffs have two ways to comply with the law while allowing their employees to make their own healthcare decisions consistent with their own religious beliefs. The companies may offer health insurance as part of their employees' compensation, so long as that health insurance includes all of the required medical coverage, including coverage for contraception. Or they may make the modest shared responsibility payment and allow their employees to obtain subsidized insurance, including coverage for contraception, on the exchanges. But Plaintiffs insist on a third option: they want to deny their workers access to coverage for contraception *and* act in a manner that prevents their employees from obtaining subsidies to buy full coverage elsewhere. RFRA does not entitle for-profit corporations to put their employees in such a bind.

B. Even if Plaintiffs elect to provide health insurance, the contraception regulations impose at most an incidental and attenuated burden on religious exercise.

Even if Plaintiffs were actually or practically required to offer insurance coverage, the burden from including contraception coverage in employee health insurance policies would not be substantial under RFRA. For several reasons, the relationship between Plaintiffs and the contraception regulations is incidental and attenuated: The insurance policies must be purchased by Plaintiffs' secular, for-profit corporations, rather than by the corporations' owners personally. Plaintiffs' secular, for-profit corporations must provide coverage for a comprehensive set of healthcare services, not contraception alone. And the corporations' group health plans would cover the cost of contraception only if an employee elected to purchase contraception, often after receiving a prescription from her physician.

Each of these intervening steps distances Plaintiffs from the ultimate purchase or use of contraception by their employees, and each prevents Plaintiffs from establishing a substantial burden under RFRA. Nothing about this analysis requires the Court to second-guess Plaintiffs' moral calculations; instead, the Court need only assess whether the burden asserted by Plaintiffs is one that RFRA recognizes as a matter of law.

1. Employees' health insurance is provided not by the individual owners, but by their secular, for-profit corporations.

If Plaintiffs choose to include health insurance in the compensation paid to their employees, any purchase of comprehensive health insurance would be paid for not by individuals who hold religious beliefs about contraception, but instead by secular, for-profit corporations. The individual owners are "distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). The individual owners' religious beliefs are one step removed from the regulations, which apply only to the secular, for-profit corporations. And the corporations, in turn, are not themselves exercising religion.

The legal difference between an individual owner and a for-profit corporation is no mere technicality. The laws of Pennsylvania and Oklahoma, where the

Plaintiff companies are incorporated, recognize that for-profit corporations are separate legal entities from the corporations' individual owners. *See Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 348 (3d Cir. 2001); *NLRB v. Greater Kan. City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993). This distinction between owner and corporation applies even to companies that are closely held or family owned. *See Sautbine v. Keller*, 423 P.2d 447, 451 (Okla. 1966); *Barium Steel Corp. v. Wiley*, 108 A.2d 336, 341 (Pa. 1954).

Nor may the owners of Hobby Lobby and Conestoga enjoy corporate benefits while shedding unwanted corporate obligations. They have taken advantage of the unique benefits offered by the corporate form, and they have used that corporate form to make money in the secular marketplace for craft supplies, books, and specialty wood products. Because they have done so, they must "accept the disadvantages of the corporate system along with its advantages." *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 536 (1941).

Further, although churches and other houses of worship may be subject to a different analysis, the corporations here engage in secular activity (the operation of craft and book stores, and the manufacture of wooden parts for kitchen cabinets) for secular ends (financial profit). Hobby Lobby argues that the company exercises religion because, among other things, its statements of purpose reflect commitment to biblical principles, and its stores play Christian music, avoid promoting alcohol, and are closed on Sundays. Hobby Lobby Resp. to Pet. 2–3. Conestoga similarly contends that the company has contributed to unspecified charities, adheres to a mission statement referencing "Christian principles," and—just before filing suit—adopted "The Hahn Family Statement on the Sanctity of Human Life." Conestoga Br. 5, 16. But these company statements and incidental charitable contributions do not make Plaintiffs' day-to-day commercial transactions, including the payment of compensation to employees, any less secular.

Plaintiffs also cannot establish a religious identity for Mardel, which "primarily sells Christian materials." Hobby Lobby Resp. to Pet. 2. Mardel operates to make financial profit, and courts have refused to ascribe religious significance to for-profit commercial activity, even when that activity is conducted by a house of worship. *See, e.g.*, *United States v. Sandia*, 188 F.3d 1215, 1218 (10th Cir. 1999) (rejecting RFRA challenge to endangered species law where defendant sold protected bird "for pure commercial gain"); *Christ Church Pentecostal v. Tenn. State Bd. of Equalization*, No. M2012-00625-COA-R3-CV, 2013 WL 1188949, at *10 (Tenn. Ct. App. Mar. 21, 2013), *appl. for permission to appeal denied* (Tenn. Sept. 10, 2013) (religious-accommodation law did not require property tax exemption for church's "retail establishment housed within the walls of the [church building], complete with paid staff, inventory control, retail pricing, and a wide array of merchandise for sale to the general public"). The connection between Mardel and religious exercise is likewise attenuated by Mardel's decision to sell religious publications for "pure commercial gain." *Sandia*, 188 F.3d at 1218.

2. *Contraception coverage is just one benefit within a comprehensive insurance plan.*

Plaintiffs are required to provide their employees with a comprehensive insurance policy that covers contraception as one item within a wide range of healthcare products and services. Among other things, groups health plans must cover an extensive list of preventive services, including "immunizations," "evidence-informed preventive care and screenings" for infants and children, and "evidence-based items or services that have in effect a rating of 'A' or 'B' in the current recommendations of the United States Preventive Services Task Force." 42 U.S.C. § 300gg-13(a). In a plan this comprehensive, there is no connection between Plaintiffs and any particular benefit.

The Court has held that an entity authorizing a range of expenditures does not necessarily promote any particular item obtained with those funds. In *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court concluded that a public university would not endorse religion by funding religious-student-group publications to the same extent that the university funded the publications of non-religious groups. *See id.* at 841–43. Similarly, in *Board of Education v. Mergens ex rel. Mergens*, 496 U.S. 226 (1990), the Court concluded that the Establishment Clause permitted student religious groups to meet on public-school premises during non-instructional time, under the same terms as non-religious groups, in part because even "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Id.* at 250.

The provision of a comprehensive insurance policy, rather than coverage for contraception alone, similarly stretches the connection between Plaintiffs and any particular medical procedure or service that is ultimately covered by the insurance plan. This is especially true where, as here, Plaintiffs "remain[ ] free to disassociate [themselves]" from the purchase or use of contraception by refraining from using contraception and encouraging others to do the same. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006).

Nor does the decision to self-insure mean that Hobby Lobby or Conestoga directly provides contraception to their employees. Under the Employee Retirement Income Security Act, even a company-funded group health plan is considered to be legally distinct from the company itself. *See* 29 U.S.C. § 1132; *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 373 (1990). Plaintiffs, moreover, can at any time contract with a third-party insurance company to provide insurance coverage, such that any reimbursement for contraception would be made by the third-party insurance company, not by Hobby Lobby or Conestoga's group health plans.

3. Contraception is used and financed only after an employee's independent decision.

Any reimbursement for the purchase of contraception takes place only after one or more of Plaintiffs' employees chooses to use contraception. That independent conduct—a private medical decision made by doctor and patient—further distances Hobby Lobby and Conestoga from any purchase or use of contraception.

In addressing First Amendment claims, the Court has held that intervening private, independent action breaks the causal chain between the original funding source and the ultimate use of such funds. In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the

Court rejected an Establishment Clause challenge to an Ohio school-voucher program, under which parents could use their vouchers at religious or nonreligious schools, in part because "[w]here tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child." *Id.* at 646. In these circumstances, any incidental advancement of religion was "reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." *Id.* at 652. Similarly, in ***Goehring v. Brophy***, 94 F.3d 1294 (9th Cir. 1996), the Ninth Circuit rejected a RFRA challenge to a public university's mandatory student-activity fee, part of which subsidized student health-insurance plans that covered abortion services; although plaintiffs' "sincerely held religious beliefs prevent[ed] them from financially contributing to abortions," the insurance subsidy was "distributed only for those students who elect to purchase University insurance." *Id.* at 1298, 1300.

In other settings, courts have likewise recognized that the chain of causation may become interrupted and thus too remote to support liability. Under tort law, for example, an act is not the proximate cause of a plaintiff's injury if an intervening act breaks the causal chain, as then-Chief Judge Cardozo recognized in *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928). When considering whether to suppress evidence under the Fourth Amendment, courts must determine whether "the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the 'taint' imposed upon that evidence by the original illegality." *United States v. Crews*, 445 U.S. 463, 471 (1980). Here, too, the intervening decisions of individual employees attenuate the connection between Plaintiffs and the provision of contraception.

Because Plaintiffs object to covering certain forms of prescription contraception, there is yet another intervening influence: the employee's physician, who must prescribe such contraception before the employee can obtain it. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (rejecting "the questionable assumption that doctors would prescribe unnecessary medications"). As reflected in virtually all states' product-liability laws, prescribing physicians act as learned intermediaries with independent responsibility for evaluating medical risks in light of the patient's needs. *See, e.g.*, *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1017 (10th Cir. 2001). Ultimately, then, there is no reimbursement for the purchase of contraception by a group health plan without the independent decision of a covered employee and, in many cases, the covered employee's physician.

Plaintiffs cannot point to any decision that grants employers a religious-liberty interest in the way that employees use their compensation. The health benefits provided by Hobby Lobby and Conestoga are "part of an employee's compensation package." *Liberty Univ.*, 733 F.3d at 91. In upholding a state-issued tuition grant to a student who used the grant to attend a religious school to become a pastor, the Court explained that "a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary." *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 486–87 (1986).

No matter what their owners' religious beliefs, Hobby Lobby and Conestoga could not decide to pay their employees below the minimum wage—or to pay women less than men—to reduce the risk that employees would use their wages to buy contraception. The Court has rejected free exercise challenges by a religious foundation to minimum wage and overtime requirements of Fair Labor Standards Act, and observed that "[l]ike other employees covered by the Act, [the religious foundation's employees] are entitled to its full protection." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303–05, 306 (1985). Courts have also refused to authorize religious exemptions to the law requiring equal pay for men and women; compliance with this law, notwithstanding a religious school's belief that males were the "head of the house," imposed "at most, a limited burden" on free exercise rights. *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392, 1398 (4th Cir. 1990).

Plaintiffs have no greater right to deprive their employees of required non-cash compensation, including health benefits. Employees work for wages, which are subject to minimum wage laws; and for non-cash benefits such as health insurance, which is subject to minimum coverage requirements. One form of compensation affects the other: "Economists are in near-unanimous agreement that workers ultimately pay for health insurance through lower wages...." Thomas Buchmueller et al., *Will Employers Drop Health Insurance Coverage Because of the Affordable Care Act?*, 32 Health Affairs 1522, 1523 (2013), *available at* http://www.dhhs.state.nh.us/sme/documents/article-aca-1522.full.pdf.

Just as an employer may not control how employees use their wages, an employer may not supervise employees' use of their health-benefits compensation. Indeed, even when employers choose to self-finance employee group health plans, federal regulations "protect the privacy of employees' health information against inquiries by their employers." *Fla. ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235, 1335 (11th Cir. 2011) (Marcus, J., concurring in part and dissenting in part) (citing 45 C.F.R. § 164.102 *et seq.*), *aff'd in part & rev'd in part, Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). Whether to buy or use birth control is an employee's own decision, using her own compensation, in consultation with her own physician, and guided by her own religious beliefs.

4. The Court can and should consider the degree of attenuation between Plaintiffs' obligations and employees' access to contraception.

Relying on *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), Plaintiffs argue that RFRA "does not ask whether [the corporations' owners'] religious exercise or moral calculus is substantial." Conestoga Br. 34. Plaintiffs are of course entitled to their own moral calculus, but here the relevant calculation is purely legal: whether Plaintiffs' religious objections amount to a burden that is "substantial" as a matter of law. The Court's observation in *Thomas*—that "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one"—refuted the state's argument that Thomas "had made a merely personal philosophical choice rather than a religious choice." 450 U.S. at 714–15 (quotation marks omitted). But

Thomas did not instruct the Court to abdicate the responsibility to assess whether, in light of a plaintiff's religious beliefs, the challenged requirement produces a burden that is substantial as a matter of law.

Even after *Thomas*, the Court has continued to assess whether an asserted religious objection amounts to a substantial burden as a matter of law. *See, e.g.*, *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (notwithstanding plaintiff's religious objections to certain provisions of tax code, court must determine "whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one"); *Bowen v. Roy*, 476 U.S. 693, 701 n.6 (1986) (no substantial burden despite parent's religious objection to government's use of child's Social Security number: "for the adjudication of a constitutional claim, the Constitution, rather than an individual's religion, must supply the frame of reference"). Most importantly, *Thomas* did not involve a plaintiff that sought to deprive someone else of compensation to which the law entitled her.

If the Court were not permitted to draw legal lines, then employers could intrude on a broad range of employees' personal decisions; virtually any law governing employee compensation could be construed to facilitate behavior offensive to an employer's owner's religious beliefs. Plaintiffs here object to offering insurance policies that cover certain types of contraception. Plaintiffs in another case might object to paying minimum wage to workers who might use the money to purchase these forms of contraception. Plaintiffs in yet another case might object to compensating workers who might use their wages to do research about contraception.

Each of these objections, moreover, could transcend the issue of contraception. Other employers' owners might object to even the incidental facilitation of other medical procedures or treatments, no matter how remote the connection between the employer and the conduct, and no matter how directly the requested exemption would burden the affected employees and hinder *their* rights to the free exercise of religion. Especially when the rights and interests of others are at stake, RFRA should not be read to make each company's owner "a law unto himself." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 885 (1990).

CONCLUSION

The judgment of the Tenth Circuit should be reversed, and the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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AMICUS
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In The
Supreme Court of the United States

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KATHLEEN SEBELIUS, ET AL.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,

Respondents,

◆

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,

Petitioners,

v.

KATHLEEN SEBELIUS, ET AL.,

Respondents.

◆

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Tenth Circuits

◆

BRIEF OF REPRODUCTIVE RESEARCH AUDIT AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY, ET AL. AND CONESTOGA, ET AL.

◆

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus, Reproductive Research Audit ("RRA") educates through peer-review analysis on the methodology of scientific studies, legislative recommendations, and public programs covering reproductive and end-of-life health issues. RRA's principle expertise includes reviewing and analyzing policies and studies relating to contraception, abortion, fetal and prenatal life, fertility, women's healthcare access, public funding, and end-of-life considerations. RRA's scientists are Ph.D.-level experts in social science and other methodologically related fields. Among its alliance of experts, RRA focuses on evidence-based analysis and conclusions in auditing and preparing studies in its mission-field. RRA seeks to create a dialogue of scholars speaking with scholars, in the hopes of elevating public knowledge on these critical scientific issues.[1]

RRA is a project of the Center for Morality in Public Life ("CFMPL") a 501(c)(3) not-for-profit education center, based in the Commonwealth of Virginia. CFMPL provides a global campus of study, discussion and research to preserve and restore a common language on objective truth, moral goodness and lived beauty. All of CFMPL's sponsored projects place prudence at the service of wisdom and seek to apply "best of" practices in advancing the core-competencies of the related fields. CFMPL is non-partisan and does not engage in any issue-advocacy efforts.

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *Amicus Curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. The parties have consented to the filing of this brief.

RRA's interests here are to determine whether the federal government's claim that the requirement that employers provide no-cost access to contraception, abortion-causing drugs, and sterilization procedures through employer provided health care plans is the least restrictive means available to accomplish the government's stated goals of promoting public health and general equality. In keeping with its mission, RRA tests the accuracy of such public policy positions in light of available evidence to ensure that basic fundamental liberties are not infringed as a result of the means government chooses to pursue its stated goals.

SUMMARY OF ARGUMENT

When a law or regulation infringes on the free exercise of religion, the government must show that the law or regulation serves a compelling government interest and is narrowly tailored to meet that interest. Religious freedom is at the cornerstone of individual liberty and beyond the control of government except in the most limited of circumstances.

Accordingly, the compelling government interest standard should apply to the government's Mandate that all covered employers provide at no cost to their employees contraception, abortion-causing drugs, and sterilization procedures and related counseling because of its burden on employer's free exercise rights.

Here, RRA focuses on whether the government's Mandate is the least restrictive means available to serve its stated interests of public health and gender equality. This standard is required by the Religious Freedom Restoration Act and this Court's Free Exercise jurisprudence.

The substantial burden on religious objectors' free exercise rights is presumed based on the substantial and crippling fines such businesses and individuals face should they not violate their religious principles and provide the required coverage. RRA leaves to the parties and others to address more fully whether the government's expressed interests satisfy the compelling government interest standard and whether the Mandate actually serves its expressed, albeit generalized interests. Rather, the focus here is on several alternative, less restrictive means that would satisfy the government's stated interests while not violating the religious conscience rights of employers who object to providing the mandated coverage on religious grounds, such as the non-governmental parties in these consolidated cases.

The government has several alternatives to providing women with no cost access to the mandated services. Courts have recognized that the government could have made the mandated coverage available to individuals who work for religious objectors either directly or through the government exchanges by either providing tax breaks to those who sign up for the limited services policy or by paying for the coverage itself. The government could also provide incentives to insurance carriers and manufacturers of contraception to provide the coverage or the medications for no charge.

In addition to the court identified alternatives, the government fails to show that providing an exemption to religious objectors would make the purpose of the Mandate unworkable. First, the government does nothing to cover the millions of women who work for employers already exempted from the Mandate. Second, there is no evidence that the number of businesses that will seek an exemption on religious grounds will create a large number of individuals without contraceptive coverage. Finally, the government already has in place programs such as Title X and Medicaid through which the mandated contraception and sterilization services could be provided at minimal cost to the government.

There is simply no rational basis, let alone a compelling government interest, to require religious objectors to provide the mandated services in violation of their religious beliefs or face substantial fines and penalties. Because other less restrictive means are available, the government cannot establish a constitutional basis for denying a religious exemption to the Mandate to any religious objector.

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ARGUMENT

"The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such. Government may neither compel affirmation of a repugnant belief nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views." *Sherbert v. Verner*, 374 U.S. 398, 403 (1963) (internal citations omitted). Here, the government subjects individuals and businesses to substantial fines and penalties should they fail to comply with the government's mandate enacted as part of the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148 (2010), to provide at no cost to its employees "'[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity,' as prescribed by a provider." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1123 (10th Cir. 2013) (quoting 77 Fed.Reg. 8,725, 8,725 (Feb. 15, 2012)) (hereinafter "the Mandate"). The Court should invalidate the Mandate because it is not the least restrictive means available to satisfy a compelling government interest so that it justifies the substantial burden placed on religious objectors' free exercise rights.

I. THE GOVERNMENT MUST ESTABLISH THAT THE MANDATE IS NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENT INTEREST.

The claims before the Court are based on both the Free Exercise Clause of the First Amendment to the United States Constitution and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, et seq. ("RFRA"). Both RFRA and the Free Exercise Clause require that to defend the Mandate's admitted substantial burden on religious objectors' free exercise of religion, the government must establish that the Mandate "is the least restrictive means of achieving some compelling state interest," recognizing "that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." *Thomas v. Review Bd. of the Indiana Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)).

A. The Religious Freedom Restoration Act Requires the Government to Use the Least Restrictive Means Possible.

When enacting RFRA, Congress expressly stated its intent to protect the "free exercise of religion" for all persons from being burdened by the government, even when involving a "law 'neutral' toward religion."

42 U.S.C. § 2000bb(a)(1) & (2). RFRA requires that laws and regulations having a substantial burden on an individual's or entity's "free exercise of religion" be reviewed under "the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). RFRA specifically provides that a substantial burden on the free exercise of religion may only be upheld if the burden "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). As analyzed below, the Mandate is not the least restrictive means available to justify the substantial burden on religious objectors that would result from compliance with the Mandate.[2]

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[2] Although beyond the scope of this Brief, the requirement that religious objectors must either comply with the Mandate or face penalties and fines of $100 per day for each "individual to whom such failure relates," 26 U.S.C. § 4980D(b)(1), or, if they were to cancel their insurance plan altogether, fines of $2000 per employee per year, 26 U.S.C. § 4980H, is more than sufficient to establish a substantial burden on the free exercise of religion. *See Sherbert*, 374 U.S. at 404 (holding that forcing petitioner "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" was a substantial burden on the free exercise of religion); *Wisconsin v. Yoder,* 406 U.S. 205, 218 (1972) (holding that after being tried, convicted and fined $5, "the impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to

(Continued on following page)

B. The Free Exercise Clause of the First Amendment Requires the Government Use the Least Restrictive Means Available Before Substantially Burdening the Free Exercise of Religion.

When it comes to the free exercise of religion, "no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth." *Sherbert*, 374 U.S. at 413 (Stewart, J., concurring). "Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause." *Emp. Div. Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 893 (1990) (O'Connor, J., concurring in result). Accordingly, "the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief. In short, [the] Constitution commands the positive protection of government of religious freedom – not only for a minority, however

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perform acts undeniably at odds with fundamental tenets of their religious beliefs"); *Korte v. Sebelius*, 735 F.3d 654, 683-84 (7th Cir. 2013) (holding that "the federal government has placed enormous pressure on the plaintiffs to violate their religious beliefs and conform to its regulatory mandate" under the Mandate at issue here).

small – not only for the majority, however large – but for each of us." *Sherbert*, 374 U.S. at 415-16 (Stewart, J., concurring).

The compelling interest test which subjects the government's substantial burden on the free exercise of religion to strict scrutiny is at the heart of ordered liberty. "[T]he Founders [did not think] their dearly bought freedom from religious persecution a 'luxury,' but an essential element of liberty – and they could not have thought religious intolerance 'unavoidable,' for they drafted the Religion Clauses precisely in order to avoid that intolerance." *Smith*, 494 U.S. at 909 (Blackmun, J., dissenting). "The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the court to deem this command a 'luxury,' *ante,* at 1605, is to denigrate '[t]he very purpose of a Bill of Rights.'" *Id.* at 903 (O'Connor, J., concurring in judgment).

Here, Hobby Lobby, Mardel, and Conestoga (collectively "Plaintiffs") seek to operate in accordance with their religious principles. In response, the government tells them they must act contrary to their religious convictions or face enormous fines. The government's stated reasons for this substantial burden on an employer's religious freedom should be subject to the strict scrutiny that the compelling interest test demands.

1. Under the compelling interest test, the government must establish the Mandate is the least restrictive means available.

Not only must the Mandate actually achieve the stated government interest that must be "of the highest order," *Yoder*, 406 U.S. at 215; *see also, id.* at 221, but the government must use the least restrictive means available. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Thomas*, 450 U.S. at 718. Accordingly, the Mandate must be "drawn in narrow terms to accomplish" the government's stated interest. *Lukumi*, 508 U.S at 546.

In this context, the government must "identify an 'actual problem' in need of solving, and the curtailment of [the right] must be actually necessary to the solution." *Korte*, 735 F.3d at 685 (quoting *Brown v. Entm't Merchs. Ass'n*, ___ U.S. ___, 131 S.Ct. 2729, 2738, 180 L.Ed.2d 708 (2011) (citations omitted)). If "[t]he proffered objectives [of the Mandate] are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree," then the regulation will be invalid. *Lukumi*, 508 U.S. at 546. Regulations that exempt non-religious conduct that has the same effect as the requested religious exemption are not narrowly tailored and cannot pass constitutional muster. *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (finding that exception to the "no beard" rule for medical reasons made the failure to exempt individuals from the rule for religious reasons unconstitutional because it "devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons"); *Stormans, Inc. v. Selecky*, 844 F.Supp.2d 1172, 1190 (W.D. Wash. 2012) (*Stormans I*) (finding that regulations that precluded an opting out of providing emergency contraception for religious reasons were not narrowly tailored and therefore invalid when regulations provided for a host of secular, non-religious reasons for a pharmacy to avoid stocking emergency contraception and other drugs and for individual pharmacists to decline to dispense the drug); *Roman Catholic Archdiocese of New York v. Sebelius*, No. 12 Civ. 2542(BMC), 2013 WL 6579764 *18-19 (E.D.N.Y. Dec. 16, 2013) (invalidating the Mandate due, in part, to other less restrictive means available).

Here, the government has alleged that the Mandate is necessary to promote "[1] public health and [2] gender equality." *Hobby Lobby*, 723 F.3d at 1143. The government then "argues that the contraception mandate furthers these interests by reducing unintended pregnancies, achieving greater parity in health-care costs, and promoting the autonomy of women both economically and in their reproductive capacities." *Korte*, 735 F.3d at 686. Of course, such "broadly formulated interests justifying the general applicability of government mandates" is insufficient to state a compelling government interest. *Hobby*

Lobby, 723 F.3d at 1143 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)). Moreover, "[b]y stating the public interests so generally, the government guarantees that the mandate will flunk the [strict scrutiny] test." *Korte*, 735 F.3d at 686. This is so because "such a high level of generality makes it impossible to show that the mandate is the least restrictive means of furthering them. There are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty." *Id.*

2. The Court's more lenient test announced in *Smith* is not applicable because the Mandate is not a rule of neutral and general applicability.

In *Smith*, the Court abandoned the compelling interest test for laws that were "neutral" and of "general applicability" and did not seek to regulate "religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs." 494 U.S. at 1600-02. Here, as noted above, the government has not applied the Mandate in a neutral manner and the Mandate is anything but "generally applicable" given the wide ranging exemptions that already exist to the Mandate for secular and narrow religious reasons. Such wide ranging exemptions take the Mandate out of the category of a regulation that is "neutral" and of "general applicability" into one that is "religious gerrymandering." *Lukumi*, 508 U.S. at 537.

By granting secular exemptions for "grandfathered" plans and small employers in their entirety, the government removed the Mandate from any possible application of the *Smith* test and back into the traditional compelling interest test. *Fraternal Order of Police*, 170 F.3d at 364-65. Even the granting of an exemption for one kind of religious employer, houses of worship and their integrated auxiliaries, the government demonstrated that the Mandate was not neutral or of general applicability. *Gonzales v. O Centro Expirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433 (2006) (finding that granting an exception to the Controlled Substances Act for religious peyote use by Native Americans compelled the government to grant an exemption for the religious use of hoasca). Indeed, "[h]aving granted so many exemptions already, the Government cannot show a compelling interest in denying one to" valid religious objectors. *Roman Catholic Archdiocese of New York*, 2013 WL 6579764 at *17.

The Court's traditional Free Exercise jurisprudence favors the application of the compelling interest test with a least restrictive means requirement even when reviewing laws of general applicability. *Yoder*, 406 U.S. at 220 (rejecting that Wisconsin's compulsory school attendance law should be upheld just because it "applies uniformly to all citizens of the State and does not, on its face, discriminate against religions or a particular religion, or that it is motivated by legitimate secular concerns"). As this Court explained, "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Id.*

II. OTHER LESS RESTRICTIVE MEANS EXIST FOR THE GOVERNMENT TO MEET ITS ALLEGED COMPELLING GOVERNMENT INTEREST.

Even if the Court were to determine that the government's stated interests were compelling interests "of the highest order" and that the Mandate furthered those interests, the question becomes whether the Mandate is the less restrictive means available to further those interests. As shown below and as found by several lower courts, it is not.

A. The Government's Exemption of so Many Employers from the Mandate for a Variety of Reasons Establishes that the Regulation Is Not the Least Restrictive Means Available.

Under the ACA, numerous employers and plans are exempted from complying with the Mandate. First, certain narrowly defined religious employers are completely exempt from the Mandate, 45 C.F.R. § 147.130(a)(1)(iv)(A). Second, religious non-profits are afforded an "accommodation" to allow them to certify an objection to the Mandate and avoid the fines and penalties so long as they authorize their third party administrator to provide coverage in accordance with the Mandate. 78 Fed.Reg. at 39,874, 79-80, 82.[3] Third, businesses that maintain "grandfathered" plans do not have to comply with the Mandate. 42 U.S.C. § 18011(a)(2). Fourth, businesses with fewer than 50 employees are exempt altogether from supplying insurance coverage to their employees and are thereby exempt from the Mandate. 26 U.S.C. § 4980H. Such exempt plans cover between 50 million and 100 million people in the United States. *Hobby Lobby*, 723 U.S. at 1124.

The Court has established in its strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547. Here, the government has created exceptions to the Mandate for secular and religious reasons alike, only to exclude from any exemption individuals and businesses that operate on a for-profit basis.[4] Importantly, the government has not taken the first step to provide a means for the employees who work for excepted employers to obtain the mandated contraceptive, abortion-causing drugs and sterilization services required by the Mandate. In short, the government has declared that it is sufficient to leave those enrolled in exempt plans potentially without the benefits of the Mandate rather than create a means for those women of child bearing age in such plans to obtain these services at no cost. As such, there is no rational basis, let alone a narrowly tailored regulation designed to achieve a compelling government interest to require all religious objectors to comply with the Mandate. *O Centro*, 546 U.S. at 431-33; *Lukumi*, 508 U.S. at 546-47 (holding "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling").

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[3] The constitutionality of this requirement is working its way through the lower courts. *See, e.g.*, *Roman Catholic Archdiocese of New York*, 2013 WL 6579764 at **5 and 18.

[4] The constitutional infirmity of the "accommodation" for religious non-profits is not discussed here and, while not before the Court, is certainly implicated in a least restrictive means analysis as noted in Section II.C., *infra*.

B. Other Less Restrictive Means are Available.

There are a number of less restrictive means that would achieve the government's stated goals while not imposing on the religious liberties of those whose sincerely held religious beliefs preclude the providing or facilitating access to contraception, abortion-inducing drugs, or sterilization. For example, in *Korte*, the court noted:

> there are many ways to increase access to free contraception without doing damage to the religious-liberty rights of conscientious objectors. The plaintiffs have identified a few: The government can provide a "public

> option" for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception and sterilization services. No doubt there are other options.

735 F.3d at 686. The *Korte* court further noted that the government did not make "*any* effort to explain how the contraception mandate is the least restrictive means of furthering its stated goals of promoting public health and gender equality." *Id.* at 687 (emphasis in original).

Likewise, in *Hobby Lobby*, the court found that the government failed to articulate any reason why granting the limited exception requested there would "fundamentally frustrate[ ] [the government's] goal." 723 F.3d at 1144. With so many exemptions already available there must be some rational basis for denying a religious exemption, yet the government fails to articulate any such reason. *See Fraternal Order of Police*, 170 F.3d at 365. It is clear that the Mandate is not narrowly tailored based on the statutory and regulatory exemptions identified above. *Stormans I*, 844 F.Supp.2d at 1199 (holding that the State's stocking and delivery rules "are not at all narrowly tailored; they are instead riddled with secular exemptions that undermine their stated goal of increasing patient access to all medications").

The District Court in *Roman Catholic Archdiocese of New York* also recently found that there are "numerous less restrictive alternatives . . . readily apparent" to the Mandate. 2013 WL 6579764 at *18. In support, the court noted the following:

> The Government could provide the contraceptive services or insurance coverage directly to plaintiffs' employees, or work with third parties – be it insurers, health care providers, drug manufacturers, or non-profits – to do so without requiring plaintiffs' active participation. It could also provide tax incentives to consumers or producers of contraceptive products. Many of these options have been recognized as feasible alternatives by other courts. *See Korte*, 735 F.3d at 686.

Id.

The government's objections to these alternatives – administrative costs and an additional burden on those in exempt plans who want contraceptive coverage – have been rightly rejected. *See Korte*, 735 F.3d at 686-87; *Roman Catholic Archdiocese of New York*, 2013 WL 6579764 at **18-19. The government has ignored alternatives to its Mandate's substantial burden on religious objectors while intentionally leaving tens of millions of people outside of the Mandate's supposed benefits. As a result, the government fails the strict scrutiny analysis that governs the issue.

C. There Would Be Minimal Cost or Disruption From Granting an Exemption to Businesses that Object to the Mandate on Religious Grounds.

There is no evidence that granting a religious exemption would unduly limit or deny women access to low-cost or no-cost contraceptive services as required by the Mandate by using less restrictive means. For example, in *Stormans I,* the State of Washington desired to ensure that all women who wanted access to emergency contraception could obtain it in a timely manner, so the State prohibited pharmacies and individual pharmacists from refusing to stock or deliver the drugs due to religious objections. When scrutinized, the motivation of the State was to target religious activity. *Stormans I*, 844 F.Supp.2d at 1176-79. Additionally, the evidence established that the alleged "problem" was nonexistent as there was not an access problem in Washington State to emergency contraception and the number of pharmacies and pharmacists who objected to stocking or dispensing the drugs was minimal. *Stormans, Inc. v. Selecky*, 854 F.Supp.2d 925, 946-48 (W.D. Wash. 2012) ("*Stormans II*"). The same is true here.

1. Granting religious objectors an exemption to the Mandate would not frustrate or do harm to the government's stated goals.

Initially, the question the government must answer is the impact on its stated goals from granting an exemption to a particular business that objects to providing the required coverage on the basis of religious beliefs. *Hobby Lobby,* 723 F.3d at 1143 (quoting *O Centro*, 546 U.S. at 430). The question necessarily concerns the extent to which businesses would seek a religious exemption. As noted above, the government has already granted an exemption for secular ("grandfathered" plans and small businesses) and limited religious reasons (houses of worship and integrated auxiliaries) that amount to tens of millions of covered persons. The incremental step of granting exemptions to employers who object to some or all of the Mandate's requirements on the basis of religious objections is likely small. It is important to remember that the exemption would only be available based on religious beliefs, not personal philosophical preferences as the First Amendment only protects religious free exercise. *Yoder,* 406 U.S. at 215-16. The government fails to identify by any analysis the number of potential religious objectors, choosing instead to rely on a blanket statement that any further exemptions would frustrate the goals of the Mandate. Such an unsupported generalization fails to meet the government's burden. *Sherbert*, 376 U.S. at 407 (when faced with possibility that people would fraudulently take advantage of a religious exemption, "it would plainly be incumbent upon the [government] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights"); *Korte*, 735 F.3d at 686-87; *Roman Catholic Archdiocese of New York*, 2013 WL 6579764 at **16-17.

In trying to estimate the number of women likely affected by religious objections to the Mandate, RRA reviewed 39 complaints from for-profit businesses seeking relief to determine the number of employees covered by insurance purchased by those employers. It determined that fewer than 20,000 employees are covered by the plans that are subject to current litigation.[5] The sum calculated from each complaint is 19,932. This figure is not merely women or insured employees with female dependents, but all employees insured by each organization as listed in each respective complaint, meaning it includes women past childbearing age as well as men.

There are many nuances to control for when estimating the number of people likely to be affected from an employer objection of contraception coverage that have been included in the methodology employed here to create a reasonable estimate of women who could be denied contraception by for-profit litigants. For example, because women are virtually the exclusive users of contraception and have use of it only during reproductive ages, it is important to both get an estimate of women who are insured, either as an employee or a dependent on someone else's insurance policy, and the number of women ages 15-44 who would potentially be consumers of contraception. All caution was taken to estimate figures precisely, but with data broad enough to represent both the for-profit litigants and others which may come forward at a later date. Furthermore, the margin of error has been shifted on the side of overestimation. This compensates for limitations in data and provides a reasonable, maximum figure while conceding that the true figure is likely less.

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[5] Of course, this estimation does not take into account those businesses that object to the Mandate on religious grounds but lacked the funds or other means to challenge the application of the Mandate to their business. The burden of showing that such numbers would make the government's system unworkable falls to the government and it makes no effort to show any adverse effect from granting the exemptions requested by the parties currently before the Court or who have filed lawsuits that remain pending in lower courts.

To estimate the number of persons who may be affected by an absence of contraception coverage, this analysis relied upon the most recent data from several sources, including The Bureau of Labor Statistics (BLS), the Census Bureau, and the Centers for Disease Control (CDC). According to the latest data from a 2013 report by the BLS, women represent 58.1 percent of the workforce.[6] One limitation of this data is that while women account for 58.1 percent of the workforce, women are more likely than men to work to part-time positions that would not be insurance-eligible (27 percent of employed women are part-time versus 11 percent of men).[7] This is the common explanation for why men are more likely to be offered employment-based insurance than women, yet there is also a difference in the number of women who accept insurance when offered. A Census Bureau report indicates that men accept employment-based insurance offers 73.9 percent to 65.3 percent of women.[8] Since industries may also vary on the prevalence of women, and employers may choose to extend insurance even to part-time workers, a figure was found that estimates the number of women who receive employment-based insurance across all industries. A 2013 report from the Kaiser Foundation states 58 percent of women have insurance coverage directly from their employer.[9] In the interest of erring on the side of overestimation, we have assumed that since 58.1 percent of the workforce are women (and 58 percent of women receive insurance through their employer) that 58.1 percent of those insured can be assumed female. By these calculations, 11,581 of the 19,932 employees insured are women.

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[6] *See* Bureau of Labor Statistics (2013) "Women in the Laborforce: A Databook" available at http://www.bls.gov/cps/wlf-databook-2012.pdf.

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[7] *Ibid.*

[8] *See* Janiki, H. (2013) "Employment Based Health Insurance: 2010" available at http://www.census.gov/prod/2013pubs/p70-134.pdf.

[9] *See* The Henry J. Kaiser Foundation (2013) "Women's Health Insurance Coverage" available at http://kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet/.

Data from the 2013 BLS report was disaggregated and then summed to determine that 48 percent of women in the workforce are of childbearing age (16-44).[10] Therefore, of the 11,581 females, an estimated 5,559 are women ages 16-44 who could be consumers of contraception. For ease, this figure will be rounded to 5,600.

There is the additional issue of dependents, as female spouses of reproductive age and daughters need to be considered when forming our estimate. In 2010, 21.7 percent of all people age 15 and over were dependents on employment-based health coverage.[11] However, 2010 was prior to the Affordable Care Act mandate that insurers include young adults on their parent's insurance plan through age 26.[12] Spousal coverage is not mandated, often penalized or discouraged by employers and recently, many employers have excluded spouses altogether.[13] Nonetheless, 23 percent of women are listed as dependents on job-based health insurance.[14] The BLS reports 58.2 percent of men are married with a spouse present, which (age of spouse not considered) adds 4,861 potential females.

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[10] *See* Footnote 6, Table 1, pg. 8.

[11] *See* Footnote 8, Figure 1, pg. 3.

[12] *See* Footnote 9.

[13] *See* Wieczner, Jen (2013) "Why your boss is dumping your wife: UPS joins growing list of companies kicking spouses off health insurance" available at http://www.marketwatch.com/story/why-your-boss-is-dumping-your-wife-2013-02-22.

Since a majority of insured women obtain coverage directly through their employers, this figure is almost assuredly a high estimate. Yet with the addition of potential female dependents of childbearing age up until age 26, even females with insurance beyond childbearing age may have daughters covered under their plan. However, to account for this uncertainty, we can assume all 4,861 spouses are covered under insurance to compensate for other potential dependents of both men and women of all ages (rounded to 4,900 for ease). When summed with the 5,600 women ages 16 to 44 estimated to be directly insured, a broad, yet reasonable estimate of potential contraceptive users affected by the for-profit litigants is 10,500.

This figure of 10,500 is merely a broad estimate of potential contraceptive consumers, not actual consumers. To estimate actual consumers, this requires the percentage of women using contraception which requires medical consultation and would be covered by insurance. The most recent figures on contraceptive usage from the Centers for Disease Control (CDC) indicate that only 62.2 percent of women of childbearing age (15-44) use contraception.[15] Of those, 14 percent of all women choose condoms, fertility awareness, or other methods that do not require insurance coverage.[16] The remaining women, 37.8 percent, are either not sexually active, already pregnant, seeking pregnancy, surgically or non-surgically sterile or otherwise not interested in contraception.[17] Accordingly, over half (51.8 percent) of the potential consumers of contraception are not consumers of contraception provided through health care plans at all. This leaves 5,061 (48.2 percent of 10,500) likely consumers of contraception who would benefit from contraception coverage in a health care plan. In short, for 19,932 insured persons, the lack of contraception coverage only affects around 25 percent of those insured assuming all contraceptive methods are refused.

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[14] *See* Footnote 9.

This number is even smaller when considering that the largest employers which have filed complaints are willing to supply most contraception and object to only some methods with abortion-causing potential. In particular, Hobby Lobby opposes the intra-uterine device (IUD) and emergency contraception (EC), and Conestoga's objection to the Mandate is similar.

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[15] *See* Jones, H., Mosher, W., Daniels, K. (2012) "Current Contraceptive Use in the United States, 2006-2012, and Changes in Patterns of Use Since 1995" available at http://www.cdc.gov/nchs/data/nhsr/nhsr060.pdf.

[16] *Ibid.*

[17] *Ibid.*

Of the 19,932 insured persons listed on for-profit complaints, these two employers comprise 14,562 or 73 percent of this total. Using the above methodology, they represent an estimated 7,665 of the 10,500 women insured. They also provide the contraceptive of choice for 96.2 percent of their employees.[18] In fact, the most recent figures on contraceptive usage from the Centers for Disease Control (CDC) indicate that only 3.5 percent of contraception users choose the IUD and only 0.3 percent of women list usage of the morning after pill among many other methods.[19] This is consistent with a different report by the CDC that found that only one in nine women have ever used EC between 1995-2010, although this number continues to rise due to over-the-counter (OTC) access (not necessarily insurance coverage).[20] When available by prescription only, EC had been accessed by 4.2 percent of sexually active women of the population over the previous 7 years, or 0.6 percent per year.[21] While birth control failure can be perceived with some methods (like condoms) and lead to women seeking

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[18] *See* Footnote 15, Table 1.

[19] *Ibid.*

[20] *See* Daniels, K., Jones, J. & Abma, J. "Use of Emergency Contraception Among Women Aged 15-55: United States, 2006-2010" available at http://www.cdc.gov/nchs/data/databriefs/db112.pdf.

[21] *Ibid.*

EC, lifestyle choices such as unprotected sex and choosing not to use any of many other contraceptives covered by Hobby Lobby and Conestoga's insurance plans would be hard to confidently estimate. Because only 11 percent of the total population have ever used EC even once, and women can access some forms of EC immediately without an appointment or a prescription, the likelihood of insurance reimbursement for EC is minimal.[22]

TABLE 1: Persons affected by the Plaintiffs' opposition to the IUD and EC.

CONTRACEPTIVE STATUS AND METHOD	PERCENTAGE OF WOMEN BY CONTRACEPTIVE METHOD	ESTIMATED NUMBER OF CONSUMERS
Potential Consumers insured by the plaintiffs:	7665	
All Contraceptive Consumers:	62.2 percent	4768
Female Sterilization	16.5 percent	1265
Male Sterilization	6.2 percent	378
Oral Contraception Pill	17.1 percent	1376
Implant, Lunelle, Patch	4.5 percent	362
Injection	2.3 percent	185
Contraceptive Ring	1.3 percent	105

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[22] *Ibid.*

Intrauterine Device (IUD)	**3.5 percent**	**282**
Other Methods: ***emergency contraception,***[3]	**0.6 percent**	**48**
Non-Prescription Methods (condom, periodic abstinence, withdrawal)	14 percent	1073
Non-Contraceptive Users (not sexually active, pregnant or seeking pregnancy, post-partum, infertile)	37.8 percent	2897
TOTAL ESTIMATE OF PEOPLE AFFECTED BY THE PLAINTIFFS' OPPOSITION TO THE IUD AND EC: 330		

1 Figure includes additional 5 percent for prescription, non-surgical methods.

2 Male sterilization was calculated from the number of insured males of all ages from Hobby Lobby/ Conestoga (6101).

3 Figure doubled to 0.6 to account for potential but unexpected spikes in emergency contraception usage.

A very liberal estimate of the number of women who may be denied free coverage of those contraceptive methods opposed by the Plaintiffs on religious grounds is 330 women. This figure was purposely inflated by 5 percent to compensate for price elasticity, an estimated increase in the demand for these services if offered at a lower price due to insurance.

The CDC report does not list cost as a barrier to contraceptive use, nonetheless, IUD and EC usage was increased here by 5 percent and still results in only 330 women affected.

Extrapolating from here, Table 2 offers the number of women affected by the other litigants, assuming the other for-profit litigants oppose all contraception even though not all of the other for-profit litigants actually oppose all means of contraception.

TABLE 2: Estimated Women Insured by Other For-Profit Corporations By Contraceptive Usage Type.

CONTRACEPTIVE STATUS AND METHOD	PERCENT OF WOMEN BY METHOD	ESTIMATED NUMBER OF USERS
Potential Consumers (P) insured by for-profits with complaints on file:	2835	
All Contraceptive Users:	62.2 percent	1763
Female Sterilization	16.5 percent	468
Male Sterilization	6.2 percent	137
Oral Contraception Pill	17.1 percent	509
Implant, Lunelle, Patch	4.5 percent	134
Injection	2.3 percent	68
Contraceptive Ring	1.3 percent	39
Intrauterine Device (IUD)	3.5 percent	104

Other Methods (diaphragm, emergency contraception, cervical cap, sponge)[1]	0.3 percent	9
Non-Prescription Methods (condom, periodic abstinence, withdrawal)	14 percent	397
Non-Contraceptive Users (not sexually active, pregnant or seeking pregnancy, post-partum, infertile)	37.8 percent	1072
Total Estimate of Actual Consumers Among For-Profit Litigants Assuming Opposition to All Contraception: 1366		

1 Figure includes additional 5 percent for prescription, non-surgical methods.

2 Male sterilization was calculated from the number of insured males of all ages employed by litigants other than Hobby Lobby/Conestoga (2212).

The sum of people affected by both the Plaintiffs and other for-profit corporations complaints is 1,696 people. This is already a liberal estimate, but can be rounded to 2,000. The Plaintiffs represent a special case in that they have more narrow religious objections, while many other litigants have a blanket opposition to contraception. Yet, with all objections considered, the 5,370 total persons insured by the other for-profit litigants (excluding Hobby Lobby/Conestoga) amounted to only 1,366 persons likely to be affected by refusal to cover contraception and sterilization. This amounts to 25.4 percent of the insured who are actual consumers of insurance-covered contraception, if we include a potential 5 percent increase. It is therefore safe to estimate, that only 254 people per 1,000 persons insured would be affected by employer objections to cover contraception.

2. The government already has the means to provide the Mandated services without having to burden religious objectors' free exercise rights.

"A statute or regulation is the least restrictive means if 'no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights." *Roman Catholic Archdiocese of New York,* 2013 WL 6579764 at *18 (quoting *Kaemmerling v. Lappin*, 553 F.3d 669, 684 (D.C. Cir. 2008) (quoting *Sherbert*, 374 U.S. at 407)). Thus far, the government implies that the only mechanism to provide contraception is to force employers, under threat of huge penalties, to purchase what they find objectionable. Yet, solutions exist that would achieve the government's desired outcome of widely available contraception while avoiding a free exercise burden to those employers who object to providing such coverage on religious grounds. The government need not mandate that employers include coverage for objectionable drugs and procedures in their health care plans to achieve its ends. Rather, there are less restrictive, markedly inexpensive means at the government's disposal to provide contraception in accordance with its goals that do not infringe on employers' religious convictions. The government is able to accommodate all religious objectors' requests for an exemption with ease (and likely at considerably less expense than litigation).

The government already has a massive network at its disposal to dispense contraception, complete with programs and clinics which exist exclusively for that purpose. Government programs already provide contraception to 8.9 million women at 8,400 publicly-funded clinics nationwide (as of 2010).[23] Nearly half of these clinics (4,100) received Title X funding.[24] While Medicaid includes family planning among a host of other services, Title X exists exclusively for family planning and provides free or low-cost contraception to 4.7 million clients annually.[25] The average costs of contraceptive coverage are $239 per client, per year to the Title X program.[26] Since Title X clinics are not proprietary in nature (grants are reserved for non-profit and governmental organizations) and supplied with contraception at significantly reduced prices,[27] Title X provides completely free contraception to clients who meet federal poverty guidelines (around 15.4 percent of U.S. women).[28] By waiving the income requirement to obtain free contraception for the small population of women insured by employers who object to providing such coverage on religious grounds, the government could ensure these individuals have access to contraception while respecting religious freedom.

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[23] *See* Frost, J. (2013) "Contraceptive Needs and Services, 2010" available at http://www.guttmacher.org/pubs/win/contraceptive-needs-2010.pdf.

[24] *Ibid.*

[25] *See* Hasstedt, K. (2013) "Title X: An Essential Investment, Now More than Ever" available at http://www.guttmacher.org/pubs/gpr/16/3/gpr160314.html.

[26] *Ibid.*

Another potential solution involves delivering contraception through Medicaid. The ACA already includes massive expansions to Medicaid that the Congressional Budget Office estimates will add 13 million enrollees[29] at an estimated $1.0 trillion added cost by 2022.[30] Medicaid has been expanded both

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[27] *See* Health Resources & Services Administration (2014) "Title X Family Planning Clinics" available at http://www.hrsa.gov/opa/eligibilityandregistration/specialtyclinics/familyplanning/index.html.

[28] DeNavas-Walt, C. Proctor, B. & Smith, J. (2013) "Income, Poverty and Health Insurance Coverage in the United States: 2012" available at http://www.census.gov/prod/2013pubs/p60-245.pdf.

[29] *See* Congressional Budget Office (2013) "CBO's May 2013 Estimate of the Effects of the Affordable Care Act on Health Insurance Coverage" available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/44190_EffectsAffordableCareActHealthInsuranceCoverage_2.pdf.

[30] *See* Holahan, J., Buettgens, M., Carroll, C. & Dorn, S. (2013) "The Cost and Coverage Implications of the ACA Medicaid

(Continued on following page)

broadly through the ACA and in other circumstances, particularly in providing family planning.

In recent years the Centers for Medicaid & Medicare Services (CMS) has offered states the option of obtaining a waiver that provides exceptions for family planning coverage to individuals who would not qualify for Medicaid; populations that did not meet income restrictions or somehow lost Medicaid coverage (i.e., those who lost coverage post-partum).[31] Although many states have challenged the broad expansion of Medicaid as part of the ACA, 30 states have employed waivers that offer 90 percent reimbursement for family planning services, and 11 have accepted a provision in the ACA that allowed amendments to the state Medicaid plan regarding family planning services.[32] Waiving income requirements for the small number of women who would seek family planning from Medicaid due to denial by their employers based on religious objections would avoid a burden on employers' free exercise rights while still allowing women insured through these employers to have the level of access to contraception the government desires.

Expansion: National and State-by-State Analysis" available at http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8384.pdf.

[31] *See* Guttmacher Institute (2014) "Medicaid Family Planning Eligibility Expansions" available at http://www.guttmacher.org/statecenter/spibs/spib_SMFPE.pdf.

[32] *Ibid.*

The solutions offered here suggest that any burden on the free exercise of religion is unnecessary to achieve the government's desired outcome. As noted above, the number of persons who are likely to be affected by an employer's religious objections is nominal (particularly when compared to the number covered by plans exempted under the government's current exemptions). Further, the per capita and aggregate cost of contraception is negligible, and providing contraception directly is a concession the government could make with procedural ease at minimal incremental cost if the government chose to provide the mandated coverage directly.

The latest figures for Title X is $239 per client, per year of public costs.[33] The costs to Medicaid are not much higher. In 2012, Oregon spent $270 per client, per year on contraception[34] and Washington spent $400 per client, per year on contraception.[35]

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[33] *See* Atkins, D. & Bradford, W. D. (2014) "Changes in State Prescription Coverage Mandates for Insurers: The Effect of Women's Contraceptive Use" p. 20. available at http://onlinelibrary.wiley.com/doi/10.1363/46e0314/abstract.

[34] *See* Association of State and Territorial Health Officials (2012) "Improving Outcomes and Reducing Costs: Oregon's Initiatives to Improve Birth Outcomes" available at http://www.astho.org/Programs/Access/Maternal-and-Child-Health/_Materials/Improving-Outcomes-and-Reducing-Costs – Oregon%E2%80%99s-Innovative-Reproductive-Health-Program/.

[35] *See* Washington State Department of Health (2013) "Washington State Family Planning Client Data Sheet 2012" available at http://www.doh.wa.gov/Portals/1/Documents/Pubs/930-119-ClientDataSheet.pdf.

In 2008, Iowa spent $364.40 per client, per year on contraception.[36] Therefore, to provide contraceptive services directly to the liberally estimated 254 actual consumers per 1000 insured by employers of conscience could cost as little as $60,706 to $101,600 per year. This is especially minimal understanding that these costs would only apply to direct government provision of contraceptive coverage for employees of employers who object to providing all such coverage on religious grounds, a number representing a very small percentage of businesses and certainly smaller than those employees working for employers with plans the government has already exempted from the Mandate for secular reasons.

There is no economic incentive to employers to seek an exemption as the cost to employers of insurance coverage that includes contraceptives is no higher than coverage which does not.[37] Accordingly, there is no basis and the government has not even suggested such a reason for employers to seek an exemption from the Mandate except for sincerely held religious reasons.[38] There is also no evidence to suggest that with a constitutionally required exemption to the Mandate for religious objectors an exceedingly large number of people who want contraceptive coverage would be without it due to their employers' objections to providing it. The government faces minimal financial risk (or no risk under its current system because it does not provide such coverage to those covered under exempt plans at all) by merely providing the constitutionally required religious exemption from compliance with the Mandate.

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[36] *See* Udeh, B. (2009) "The Cost of Unintended Pregnancy in Iowa: A Benefit-Cost Analysis of Public Family Planning Services" available at http://ir.uiowa.edu/cgi/viewcontent.cgi?article=1047&context=ppc_health.

[37] U.S. Department of Health and Human Services, ASPE Issue Brief (February 2012), "The Cost of Covering Contraceptives Through Health Insurance" available at http://aspe.hhs.gov/health/reports/2012/contraceptives/ib.shtml.

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[38] In fact, it is just as likely if not more likely that smaller employers with religious objections to the Mandate would actually continue or provide health insurance coverage to their employees if an exemption were granted, thus saving the government from having to provide the entire health insurance coverage for this population.

CONCLUSION

For the foregoing reasons, this Court should permanently enjoin the enforcement of the Mandate against those employers who, based on sincerely held religious beliefs, object to providing contraception, abortion-causing drugs, and/or sterilization procedures along with related counseling as part of their health care plans.

Respectfully submitted,

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Nos. 13-354 and 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS, et al,
Petitioners,

v.

HOBBY LOBBY STORES, INC., et al,
Respondents.

CONSESTOGA WOOD SPECIALTIES CORP., et al,
Petitioners,

v.

KATHLEEN SEBELIUS, et al,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

BRIEF *AMICI CURIAE* OF PROFESSOR EMERITUS OF LAW CHARLES E. RICE, PROFESSOR OF LAW BRADLEY P. JACOB, PROFESSOR OF LAW DAVID M. WAGNER, COMMON GOOD FOUNDATION, COMMON GOOD ALLIANCE, CATHOLIC ONLINE, LLC, THE TEXAS CENTER FOR DEFENSE OF LIFE, AND THE NATIONAL LEGAL FOUNDATION,

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QUESTION PRESENTED

The individual plaintiffs in these actions, the Hahns and the Greens, seek to operate their closely-held, family-run businesses consistently with their Christian faith. These plaintiffs, based on that faith, believe that abortion is morally wrong and contrary to their faith and also that to facilitate abortion by providing their employees with health insurance that covers abortifacient drugs and devices is morally wrong and contrary to their faith. The HHS mandate at issue in these cases subjects the Hahns' and the Greens' businesses to millions of dollars in penalties if the Hahns and the Greens do not direct their businesses to provide employees with health insurance that covers abortifacients. In effect, the mandate commands the Hahns and the Greens to do what their faith tells them is a sin or subject their businesses to substantial financial penalties. The question before this Court is the following: Does the HHS mandate impose a "substantial burden" on the Hahns' and the Greens' exercise of religion as that term is used in the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(a) and in First Amendment jurisprudence.

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INTEREST OF *AMICI CURIAE*[1]

Charles E. Rice is Emeritus Professor of Law at Notre Dame Law School. Professor Rice has taught Constitutional Law and Jurisprudence and has written extensively on the constitutional and moral issues surrounding abortion and contraception. Professor Rice is concerned about the HHS mandate's attack on religious liberty and about a possible decision that would unduly restrict RFRA's protections.

Bradley P. Jacob is Associate Professor of Law at Regent University School of Law, specializing in Constitutional Law and religious liberty. From 1991 to 1993, Professor Jacob was Executive Director and CEO of the Christian Legal Society, which was a leading member of the Coalition for the Free Exercise of Religion during the legislative debates that led to the passage of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (2012). Professor Jacob is concerned to see RFRA applied in a way that affirms RFRA's robust protection for religious liberty.

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[1] All parties have consented to the filing of this Brief. Blanket letters of consent from Counsel for several parties have been lodged with the Court. An individual letter of consent has been enclosed with the copies of this Brief for the remaining parties. No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *Amici Curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the Brief.

David Wagner is Professor of Law at Regent University School of Law and teaches and writes about constitutional law, including religious liberty. Professor Wagner is concerned that the HHS mandate that forces employers to provide insurance for contraceptives, abortifacients, and sterilizations despite the employers' religious objections unjustifiably attacks those employers' religious liberty. Professor Wagner is also concerned that to hold that the mandate does not substantially burden the plaintiffs' religious liberty unduly restricts the protection that RFRA provides for the free exercise of religion.

Common Good Foundation is a 501(c)(3) organization. Common Good Alliance is a 501(c)(4) organization. Founded by Keith A. Fournier, a Catholic apologist and constitutional lawyer, both organizations are informed by classical Christian social teaching and committed to building a culture of life, family, and freedom, while affirming classical Christian teaching, including that concerning religious freedom. Common Good Foundation and Common Good Alliance each have a Legal Defense Fund that provides legal advocacy and support in cases concerning the organizations' missions. To perform their missions, Common Good Foundation and Common Good Alliance rely upon a robust interpretation of the religious liberty protected by the Free Exercise Clause and RFRA. Common Good Foundation and Common Good Alliance are concerned that a decision rejecting the plaintiffs' claims in this case would unduly restrict the protection RFRA provides for religious liberty.

Catholic Online is a business that serves

Catholics and all people of good will by providing content over its integrated media network. Catholic Online operates its business in fidelity with the Catholic Church's teachings and is thus committed to building a culture of life, family, freedom, and solidarity. Catholic Online affirms classical Christian teaching, including that concerning religious freedom. Catholic Online's business mission depends upon a proper interpretation of the religious liberty protected by the Free Exercise Clause and RFRA. Catholic Online is concerned that a decision rejecting the plaintiffs' claims in this case would unduly restrict the protection RFRA provides for religious liberty.

Texas Center for Defense of Life (TCDL) is a 501(c)(3) organization that operates to defend human life, from conception to natural death, in both state and federal courts. TCDL serves persons, businesses, and non-profits to protect their rights of conscience on life-related issues. This case concerns the Plaintiffs' rights, as part of their religious liberty, not to violate their consciences on a life-related issue. TCDL believes the government's argument uncritically conflates the notion of "indirect" with "unsubstantial," as it relates to funding of abortifacient coverage forced upon Plaintiffs' businesses against their sincerely held religious beliefs.

The National Legal Foundation (NLF) is a public interest law firm dedicated to defending First Amendment liberties and restoring America's moral and religious foundation. The NLF and its donors and supporters are vitally concerned with these cases' outcome because of the impact this Court's decision will have on religious business owners who seek to operate their businesses in accord with their faith, regardless of the business form chosen. The NLF counts such business owners among its donors and supporters.

SUMMARY OF THE ARGUMENT

This Brief makes two arguments that complement and amplify points the Plaintiffs in these actions make in their Briefs before this Court. First, the Brief argues that even though the HHS abortifacient coverage mandate technically applies to the corporate plaintiffs, Conestoga Wood Specialties Corporation, and Hobby Lobby, Inc. and Mardel, Inc., that mandate imposes a substantial burden on the religious exercise of the individual plaintiffs, the Hahns (who own and operate Conestoga) and the Greens (who own and operate Hobby Lobby and Mardel[2]), because they must direct the corporations they own and operate to provide the mandated coverage or subject their businesses to substantial penalties. Second, the Brief argues that the plaintiffs, based on commonly understood moral principles, could reasonably conclude that providing abortifacient coverage would be morally wrong and thus violate their faith and, moreover, that courts are incompetent to decide whether the plaintiffs have correctly concluded that complying with the HHS mandate would violate their faith.

As to the first argument, although the HHS mandate technically applies to the corporations that the Hahns and the Greens own and operate, the mandate imposes a substantial burden under RFRA on the Hahns and the Greens.[3] To assert otherwise ignores three basic points.

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[2] For ease of reference, we will refer to Hobby Lobby and Mardel collectively as Hobby Lobby.

First, the corporations cannot provide abortifacient coverage to employees unless the Hahns and the Greens, who own and operate the corporations, direct the corporations to provide the coverage. The mandate thus effectively commands the Hahns and the Greens to direct their businesses to provide abortifacient coverage. Commanding the Hahns and the Greens to direct their businesses to provide abortifacient coverage is in effect no different than commanding the Hahns and the Greens to provide that coverage. That the corporate form shields these individual plaintiffs from corporate financial liability is irrelevant because the issue here is the Hahns' and the Greens' understanding that providing that coverage is immoral. That question turns on the Hahns' and the Greens' moral responsibility for the acts they direct the corporations to undertake. The Hahns and the Greens can no more escape moral responsibility for directing their corporations to provide abortifacient coverage than a corporation's owner-operator can escape responsibility for directing corporate employees to kite corporate checks or an assassin can escape moral responsibility because, technically, his gun fired the fatal shot. The HHS mandate thus effectively commands the Hahns and the Greens to perform an act that they believe is immoral and violates their faith.

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[3] As the standard for what constitutes a substantial burden under RFRA derives from this Court's cases defining a substantial burden under the Free Exercise Clause before the decision in *Employment Division v. Smith*, 492 U.S. 872 (1990), the HHS mandate would also impose a substantial burden on the Hahns and the Greens for purposes of the Free Exercise Clause. Your *Amici*, however, believe that no showing of substantial burden is even necessary to establish a Free Exercise clause violation because the HHS mandate is neither neutral nor generally applicable. *See, e.g.*, *Hartman v. Stone*, 68 F.3d 973, 979 & n. 4 (6th Cir. 1995). That said, because this brief focuses on RFRA, the brief will demonstrate that the mandate substantially burdens the Hahns' and Greens' religious exercise under RFRA's standard.

Second, the fact that the mandate technically imposes its penalties on the corporations is irrelevant. The mandate threatens substantial financial harm to corporations that the Hahns and the Greens own. If those corporations are harmed financially, the Hahns' and the Greens' investments in the businesses will be diminished (and possibly destroyed). Thus, to threaten substantial harm to the businesses is to threaten substantial harm to the Hahns and the Greens, the businesses' owners. Therefore, the HHS mandate directly coerces the Hahns and the Greens to violate their faith.

Third, RFRA prohibits the federal government from imposing "substantial" burdens on the exercise of religion. It is a commonplace that a threat to harm one person or entity can exert substantial pressure on another person to do something he would otherwise not do. Nobody would deny that the threat, "I'll kill your family if you do not kill the mayor" does not exert substantial pressure to comply with the demand even if one considers that pressure to be "indirect." Likewise, even if one characterizes as indirect the pressure the HHS mandate imposes on the Hahns and the Greens in these cases—the threat of huge penalties being imposed on their businesses if they do not direct those businesses to provide abortifacient coverage—that threat imposes substantial pressure on these plaintiffs to act contrary to their faith. To argue that the mandate imposes no burden on the Hahns' and the Greens' exercise of religion because they conduct their businesses as corporations does nothing but obfuscate this common sense conclusion.

As to the second argument, the Hahns and Greens could reasonably conclude that providing abortifacient coverage to their businesses' employees is morally wrong and therefore contrary to their faith. If the Hahns and the Greens comply with the HHS mandate and direct their businesses to provide health insurance that specifically provides abortifacient coverage, the Hahns and the Greens would be acting intentionally to provide a fund for covered employees to pay specifically for abortifacients. Thus, the plaintiffs would be manifesting an intent to see that their employees would be able to pay for, and thus obtain (or more readily obtain), abortifacients (just as an employer who establishes a "Hitman Compensation Fund" that allows employees to withdraw money specifically to pay hired killers would be manifesting an intent to see that his employees would be able to pay for, and thus obtain, murder-for-hire services). That not all Christians might agree with, or that judges (or government attorneys) might not comprehend, the Hahns' and Greens' conclusion that complying with the HHS mandate would be morally wrong is irrelevant. This Court has made clear that courts are not competent to determine whether a believer's understanding of what his faith requires is correct.

For employers like the Hahns and the Greens, who believe on religious grounds that abortion is morally wrong and that providing health insurance that covers abortifacients is morally wrong, the HHS mandate imposes a stark choice—violate your faith, or subject your businesses to enormous penalties. A holding that this choice imposes no substantial burden on the Hahns' or Greens' exercise of their Christian faith would not only be wrong; it would nullify the very protection that RFRA promises for the free exercise of religion.

ARGUMENT

I. INTRODUCTION

This case poses one fundamental question: May the federal government, without a compelling reason, impose a significant penalty on a business because the business's owners and operators refuse to direct the business to do something that they sincerely and reasonably believe violates their religious faith? The answer to that question must surely be, "No." The Religious Freedom Restoration Act provides that the federal government "shall not substantially burden a person's exercise of religion" unless that burden is the "least restrictive means" of furthering a "compelling government interest." 42 U.S.C. § 2000bb-1(a) & (b) (2012). A federal mandate that commands a person to violate his sincerely held religious beliefs (or, more bluntly, commands a person to sin) and threatens substantial financial harm to his business if he does not would seem to be the quintessential substantial burden on religious exercise. That conclusion is consistent with this Court's precedent defining what constitutes a substantial burden on religious exercise for Free Exercise Clause purposes (and quite frankly, with common sense). *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (law requiring parents to send their children to school or face small fines and three-months imprisonment imposed a "severe" burden on Amish parents by "compel[ling] them to perform acts undeniably at odds with the fundamental tenets of their religious beliefs"); *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981) ("where a state conditions receipt of an important benefit upon conduct proscribed by religious faith . . . , thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a [substantial][4] burden on religion exists.")

The individual plaintiffs in these cases, members of the Hahn family and the Green family, are Christians who strive to direct their closely-held, family-owned-and-operated businesses, Conestoga and Hobby Lobby, in accord with their Christian faith. The Hahns and the Greens believe, based on their faith, that abortion is morally wrong. They also believe that they would violate their Christian faith—that is, they would sin—if they directed the businesses they own and operate to provide employees with health insurance that covers abortion-causing drugs and devices.

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[4] Whether a burden is substantial is, of course, a critical component of the analysis in this case. Your *Amici* do not insert the word "substantial" into this quotation a second time to stack the deck. Rather, that insertion is derived from the next sentence in *Thomas*. 450 U.S. at 718 ("Where the state conditions receipt of an important benefit upon conduct proscribed by religious faith..., thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden on religion exists. While the compulsion may be indirect, the infringement on free exercise is nonetheless *substantial*.") (emphasis added).

The Department of Health and Human Services, however, has promulgated a regulation requiring that employers (with exceptions not at issue here) provide their employees with health insurance that covers all Food and Drug Administration-approved contraceptive methods and sterilization procedures. Among the approved contraceptives are drugs and devices (Ella, Plan B, IUDs) that one can reasonably conclude act as abortifacients.[5] If the Hahns and the Greens follow their consciences and do not comply with the HHS mandate, their businesses will be subject to millions of dollars annually in financial penalties. Because the mandate would impose enormous penalties on Conestoga and Hobby Lobby if the Hahns and the Greens do not direct the companies to provide their employees with the HHS-mandated coverage, and because the Hahns and the Greens believe that to provide the coverage would violate their Christian faith, the HHS mandate imposes on the Hahns and the Greens a stark choice: Do what your consciences tell you violates your Christian faith—in other words, sin—or subject your family businesses, your means of livelihood, and the means of support for your employees, to substantial and possibly ruinous penalties. In the words quoted above from *Yoder* and *Thomas*, the mandate "compels [the Hahns and the Greens] to perform acts . . . at odds with the fundamental tenets of their religious beliefs" and puts "substantial pressure on [the Hahns and the Greens] . . . to modify [their] behavior and to violate [their] beliefs." If that does not substantially burden the plaintiffs' exercise of their faith under RFRA, then RFRA is meaningless.

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[5] *See* Michael Fragoso, *The Stealth Abortion Pill* (Aug. 17, 2010) http://www.thepublicdiscourse.com/2010/08/1515/ (last visited Jan. 20, 2014).

But despite the penalties the HHS mandate imposes on businesses like Conestoga and Hobby Lobby should their owners and operators refuse to violate their faith, the district court in the *Conestoga* case concluded that the mandate imposes no substantial burden on the individual plaintiffs' exercise of their religion. *See Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394, 411-15 (E.D. Penn. 2013) (order denying preliminary injunction). The Third Circuit affirmed this decision. *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 387-88 (3rd Cir. 2013). While purporting to accept that the Hahns are exercising their religion by refusing to provide health insurance covering abortifacients, *see Conestoga*, 917 F.Supp.2d at 416, the district court found the burden imposed on the Hahns to be insufficiently "direct" to constitute a *substantial* burden, *see id.* at 414-15.

The district court in *Conestoga* reached this startling conclusion in large part because "Conestoga's corporate form further separates the Hahns from the requirements of the [mandate]" in that the mandate "regulations apply only to Conestoga" *Id.* at 415. The Third Circuit echoed this analysis on appeal. *See Conestoga* 724 F.3d at 387-88 (relying on the principle that Conestoga Wood Specialties Corporation is a separate entity from its owners to conclude that the Hahns have no claim under the Free Exercise Clause or RFRA). The district court in *Conestoga* also noted the reasoning first set forth by the district court in *O'Brien v. United States Dept. of Health and Human Services*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012). The *O'Brien* court opined that the HHS mandate did not substantially burden a Catholic employer's exercise of his faith (a faith that led him to conclude that he could not provide health insurance covering contraception, abortifacients, or sterilizations) because the employer would have to subsidize those goods and services only "after a series of independent decisions" by covered employees and their health care providers. *Id.*; *see Conestoga*, 917 F. Supp. 2d at 415 (citing *O'Brien*).

But none of these purported reasons justify finding that the HHS mandate imposes no substantial burden on the Hahns' or the Greens' exercise of their faith. Even if insurance would pay for abortifacients only if employees decide to use the coverage to purchase abortifacients, the fact remains that the Hahns and the Greens sincerely believe that it would be inconsistent with their faith—that is, it would be a sin—to facilitate the use of abortifacients by *directing the corporations they own and operate* to provide employees coverage that provides the specific means to pay for abortifacients. Moreover, to say that any burden the mandate imposes on the Hahns and the Greens is too indirect to be substantial because the mandate technically requires the corporations to provide the objectionable coverage ignores the fact that the businesses can provide that coverage only if these individual plaintiffs, as their businesses' owners and operators, direct the businesses to provide that coverage. Conestoga's or Hobby Lobby's "decision" to provide the coverage is thus *the Hahns' or the Greens'* decision to provide the coverage. And to say that the burden is too indirect to be substantial because the penalties technically fall on the corporations likewise ignores the relationship between the Hahns and the Greens and their businesses. These plaintiffs own Conestoga and Hobby Lobby; therefore, harming the corporations harms the Hahns and the Greens by putting their investment in these corporations at substantial risk (not to mention putting at risk their employees' jobs, which in itself would weigh heavily on anyone concerned with the welfare of his business's employees). The mandate's threatened penalties on Conestoga and Hobby Lobby thus operate to coerce *the Hahns and the Greens, who own and operate these businesses*, to violate their faith.

If one grants the Hahns' and the Greens' understanding of what their faith requires, the HHS mandate does not impose, to quote *O'Brien*, 894 F. Supp. 2d at 1158, an "insignificant or remote" burden on the exercise of that faith. Rather, by imposing substantial penalties on their businesses should the Hahns and the Greens decline to do what their consciences tell them is a sin, the mandate imposes substantial and direct compulsion on the Hahns and the Greens to violate their faith.

The district courts in *Conestoga* and *Hobby Lobby* purported to recognize that "it is not within a court's province to question a plaintiff's religious beliefs." *Conestoga*, 917 F. Supp. 2d at 412 (citing approvingly *Hobby Lobby, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1293 (W.D. Okla. 2012)). Indeed, as the district court in *Hobby Lobby* stated, "it is not the province of the court to tell the plaintiffs . . . whether their beliefs about abortion should be understood to extend to how they run their corporations . . . or to decide whether such beliefs are fundamental to their belief system or peripheral to it." *Hobby Lobby*, 870 F. Supp. 2d. at 1293. But ultimately, the only way to find insubstantial the significant and rather obvious compulsion (millions of dollars in penalties every year on their businesses) that the HHS mandate places on the Hahns and the Greens to (in their view) sin is to refuse to countenance (despite any words to the contrary) the Hahns' and the Greens' understanding of what their faith requires; that is, to find the mandate's burden insubstantial requires one to question (and ultimately reject) the Hahns' and the Greens' conclusion that facilitating abortion by providing one's employees health insurance that covers abortifacients is morally wrong. Judge Rovner, in her dissent in *Korte v. Sebelius*, 735 F.3d 654, 717 (7th Cir. 2013) (Rovner, J., dissenting), bluntly expressed this skepticism: in her view, "what [plaintiffs who object to the mandate] are really objecting to is the private choices that employees and their families might make in reliance on healthcare coverage that includes contraceptive [and abortifacient] care." *See also*, *id*. at 706 (HHS mandate "does not require the owners themselves to do anything in violation of their religious faith.")

Perhaps Judge Rovner and other judges who have rejected other challenges to the HHS mandate find it difficult to understand that employers like the Hahns and the Greens could conclude that it is morally wrong to make health insurance covering abortifacients available to employees who may or may not use that coverage. But this skeptical view proves too much. A religious belief need not be "comprehensible to others" to warrant protection. *Thomas*, 450 U.S. at 714. And this Court has made clear that courts are legally incompetent to determine whether a believer's understanding of what his faith requires is correct. *Id.* at 715-16.

This Brief will discuss in greater detail why the HHS mandate imposes a substantial burden on the Hahns' and Greens' religious exercise even though the mandate technically applies to Conestoga and Hobby Lobby. The Brief will proceed to explain why employers like the Hahns and the Greens who believe abortion is morally wrong could reasonably conclude that it would be morally wrong (that is, a sin) to provide health insurance covering abortifacients.[6] While some Christians might disagree with that conclusion, this Court admonished in *Thomas* that it is not the business of federal courts—including this Court—to decide whether people like the Hahns and the Greens correctly understand what their faith requires.

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[6] Your *Amici* do not address this point necessarily to convince this Court that complying with the mandate would be morally wrong, because as we have noted and will expand upon further, it is not generally within a court's competence to determine whether a believer's understanding of his faith is correct. Rather, we address this point to demonstrate that the Hahns' and the Greens' understanding of their duty as Christians must be taken by courts to be both sincere and religious, *see Korte v. Sebelius*, 724 F. 3d 654, 683 (7th Cir. 2013); that is, their understanding is "not so bizarre . . . as not to be entitled to protection." *Thomas*, 450 U.S., at 715.

II. ALTHOUGH THE HHS MANDATE TECHNICALLY REQUIRES THE CORPORATE DEFENDANTS TO PROVIDE ABORTIFACIENT COVERAGE OR PAY PENALTIES, THE MANDATE EXERTS SUBSTANTIAL PRESSURE ON THE HAHNS AND THE GREENS, THE CORPORATIONS' OWNERS AND OPERATORS, TO ACT IN A WAY THAT VIOLATES THEIR FAITH.

It is true that the HHS mandate technically operates against the corporations the Hahns and the Greens own and operate, but to conclude from this that the HHS mandate does not substantially burden the Hahns' and the Greens' free exercise of religion would require one to ignore three basic points: First, because the Hahns and the Greens own and operate the corporations, for the businesses to provide the objectionable coverage, *the Hahns and the Greens* must act contrary to their faith by directing the businesses to provide the coverage. Second, because the Hahns and the Greens own Conestoga and Hobby Lobby, harming (or threatening to harm) the corporations harms (or threatens to harm) the Hahns and the Greens. Third, RFRA prohibits "substantial" burdens on religious exercise, not "direct" burdens. Harm threatened to X can impose substantial compulsion on Y to act in a way that he would not otherwise act so he can prevent the harm to X, even if one characterizes the compulsion on Y as "indirect."

A. For Conestoga and Hobby Lobby to provide abortifacient coverage, the Hahns and the Greens must direct those businesses to provide that coverage; the HHS mandate therefore effectively commands the Hahns and the Greens, contrary to their faith, to provide abortifacient coverage.

Although considered a "person" at law, a corporation cannot think or act on its own. A corporation can act only through its human agents and at the direction of those who have the responsibility to make decisions on its behalf and manage its affairs. Here, the people who have that responsibility for Conestoga are the Hahns, and for Hobby Lobby, the Greens. These corporations can provide their employees with health insurance that covers abortifacients only if *the Hahns* and *the Greens* direct these corporations to provide that insurance. In reality, any decision by Conestoga or Hobby Lobby to provide the HHS-mandated coverage would be a decision by the Hahns or the Greens to provide that coverage. The HHS mandate, therefore, while technically applying to the corporations, in reality commands *the Hahns* and *the Greens* to provide the mandated coverage. The mandate thus commands the Hahns and the Greens, under threat of substantial and likely ruinous penalties to their businesses, to perform an act their consciences tell them is a sin.

Despite the rather obvious proposition that a corporations cannot act unless human agents (here, the individual plaintiffs who own and operate Conestoga and Hobby Lobby) direct them to act, the

Third Circuit in *Conestoga* dismissed the Hahns' RFRA claims because, in the panel majority's view, "[t]he Hahn family chose to incorporate and conduct business through Conestoga, thereby obtaining both the advantages and disadvantages of the corporate form." *Conestoga*, 724 F.3d at 388; *see id.* at 389. But while the "advantages of the corporate form" may well include shielding the corporation's owners from corporate *financial* liabilities, those advantages do not include shielding the corporation's operators from moral responsibility for the acts they direct the corporation to perform. A simple example illustrates this. Suppose that Able, who owns and serves as President and Chairman of the Board of a closely-held corporation, directs corporate employees in the course of their employment duties to kite corporate checks to corporate creditors. It would be absurd to suggest that Able is not *morally* responsible for defrauding the corporation's creditors because it was the corporation, a separate entity, that technically kited the checks. Able, having directed the corporation to conduct the check kiting scheme, is morally responsible for the fraud; the corporation is the means he used to defraud the corporation's creditors.

Likewise, Conestoga and Hobby Lobby are the means by which the Hahns and the Greens act—and live out their Christian faith—in the commercial marketplace. Like Able, who used his corporation to defraud corporate creditors, the Hahns and the Greens, by directing Conestoga and Hobby Lobby to provide abortifacient coverage, would be using their corporations to facilitate abortifacient use by their employees. The Hahns and the Greens would no more be shielded from moral responsibility than would Able.

Another analogy makes the point more starkly. To suggest that the Hahns and the Greens would not be morally responsible because, technically, their corporations would be providing abortifacient coverage makes no more sense than saying that an assassin is not morally responsible for murder because, technically, it was the gun he used that fired the fatal shot. For the assassin, the gun was an instrument, the means he used to achieve the end of killing his victim. Likewise, if the Hahns and Greens were to direct their businesses to provide abortifacient coverage, the Hahns and Greens would be using their corporations—corporations they control like the assassin controlled his gun—as the means to the end of providing abortifacient coverage to the corporations' employees. The Hahns and the Greens could no more escape moral responsibility for using their corporations as the means to accomplish what they believe to be an immoral end than the assassin can escape moral responsibility for using a gun to achieve his immoral end. Thus, by compelling the Hahns and the Greens to use their corporate businesses to accomplish what their faith informs them is an immoral end, the HHS mandate compels the Hahns and the Greens to act in a way that violates their faith.

At bottom, the Hahns' and the Greens' claim in these cases is that the HHS mandate coerces them to act in a way that their faith tells them is wrong by coercing them to direct their corporate businesses to provide abortifacient coverage to employees (and thus, in effect, to use these corporate businesses as the means to accomplish what their faith tells them is an immoral end). Using a corporation as the means to accomplish an immoral end is no different than using any other separate object, be it a gun, a car, or another person, as a means to accomplish an immoral end. In any of these cases, the person who used the means would be responsible for the immoral end achieved. The corporate law principle that a corporation is a separate entity from its owners has nothing to say about the moral responsibility of those who direct the corporation to accomplish an immoral end. The separate entity doctrine thus does not clarify analysis; rather, it obfuscates. That Conestoga and Hobby Lobby are separate entities from the Hahns and the Greens provides only an excuse, not a reason, to find that the HHS mandate does not substantially burden the Hahns' and the Greens' exercise of their faith.

B. To threaten substantial harm to a closely-held, family-run corporation is to threaten substantial harm to the corporations' owners; thus, the HHS mandate directly coerces Conestoga's and Hobby Lobby's owners, the Hahns and the Greens, to violate their faith.

To conclude, as the district court did in *Conestoga*, and as the government argues, (*See* Brief for Kathleen Sebelius, *et al.*, in No. 13-354, at 27-29), that the HHS mandate does not impose a substantial burden on the individual plaintiffs' exercise of their faith because the threatened penalties would fall on the corporations also ignores the relationship between the Hahns and the Greens and their businesses. As explained above, the mandate operates to command the Hahns and the Greens, as

Conestoga's and Hobby Lobby's owners and operators, to do what they believe is a sin. Likewise, the means the mandate employs to compel the Hahns and the Greens to act—the threat of substantial and likely ruinous penalties on their businesses if they do not direct their businesses to provide the mandated coverage—applies direct pressure on the Hahns and the Greens. The value of the stock that the Hahns and the Greens own in their businesses, and thus, their financial well being, depend on their corporations' financial health. If that financial health suffers, it stands to reason that the owners' stock would be less valuable. And if these businesses suffer financial ruin—not a far-fetched possibility given that failing to provide the mandated abortifacient coverage would subject the businesses to millions of dollars in penalties every year—the stock could well be worthless.

The harm the HHS mandate threatens to Conestoga and Hobby Lobby if the Hahns and the Greens do not direct their businesses to provide abortifacient coverage is thus harm threatened to the Hahns and the Greens as well. The mandate's effective command—"sin or subject your business to substantial penalties"—thus can be reformulated as, "sin or subject the value of your holdings in your business to substantial diminution." The mandate in effect seeks to coerce the corporations' owners to act contrary to their faith by threatening them with financial harm. That is not an indirect, insubstantial burden on the Hahns' and the Greens' exercise of their faith; it is direct, substantial pressure on the Hahns and the Greens to do that which their consciences tell them is a sin.

C. RFRA prohibits "substantial" burdens on religious exercise; even if the burden the mandate imposes on the Hahns and the Greens is indirect, it is still substantial.

In any event, even if one characterizes as indirect the pressure the HHS mandate imposes on the Hahns and the Greens to violate their faith, nothing in RFRA suggests that such indirect pressure cannot violate RFRA. RFRA does not prohibit only "direct" burdens on religious exercise; RFRA prohibits "substantial" burdens, *see* 42 U.S.C. § 2000bb-1(a)(2012), and the burden the mandate imposes on the Hahns and the Greens, even if one characterizes it as "indirect," is still substantial.

There is no question that a threat to harm one person can exert substantial pressure on another person to do something he would otherwise not do. For example, suppose Baker tells Charlie, "I am holding your family hostage. If you do not kill the mayor, I will kill your family." Although the threatened harm—death—will fall on Charlie's family, it defies reality to suggest that the pressure the threat places on Charlie to kill the mayor is not substantial, even if one characterizes that pressure as "indirect." So it is with the pressure the mandate imposes on the Hahns and the Greens to direct their businesses to provide abortifacient coverage. Even if one considers that pressure to be indirect because Conestoga and Hobby Lobby are legally separate entities from their owners, it defies reality to suggest that the choice the mandate imposes on the Hahns and the Greens—sin or have substantial penalties imposed on the corporations that they founded, own, rely on for their living, and rely on to provide employment to the businesses' employees—does not impose substantial pressure on the Hahns and the Greens to act in a way they believe violates their faith.

To hold that threatening harm to a corporation if the owners and operators do not operate the business in a way that violates their religious beliefs does not substantially burden the owners' religious exercise would lead to absurd results. Suppose the federal government were to enact a law requiring all food service businesses affecting interstate commerce to be open seven days a week or pay a fine.[7] This law would certainly impose a substantial burden on an Orthodox Jew who operates a deli as a sole proprietorship by forcing him either to open the deli on the Sabbath or pay a fine. *Cf. Sherbert v. Verner*, 374 U.S. 398, 403-05 (1963) (denying unemployment benefits to a Sabbatarian who refused to work on Saturdays imposed "unmistakable" pressure to violate Sabbatarian beliefs). But if the deli owner incorporated *the very same deli business,* the burden on the owner's religious exercise would be considered only indirect, and therefore not substantial, and therefore not sufficient to state a claim under RFRA.

That result is not only senseless; it also embodies a perverse reading of RFRA, a statute enacted to protect religious adherents from government-imposed burdens on the exercise of their faith. To deny RFRA's protection to religious adherents who incorporate their businesses is to tell those religious adherents that they will be protected from federally-imposed burdens on their ability to operate their businesses consistently with their faith only if they are willing to forego a form of business organization—incorporation—generally available to all other business owners. Forcing business owners to forego incorporation in exchange for receiving protection of their right to operate their businesses according to their faith is exactly the kind of burden on the exercise of religion against which RFRA is meant to protect.

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[7] This hypothetical is adapted from one proposed by Ed Whalen. *See* Ed Whalen, *Re: Another Crazy DOJ Stance Against Religious Liberty* (July 26, 2012), http://www.nationalreview.com/bench-memos/312422/re-another-crazy-doj-stance-against-religious-liberty-ed-whalen (last visited Jan. 20, 2014).

There is no logical or coherent reason why Conestoga and Hobby Lobby being corporations renders insubstantial under RFRA the burden the HHS mandate imposes on the Hahns' and the Greens' exercise of their faith—sin, or subject your businesses to significant penalties. Indeed, to hold that this burden is insubstantial (as demonstrated above) could well lead to absurd and even perverse results. This Court should hold that a substantial burden under RFRA exists when the federal government attempts to coerce business owners to act contrary to their faith by threatening harm to their businesses, regardless of whether the business is incorporated.

III. AN EMPLOYER WHO BELIEVES, BASED ON HIS FAITH, THAT ABORTION IS MORALLY WRONG CAN REASONABLY CONCLUDE THAT SPECIFICALLY PROVIDING OTHERS THE MEANS TO PAY FOR ABORTIFACIENTS IS MORALLY WRONG; MOREOVER, COURTS ARE NOT COMPETENT TO SECOND GUESS AN EMPLOYER'S CONCLUSION CONCERNING WHAT HIS FAITH REQUIRES.

As noted in the Introduction to this Brief, it is reasonable to infer from the district court's decision in *Conestoga*, from Judge Rovner's dissent in *Korte*, and from decisions by courts in other cases, that those courts, at least implicitly, decided that plaintiffs like the Hahns and the Greens are wrong to conclude that complying with the mandate would violate their faith. Of course, those courts were not legally competent to decide that. *See Thomas v. Review Board*, 450 U.S. 707, 715-16 (1981). But in any event, it is perfectly reasonable for those who believe abortion is morally wrong to conclude that providing employees health insurance that covers abortifacients would be morally wrong and thus contrary to their faith.

In reaching his decision that providing his employees abortifacient coverage would be morally wrong, an employer, whether or not he would put it this way himself, would be applying a moral analysis that Catholic moralists commonly refer to as cooperation with evil.[8] While the Hahns and Greens are not Catholic, one need not be a Catholic moral theologian to understand the general moral reasoning that would lead people like the Hahns and the Greens to conclude that it is morally wrong to enable (or make it easier for) employees to obtain abortifacients by providing those employees the specific means to pay for abortifacients.

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[8] *See, e.g.*, William Newton, *Avoiding Cooperation with Evil: Keeping Your Nose Clean in a* [continued next page]

The general principle of cooperation with (or facilitation of) evil is not difficult to grasp, as a simple example illustrates. Suppose that Baker approaches Able and asks in a way that makes it clear that he is serious, "May I borrow your gun so I can kill my wife?" If Able gives Baker the gun knowing that Baker intends to use it to kill his wife, no one would seriously suggest that Able, though he did not pull the trigger, would not be morally culpable for assisting Baker in killing his wife. The same conclusion—that Able has committed a moral wrong by loaning Baker his gun under these circumstances—would hold even if Baker changed his mind and decided not to kill his wife. Able loaned Baker his gun intending that Baker would have the gun to kill his wife. Able intended to enable Baker to kill his wife, and this intent made it morally wrong for Able to loan Baker his gun (even if Baker

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Dirty World, Homiletic & Pastoral Review (Sept. 21, 2012), *available at* www.hprweb.com/2012/09/avoiding-cooperation-with-evil-keeping-your-nose-clean-in-a-dirty-world/ (last visited Jan. 20, 2014); Joseph Delaney, *Accomplice*, 1 *The Catholic Encyclopedia* (1907), *available at* http://www.newadvent.org/cathen/ 01100a.htm (last visited Jan. 20, 2014); *Vatican Statement on Vaccines Derived from Aborted Human Stem Cells* (June 9, 2005), *available at* www.immunize.org/concerns/vaticandocument.htm (last visited Jan. 20, 2014).

ultimately did not commit the murder).

Based on this mode of moral reasoning, employers who morally oppose abortion could reasonably conclude that providing their employees with health insurance covering abortifacients would be morally wrong. Another example helps to illustrate this. Suppose an employer establishes a "Hitman Compensation Fund" for his employees. Any employee who needs a hitman's services may draw from the fund to pay for those services. By creating the fund, this employer has intentionally chosen to provide his employees specifically with access (or more ready access) to murder-for-hire services by providing them the specific means to pay for those services. It is reasonable to conclude that even if no employee takes advantage of the hitman fund, the employer still harbors an intent to see that his employees are able to pay for and thus obtain murder-for-hire services. That is, he harbors an intent to make possible—or, at least more readily achievable—an immoral act.

Few would doubt that an employer who intentionally provides the specific means for his employees to pay for murder-for-hire services would be acting immorally. That would be so even if no employee takes advantage of the hitman fund, because the employer still intended to make available the specific means to pay for those services. It follows that if the federal government were to mandate that all employers establish hitman funds or pay substantial fines, that mandate would impose a substantial burden on the religious exercise of employers who believe that murder is contrary to their religious beliefs.

But if the employer who establishes the hitman fund is acting immorally, it must be reasonable for the employer who, based on his faith, believes abortion is morally wrong to conclude that intentionally providing his employees the specific means to pay for abortifacients (as the HHS mandate requires) is morally wrong. Just as the employer who establishes the hitman fund is intentionally deciding to provide the specific means for his employees to pay for murder-for-hire services, the employer who establishes a fund specifically to reimburse employees who purchase abortifacients is intentionally deciding to provide his employees with the specific means to pay for abortifacients. And as with the employer who establishes the hitman fund, it is reasonable to conclude that even if no employee takes advantage of the abortifacient reimbursement fund, the employer is still acting immorally because of his intent to enable his employees to pay for and thus obtain abortifacients.

If it is reasonable to conclude that an employer who establishes a fund specifically to pay for abortifacients is acting immorally by intentionally facilitating abortifacient use, it is also reasonable to conclude that an employer who in effect establishes such a fund by providing health insurance for his employees that specifically includes coverage for abortifacients is acting immorally by facilitating the evil of abortifacient use. That he is doing this through a contract with a third party does not matter because the end result is the same—both the employer who self-funds his abortifacient fund and the employer who provides insurance coverage for abortifacients have intentionally provided a pool of money for their employees to use specifically to pay for abortifacients. Each employer has deliberately chosen to make the means of paying specifically for (and thus obtaining or more easily obtaining) abortifacients available to his employees. Thus, this employer could reasonably be thought to share the intent of those who would use the insurance to pay for abortifacients.

Some lower court judges have opined that providing employees with health insurance that specifically covers abortifacients is no different than paying employees wages or salary that they could use to pay for abortifacients. *See, e.g., O'Brien v. United States Dept. of Health and Human Services,* 894 F. Supp. 2d at 1160; *Korte,* 735 F.3d at 715-16 (Rovner, J., dissenting); *Gilardi v. United States Dept. of Health and Human Services,* 733 F.3d 1208, 1237-38 (D.C. Cir. 2013) (Edwards, J., concurring in part and dissenting in part). The suggestion is that if an employer does not consider it morally wrong to pay employees a salary that an employee may use to pay for abortifacients, it cannot be a substantial burden on the employer's exercise of religion to require the employer to provide health insurance that covers abortifacients.

There is, however, a significant difference between paying an employee a salary and providing insurance that specifically covers abortifacients:

> The difference is analogous to the difference between giving cash to someone and giving someone, say, a gift certificate to a steakhouse. In the former case, the money you give could be used to buy steak, but there is no essential tie between your gift and that

> particular use of it. In the latter case, you are giving a voucher for the procurement of *a specific and limited range of goods and services*; there is an intelligible link between your gift and the use to which the recipient might put it.[9]

Just as a person who believes "killing animals is morally wrong would reasonably think it wrong to give a gift certificate to a steakhouse,"[10] so a person who believes abortion is morally wrong could reasonably believe it is morally wrong to provide health insurance that can be used to pay only for those goods and services the policy covers and that specifically covers abortifacients. It is not reasonable to say that an employer who pays his employees wages has any specific intent regarding how the employees spend those wages. It *is*, however, reasonable to say that the employer who provides a means to pay specifically for abortifacients is acting specifically to assist his employees to pay for, and thus obtain, abortifacients. Therefore, that employer manifests an intent to enable his employees to pay for, and thus obtain, abortifacients.

By mandating that employers provide their employees with health insurance that covers abortifacients, the HHS mandate in effect commands those employers to establish a fund to provide employees the specific means to pay for, and thus obtain, abortifacients. It is perfectly reasonable for employers like the Hahns and the Greens to conclude that to provide the mandated coverage would be immoral and therefore contrary to their faith.

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[9] Melissa Moschella, *The HHS Mandate and Judicial Theocracy* (Jan. 3, 2013), http://www.thepublicdiscourse.com/2013/01/7403/ (last visited Jan. 20, 2014).

[10] *Id.*

Perhaps not all Christians would agree with the conclusion that it would be immoral to provide the mandated coverage. And as noted in the Introduction to this Brief, perhaps some judges find it difficult to believe or understand that employers could conclude that making health insurance covering abortifacients available to employees who may or may not use that coverage is morally wrong. But all that is irrelevant. A religious belief need not be "comprehensible to others" to warrant protection. *Thomas*, 450 U.S. at 715. And as this Court also made clear in *Thomas*, "[i]ntrafaith differences . . . are not uncommon among followers of a particular creed, and the judicial process is singularly ill-equipped to resolve such differences . . . . It is not within the judicial competence to decide [who] more correctly perceives the commands of their common faith." *Id.* at 715-16.

Thomas is particularly on point because *Thomas* involved a plaintiff who like the Hahns and the Greens had to decide whether he was acting inconsistent with his faith by doing something that ultimately assisted activity that his conscience told him was wrong. Thomas, a Jehovah's Witness, worked at a steel foundry and was transferred to a department that fabricated tank turrets. Thomas concluded that he could not work on weapons without violating his faith. He therefore quit his job. *Id.* at 710. At his unemployment compensation hearing, Thomas testified that while "he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms," he could not work directly on producing arms. *Id.* at 711. Thomas was denied unemployment benefits, and the Indiana Supreme Court, over Thomas's objection that denying him benefits would violate his free exercise rights, ultimately found no free exercise violation and affirmed the benefits denial. *Id.* at 712-13.

In its decision, the Indiana Supreme Court relied largely on what it saw as the inconsistency between Thomas's professed conviction that he could not work directly on armaments and his statement that he would not object to "produc[ing] the raw product necessary for the production of any kind of tank" because he "would not be a direct party to whoever they shipped it to [and] would not be . . . chargeable in . . . conscience." *Thomas*, 450 U.S. at 715 (citation omitted). In reversing the Indiana Supreme Court's decision, this Court rejected the Indiana court's reasoning out of hand: "Thomas' statements reveal no more than that he found work [producing raw materials] sufficiently insulated from producing weapons of war. . . . Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715.

Like Thomas, the Hahns and the Greens have had to decide whether their faith would allow them to perform an act that would assist others in doing what that faith tells them is morally wrong. Like Thomas, the Hahns and the Greens drew a line. As in *Thomas*, "it is not for [the district courts, the courts of appeal, or this Court] to say that the line they drew was an unreasonable one." *Id.*

The Hahns and the Greens sincerely believe that to comply with the HHS mandate would violate their Christian faith. The HHS mandate thus presents both families with a stark choice: do what you believe is a sin according to your (reasonable) understanding of your religious faith, or subject your business to enormous penalties. This Court's precedent makes clear that being put to that choice substantially burdens the Hahns' and the Greens' exercise of their religion. To hold that it does not would not just be wrong; that holding would usurp the Hahns' and the Greens' right, and all employers' right, to follow their own conscientious judgment in the face of government coercion and would thus nullify for those employers the protection RFRA promises for the free exercise of religion.

CONCLUSION

For the reasons stated above and the reasons stated in Conestoga's and Hobby Lobby's Briefs, this Court should reverse the Third Circuit's decision denying Conestoga's and the Hahns' motion for a preliminary injunction and should remand with instructions to enter a preliminary injunction on behalf of Conestoga and the Hahns, and affirm the Tenth Circuit's decision in *Hobby Lobby*.

Respectfully submitted, this 28th day of January, 2014.

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AMICUS
CURIAE
BRIEF

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Nos. 13-354, 13-356

IN THE
Supreme Court of the United States

KATHLEEN SEBELIUS, SECRETARY OF HEALTH
& HUMAN SERVICES, *et al.*,
Petitioners,
v.
HOBBY LOBBY STORES, INC., *et al.*,
Respondents,

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,
v.
KATHLEEN SEBELIUS, SECRETARY OF HEALTH
& HUMAN SERVICES, *et al.*,
Respondents.

**On Writs of Certiorari to the
United States Courts of Appeals
for the Third Circuit and Tenth Circuit**

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS IN NO. 13-354 AND PETITIONERS IN NO. 13-356

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IDENTITY AND INTEREST OF *AMICUS CURIAE* [1]

The Rutherford Institute is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, The Rutherford Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute is interested in the instant case because this Court's decision on who or what qualifies as a "person" or can "exercise" religion for purposes of the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act has implications for the rights of individuals to associate in business as well as other areas of life and to exercise their religious beliefs. It also has implications for the States' prerogative to define the purpose and scope of entities created under the aegis of their laws. The Rutherford Institute urges this Court to affirm the decision below in No. 13-354 and reverse the decision below in No. 13-356.

SUMMARY OF ARGUMENT

Free exercise is an area in which courts traditionally take especial care to tread lightly, but in *Conestoga*, the Court of Appeals for the Third Circuit resorted to absolutes instead. Somewhere along the line, the

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[1] This amicus brief is filed with the parties' consent. The Government and Conestoga filed their consents with the Clerk of Court in December 2013. Hobby Lobby consented to the filing of this brief on January 27, 2014. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

Court of Appeals formed an image of corporations as machines with the sole purpose of making of money, and that perception drove its opinion. As a consequence, the Court of Appeals never took into account the fact that corporations are as varied in their forms and their motives as people are. The Court of Appeals for the Tenth Circuit understood that the reasoning that the Court of Appeals for the Third Circuit accepted was fatally flawed. But both failed to recognize that the fifty States have offered and are still experimenting with new ways to offer various means by which entities can have the character (and expectations of character) of natural persons. That role properly belongs to the States, because corporations are a creation of state law—another area in which this Court has taken especial care to tread lightly. The Rutherford Institute respectfully urges this Court to explain that both the nature of the right and the genesis of the entity require courts to take especial care.

ARGUMENT

I. THE COURT OF APPEALS IN *CONESTOGA* ASKED THE WRONG QUESTION.

In *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), the Court of Appeals found that neither Conestoga Wood Specialties Corp., a Pennsylvania corporation, nor its owners, the Hahns, who are practicing Mennonites, could secure a preliminary injunction on account of asserted violations of the First Amendment or the Religious Freedom Restoration Act ("RFRA"). The Court of Appeals based this decision on its conclusion that "a for-profit, secular corporation cannot assert a claim under the Free Exercise Clause." 724 F.3d at 388. The court also rejected the suggestion that a company could assert the Free Exercise rights of its owners. *Id.* at 387-88. In reaching this conclusion, the Court of Appeals observed, but did not give any effect to, the statement of policy of Conestoga's Board of Directors that explained the religious convictions underlying the corporation's position on the Contraceptive Mandate. *See id.* at 382 n.5.

In its brief in this Court seeking to overturn the *en banc* decision of the Court of Appeals for the Tenth Circuit in *Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114 (10th Cir. 2013), the Government likewise contends that a for-profit corporation cannot exercise religion, and that corporate law precludes a finding that a corporation can share the values of its shareholders. Gov't Br. at 13 (No. 13-354). The Government goes so far as to say that no case prior to *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), even suggested that for-profit corporations have religious beliefs that could be impermissibly burdened by "general corporate regulation." Gov't Br. at 17 (No. 13-354). Because the principles of corporate law that are at stake here are of tremendous importance to businesses and to the States that regulate them, The Rutherford Institute submits this *amicus* brief in support of the free exercise rights of Conestoga and Hobby Lobby and in opposition to the Government's position. Fundamentally, the premise of the Government and the Court of Appeals for the Third Circuit rests upon flawed assumptions about corporations (and other entities) and the States that created them. In fact, States both enable and require corporations to make moral decisions and to engage in practices that result from those decisions. It follows that to the extent the "morality" giving rise to the decisions is "religious," the practices that result are religious practices.

As a preliminary matter, it is worth noting that when the Court of Appeals for the Third Circuit applied this Court's precedent in *First National Bank v. Bellotti*, 435 U.S. 765 (1978), it did so in reverse. Ironically, in *Bellotti* itself, this Court prefaced its opinion with the observation that the court of appeals in that case had "posed the wrong question," which is to say that it had asked "whether and to what extent corporations have First Amendment rights" when, in fact, the proper question was "whether [the challenged provision] abridges expression that the First Amendment was meant to protect." 435 U.S. at 775-76. The Court of Appeals for the Third Circuit made precisely the same error here, and then compounded that error by assuming that its analysis of the constitutional right in question controlled its analysis of the separate statutory right.

Certainly, the statement by Conestoga's Board is not "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981). Indeed, the Government clearly understood that beliefs and practices concerning contraception could be religious, because it incorporated a regulation and exemption into the Affordable Care Act to carve out accommodations for certain organizations: first, it exempted churches and houses of worship from the requirement entirely; and, second, it allowed self-certification by companies that are both (1) non-profit organizations as that term is used by the Internal Revenue Service, and (2) organizations that hold themselves out as religious and as having religious objections to providing coverage for contraceptive services. Businesses that meet these criteria may provide a self-certification to the third-party administrator of their self-insured group health plan, at which point the outside insurer picks up the cost of providing the objected-to services.

The Court of Appeals transformed the certification standards into a bright-line test to determine what entities could come within the scope of Free Exercise protection under the First Amendment, holding that because Conestoga was "for-profit" and had not been organized for religious purposes, it was a corporation that could not exercise religion. *Conestoga*, 724 F.3d at 388. Indeed, the Court of Appeals went further, characterizing such a corporation in essence as a conscienceless entity that *could not* be religiously motivated or act for religious reasons. *Id.* at 385-86. *But see Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 525, 547 (1993) (enforcing Free Exercise claim brought by an entity).

It is factually erroneous—and dangerous—to view federal non-profit status as a threshold for moral action, because (a) the measure of moral action is motivation; (b) this Court has regularly recognized that religious and secular conduct can co-exist; and (c) there are many different corporate forms—both for-profit and non-profit—that engage in religious conduct.

II. THE MEASURE OF MORAL ACTION IS MOTIVATION.

The Court in *Bellotti* recognized that even if an *action* is protected, the *actor* might not be. But the presumption in such a case favors the actor. *Bellotti*, 435 U.S. at 777. By asking only whether corporations were historically persons protected by the Free Exercise Clause, the Court of Appeals for the Third Circuit placed a burden on Conestoga that Conestoga should not have borne; Conestoga was entitled to the presumption that because it was engaging in protected conduct, it was protected.

No one doubts that at least some organizations can exercise religion and seek to protect the right to do so. *See, e.g.*, *Babalu Aye*, 508 U.S. at 525, 547; *Corp. of Presiding Bishop of the Chuch of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 330 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.29 (1983). Indeed, in the Judeo-Christian tradition, it was widely understood that not only individuals but households, cities, tribes, and nations were called to serve God in everything that they undertook. Joshua did not speak for himself alone when he said: "[B]ut as for me and my house, we will serve the Lord." Joshua 24:15. And Moses began the injunctions contained in Deuteronomy 5 with "Hear, O Israel" – and among the commandments to that people was: "Ye shall walk in all the ways which the Lord your God hath commanded you." Deuteronomy 5:33. Part of the message of the New Testament is that the literal nation of the Old Testament became a people sharing a common bond of faith, associating in fellowship. *See, e.g.*, Galatians 3:28 ("There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one in Christ Jesus").

As Justice Brennan explained in the concurrence in *Amos*:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious

> mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

483 U.S. at 342 (Brennan, J., concurring). Accordingly, the right to practice one's religion is linked to the right to associate, another First Amendment right:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) (citations omitted). It follows that an entity that is a composite of associated persons does not lose the capacity to believe or to act any more than the individuals who comprise it do. Indeed, States have worried about the opposite question: whether an entity formed from persons exercising their religion could be non-religious. Thus in *Collins v. Kephart*, 117 A. 440 (Pa. 1921)—particularly relevant here because Conestoga is a Pennsylvania corporation—the Pennsylvania Supreme Court found that five variously constituted and purportedly secular institutions, including schools and hospitals, were in fact sectarian, based upon that court's analysis of various entity-specific characteristics. In so finding, the Pennsylvania Supreme Court expressly distinguished *Bradfield v. Roberts*, 175 U.S. 291, 297-99 (1899), which had characterized as secular a hospital comprised solely of members of a church. Because the identification of a person's status—essential for addressing the scope of the free exercise right at issue—is a question of state law, the starting point for the analysis in *Conestoga* should have been how Pennsylvania views companies such as Conestoga. *McDaniel v. Paty*, 435 U.S. 618, 627 & n.5 (1978); *see also Bellotti*, 435 U.S. at 777 (presuming within scope of protected actors).

Pennsylvania law recognizes expressly that corporations are persons with the "legal capacity of natural persons to act." 15 Pa. Cons. Stat. § 1501; 1 Pa. Cons. Stat. § 1991 ("person"). As such, they may "sue and be sued, complain and defend and participate as a party or otherwise in any judicial, administrative, arbitrative or other proceeding in [their] corporate name." 15 Pa. Cons. Stat. § 1502(a)(2). In other words, they may enforce their rights in the same way and to the same extent as individuals. Moreover—and contrary to the implication of the Court of Appeals—absent a restriction in the articles of incorporation, "*every* business corporation has as its corporate purpose the engaging in *all* lawful business for which corporations may be incorporated under this subpart." 15 Pa. Cons. Stat. § 1301 (emphasis added). In Pennsylvania, the law as to non-profits is no different. 15 Pa. Cons. Stat. § 5502. As the Court of Appeals recognized, a Pennsylvania business may lawfully incorporate for the purpose of religious outreach or ministry; the court should have also recognized the corollary—that because religious activity is a lawful purpose for incorporation, it is a lawful activity for every other Pennsylvania business, even secular ones (unless otherwise restricted).

In short, taking on a corporate form does not undermine the straightforward principle that persons associated together act—and are both authorized and accountable to act—as an entity. Corporately as well as individually, there are persons who consider their actions to be motivated by and subject to the constraints imposed by God or other religious beliefs—and that is the quintessential definition of the *exercise* of religion. *See* 42 U.S.C. § 2000bb-2(4) (adopting definition of "exercise of religion" from 42 U.S.C. § 2000cc-5(7)(A): "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief" (emphasis added)).[2]

It is no accident that this Court has applied a similar threshold for the Free Exercise Clause, protecting persons (including, in that case, Native Americans, nature organizations, and the State of California) from "be[ing] coerced by the Government's action into violating their religious beliefs, [or] governmental action [that] penalize[s] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449

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[2] It is this broadened definition of "religious exercise" under the RFRA that reveals a key flaw in the analysis by the Court of Appeals for the Third Circuit. In its decision, the Court of Appeals opined that because Conestoga cannot "exercise" religion under the Free Exercise Clause, it necessarily cannot "exercise" religion under the RFRA. But that presupposes that the constitutional and statutory protections are coterminous. Quite the contrary, the RFRA both incorporated a broader definition of free exercise and established a strict scrutiny standard of review.

(1988); *see also Wallace v. Jaffree*, 472 U.S. 38, 53 (1985) (recognizing "that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all"); *Torcaso v. Watkins*, 367 U.S. 488, 495-96 & n.11 (1961) (affirming that the Government cannot force a person to profess belief in a religion and cannot prefer believers against non-believers).

Inherent in the decision of the Court of Appeals for the Third Circuit in *Conestoga*, however, is a perception that corporations are insentient entities that cannot exercise judgment or morality. But the States would disagree. In many different areas, States expect—and require—corporations to exercise moral decision-making. A corporation in Pennsylvania is subject to tort liability—which itself is a reflection of the "primary social duty . . . to take thought and have a care lest his action result in injuries to others." *Bisson v. John B. Kelly, Inc.*, 170 A. 139, 143 (Pa. 1934). If the tort is committed not just negligently but with "evil motive" a corporation can be subject to punitive damages. *Daniel v. Wyeth Pharm., Inc.*, 15 A.3d 909, 933 (Pa. Super. Ct. 2011). A corporation can directly owe enforceable duties of care to its customers. *E.g.*, *Scampone v. Highland Park Care Ctr., LLC*, 57 A.3d 582, 598 (Pa. 2012). Indeed, it can be criminally prosecuted for deception, which requires a finding that a corporation acted with intent. *E.g.*, *Pennsylvania v. J.P. Mascaro & Sons, Inc.*, 402 A.2d 1050, 1051 (Pa. Super. Ct. 1979); *see also* 18 Pa. Cons. Stat. § 3922.

These expectations are not limited to Pennsylvania law or to the "modern" era. *See Direct Sales Co. v. United States*, 319 U.S. 703, 713 (1943) (characterizing a company as not only "know[ing] and acquiesc[ing], but join[ing] both mind and hand" with another, justifying the "step from knowledge to intent and agreement"); *Tiller v. Atl. C.L.R. Co.*, 318 U.S. 54, 61 n.8 (1943) ("Morally speaking, those who employ men on dangerous work without doing all in their power to obviate the danger are highly reprehensible, as I certainly think the company were in the present instance.") (quoting *Woodley v. Metro. Dist. Ry. Co.*, L.R. 2 Ex. Div. 384 (1887)); *Home Indem. Co. v. Williamson*, 183 F.2d 572, 577 (5th Cir. 1950) (finding a jury question as to whether a company was serving two masters).

James Madison urged that religion be left "to the conviction and conscience of every man . . . to exercise it as these may dictate." James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), *in* Founding the Republic: A Documentary History 90 (John J. Patrick ed., 1995).[3] Because society rightly expects corporations to be held accountable for acting according to "conviction and conscience" and to conform their actions to the public policy—even evolving public policy—of States and the Federal Government, it is sophistry to presume that such decisionmaking must occur in a vacuum that is uninformed by judgment, discretion, and, for many, faith and the teachings of one's religion. How can a corporation be condemned for acting immorally if it is incapable of acting morally? After all, "A good man out of the good treasure of his heart bringeth forth that which is good; and an evil man out of the evil treasure of his heart bringeth forth that which is evil. For of the abundance of the heart his mouth speaketh." Luke 6:45. This principle led John Wesley in the middle of the 18th century to preach against many of the ills that have come to be known as business torts:

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[3] Madison kept in clear view the dangers of religious persecution.

> We cannot, consistent with brotherly love, sell our goods below the market price; we cannot study to ruin our neighbour's trade, in order to advance our own; much less can we entice away or receive any of his servants or workmen whom he has need of. None can gain by swallowing up his neighbour's substance, without gaining the damnation of hell!

John Wesley, *Sermon 50: The Use of Money*, *in* The Works of the Reverend John Wesley (1840).

All of which is to say that individuals walk according to their faith—or their lack thereof—and corporations do the same. *Cf.* James 2:18 ("Yea, a man may say, Thou hast faith, and I have works: shew me thy faith without thy works, and I will shew thee my faith by my works.").

III. THIS COURT AND OTHERS HAVE REGULARLY RECOGNIZED THAT RELIGIOUS AND SECULAR CONDUCT CAN CO-EXIST.

In *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011), the Court of Appeals for the Ninth Circuit asked whether a humanitarian service organization that had expressly conditioned employment on a statement of faith could claim to be a religious corporation within the meaning of 42 U.S.C. § 2000e-2(a). That question—which characterizes an organization rather than evaluating conduct—prompted three different answers, although two of the judges agreed as to the result and as to most of the core principles underlying the analysis. In the portion of the opinion on which two judges agreed, the panel looked closely at this Court's admonition in *Amos*, in which the Court warned that it would be burdensome to ask organizations to "predict which of its activities a secular court will consider religious." 483 U.S. at 336.

In *Amos*, of course, the question was whether a building engineer at a gymnasium was performing a religious or a secular activity. In his concurrence, Justice Brennan was even more cautious than the majority, expressing doubt that a court was even competent to answer such a question. As the *Spencer* panel recognized in the case before it, the work that World Vision did was "relief, development, advocacy and public awareness" and not what the court called "hardnosed proselytizing"—good deeds accompanied by "preaching" only when someone initiated the conversation with a World Vision employee. 633 F.3d at 737-38. As the concurrence recognized, "[h]umanitarian work may be a secular or a religious activity, depending on motivation and meaning among those who perform it." *Id.* at 745 (Kleinfeld, J., concurring). This is certainly because there is no "sharp distinction" between religious belief and religiously motivated action. *Paty*, 435 U.S. at 631 n.2 (Brennan, J., concurring). The Iowa Supreme Court recognized that corporate action is religious when it is "in pursuance of and in conformity with an essential article of religious faith." *Iowa v. Amana Soc'y*, 109 N.W. 894, 899 (Iowa 1906).

As a result, secular and religious activity may be one and the same. *See Bd. of Educ. v. Allen*, 392 U.S. 236, 245 (1968) (recognizing that a State's interest in education is served by a religious school because of the "secular teaching that accompanied religious training in the schools maintained by the Society of Sisters"); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 12 n.2 (1989) (distinguishing earlier precedent that analyzed *secular* benefits provided by *religious* organizations). This is the same reason this Court found that an individual's religious vocation was not compromised by the fact that he held a secular commercial job as well. *Dickinson v. United States*, 346 U.S. 389, 395-96 (1953). The fact that secular and religious may not be readily categorized by an outside observer—and, indeed, may not only be indistinguishable but even indistinct—has prompted the Court to conclude: "the inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's *or institution's* religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (emphasis added). Indeed, the very question whether an entity is *pervasively* religious necessarily presupposes that the entity is in some part religious—a part that is exercising religion as it is acting in accordance with that religious nature.

This is not to say that a court ought never to inquire whether a corporation is exercising religion. Courts looking to the Court of Appeals for the Ninth Circuit have focused on close corporations and the views of their owners. As both the Government and the Court of Appeals for the Third Circuit recognized, ownership is not a proper measure of a corporation's beliefs. *Conestoga*, 724 F.3d at 388; Gov't Br. at 23-26 (No. 13-354). Nonetheless, the conclusion that there is no measure of corporate belief—or, worse, that corporations have no beliefs—is inconsistent both with this Court's precedents and with State corporate law, which provides a straightforward test to determine the beliefs and motivation of a corporation: it is the *Board* that is entrusted with the exercise of the powers of the corporation. *E.g.*, 15 Pa. Cons. Stat. § 1715. The proper inquiry is thus what the Board of Directors has articulated. In *Conestoga*, for example, the Board of Directors had adopted the following, on behalf of the corporation:

> The Hahn Family believes that human life begins at conception (at the point where an egg and sperm unite) and that it is a sacred gift from God and only God has the right to terminate human life. Therefore, it is against our moral conviction to be involved in the termination of human life through abortion, suicide, euthanasia, murder, or any other acts that involve the taking of human life.

724 F.3d at 382 n.5 (citation omitted). The Court of Appeals recognized that the religious values of the *owners* were sincerely held, but it ignored the fact that the religious values of the *Board* were as well. The court's discrediting of Conestoga's exercise of its religious beliefs is based on a fundamentally flawed view of corporate law.

IV. THERE ARE MULTIPLE CORPORATE FORMS THAT ENGAGE IN RELIGIOUS CONDUCT.

Asking whether an organization is sufficiently religious for the purpose at hand cannot answer the question whether a particular action or choice made by a corporation is religiously motivated. Short-circuiting the proper question, the Court of Appeals for the Third Circuit imposed a requirement (presumably derived from Justice Brennan's concurrence in *Amos*, in which he advocated a *carte blanche* characterization of non-profit as religious) that a company be not only religious but also registered with the Internal

Revenue Service as a non-profit. 724 F.3d at 385 ("We do not see how a for-profit 'artificial being, invisible, intangible, and existing only in contemplation of law,' that was created to make money could exercise such an inherently 'human' right." (citations omitted)).

The label "for-profit" does not preclude anyone or any entity from acting in accordance with an underlying religious motivation or in pursuit of a religious aim. Neither does being a non-profit guarantee conduct that is religiously motivated. In its brief, the Government contends that for-profit corporations "enter the commercial world" and "submit themselves to legislation." Gov't Br. at 19 (No. 13-354). That is no less true of non-profits, and this Court has refused to draw such a simplistic distinction:

> Our cases have frequently applied laws regulating commerce to not-for-profit institutions. In *Associated Press v. NLRB*, 301 U.S. 103, 81 L. Ed. 953, 57 S. Ct. 650 (1937), for example, we held the National Labor Relations Act as applied to the Associated Press' newsgathering activities to be an enactment entirely within Congress' Commerce Clause power, despite the fact that the A. P. does not sell news and does not operate for a profit. Noting that the A. P.'s activities involved the constant use of channels of interstate and foreign communication, we concluded that its operations amounted to commercial intercourse, and such intercourse is commerce within the meaning of the Constitution.
>
> We have similarly held that federal antitrust laws are applicable to the anticompetitive activities of nonprofit organizations. The nonprofit character of an enterprise does not

> place it beyond the purview of federal laws regulating commerce.
>
> We have already held that the dormant Commerce Clause is applicable to activities undertaken without the intention of earning a profit.

Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, 520 U.S. 564, 583-84 (1997) (quotations and citations omitted); *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 294-95 (1985) (affirming the district court's conclusion that "[b]y entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees. The requirements of the Fair Labor Standards Act apply to its laborers."); *Am. Med. Ass'n v. United States*, 317 U.S. 519, 528 (1943) (recognizing that "the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health").

The Court of Appeals for the Third Circuit and the Government prefer instead to invoke the label "non-profit" as a proxy for "religious" as a means of determining which entities can "exercise" religion. But there are only two possible reasons for adopting that proxy. The first—and one that admittedly has historical antecedents—is an assumption that acts of unselfishness have to be divinely inspired because, left to their own devices, humans are selfish. Indeed, Pennsylvania itself has a long tradition of recognizing that charity is by its nature a religious expression. *See, e.g.*, *Miller v. Porter*, 53 Pa. 292, 298-99 (1867) ("'Whatever . . . is given for the love of God, or for the love of your neighbor, in the catholic and universal sense—given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private or selfish,' is a gift for charitable uses. 'The love of God is the basis of all that is bestowed for His honor, the building up of His Church, the support of His ministers, the religious instruction of mankind. The love of his neighbor is the principle that prompts and consecrates all the rest. The current of these two great affections finally run together, and they are at all times so near that they can hardly be said to be separated.'" (citation omitted)).

The second possible reason appears to arise from Justice Brennan's rationale in *Amos*, that a way to overcome the fact that "the character of an activity is not self-evident" is to ask instead whether the activity is profitable:

> The risk of chilling religious organizations is most likely to arise with respect to nonprofit activities. The fact that an operation is not organized as a profit-making commercial enterprise makes colorable a claim that it is not purely secular in orientation. In contrast to a for-profit corporation, a nonprofit organization must utilize its earnings to finance the continued provision of the goods or services it furnishes, and may not distribute any surplus to the owners. This makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose. Furthermore, unlike for-profit corporations, nonprofits historically have been organized specifically to provide certain community services, not simply to engage in commerce.

> Churches often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster.

483 U.S. at 344 (Brennan, J. concurring) (citation omitted).

But the mere fact that a non-profit can, for example, violate antitrust laws, is evidence that whether an entity earns "profits" does not fully measure the moral character of its conduct. This Court has also recognized the converse; that a religiously motivated institution may maintain its religious beliefs and conduct—but forfeit non-profit status. *Bob Jones Univ.*, 461 U.S. at 603-04. Indeed, in that case, the Court provided an assurance that what the Court of Appeals for the Third Circuit has done here would not happen: "Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, *but will not prevent those schools from observing their religious tenets*." *Id.* (emphasis added).

More to the point, there is nothing irreligious about a Board that pursues both profits and religiously (or otherwise) motivated social good. Pursuing profit is not inconsistent with religion. Indeed, there is a long historical precedent for recognizing that profits can be a tool of religious decisionmaking. At the time of our nation's founding, John Wesley preached on money, saying:

> You see the nature and extent of truly Christian prudence so far as it relates to the use of that great talent, money. Gain all you can, without hurting either yourself or your neighbour, in soul or body, by applying hereto

> with unintermitted diligence, and with all the understanding which God has given you;—save all you can, by cutting off every expense which serves only to indulge foolish desire; to gratify either the desire of flesh, the desire of the eye, or the pride of life; waste nothing, living or dying, on sin or folly, whether for yourself or your children;—and then, give all you can, or, in other words, give all you have to God.

John Wesley, *Sermon 50*.

John Calvin likewise did not condemn the making of money, but only the making of money that was unjust:

> I think that their declarations ought to be judged of by the rule of charity [*normam caritatis*]; and therefore that only those unjust exactions are condemned whereby the creditor, losing sight of equity [*aequitate*], burdens and oppresses his debtor . . . . Hence it follows, that usury is not now unlawful, except in so far as it contravenes equity [*aequitate*] and brotherly union.

Guenther H. Haas, *Concept of Equity in Calvin's Ethics* 120 (Wilfrid Laurier Univ. Press 1997) (citation omitted).

John D. Rockefeller famously taught his Sunday School class: "The growth of a large business is merely the survival of the fittest . . . . The American Beauty rose can be produced in the splendor and fragrance which bring cheer to its beholder only by sacrificing the early buds which grow up around it. This is not an evil tendency in business. It is merely the working-out of a law of nature and a law of God." John Kenneth

Galbraith, *Affluent Society* 51 (Mariner Books 1998) (quotations and citations omitted).

Now, of course, there were those—including the Department of Justice—who questioned the *content* and fundamentally uncharitable and anticompetitive nature of Rockefeller's Standard Oil Trusts, but if the test of free exercise is action in accordance with sincerely held religious convictions—and this Court has said that it is—the corporate actions were carrying Rockefeller's theology into practice. *See United States v. Ballard*, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.").

Interestingly, part of Rockefeller's legacy broke ground in a different way a half century later, when Frank W. Abrams, the chairman of the Board of what was then Standard Oil Company of New Jersey (later to become Exxon), succeeded in convincing the New Jersey Supreme Court that a for-profit corporation can make charitable donations even in a State that—like the Court of Appeals for the Third Circuit improperly surmised here—prized shareholder value over all. He explained:

> [C]orporations are expected to acknowledge their public responsibilities in support of the essential elements of our free enterprise system. He indicated that it was not "good business" to disappoint "this reasonable and justified public expectation," nor was it good business for corporations "to take substantial benefits from their membership in the economic community while avoiding the normally accepted obligations of citizenship in the social community."

A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 583 (N.J. 1953) (citation omitted).

Others—including other Pennsylvania Mennonites—combined for-profit companies with trusts or foundations dedicated to enhancing their communities. Milton Hershey, for example, established his chocolate company and then, in 1918 a trust, funding the trust with stock from the chocolate company. *In re Milton Hershey Sch. Trust (Appeal of Milton Hershey Sch.)*, 807 A.2d 324, 325-26 (Pa. Commw. Ct. 2002). He is reported to have said: "If the wrong people or organization get control, they can spend or give away more money in a short time than I have made in my life, to build monuments unto themselves, for their own financial gains, ego and recognition—whose heads would swell and hearts would shrink, who would give to those who had plenty and take away from those who had little or none." Herman H. Hostetter, *The Body, Mind and Soul of Milton Snavely Hershey* 25-26 (1971). And at Gettysburg College there is a tribute to the longstanding philanthropy of the Musselman Foundation—funded from the sales of applesauce and other foods by another Pennsylvania business started by a Mennonite family, this one in 1907.

Today, in most states, the profits would not need to be invested in a trust to carry out those deeds. Thirty-two of the fifty States statutorily empower (or obligate) corporations to make decisions that honor the interests of various stakeholders, such as communities, employees, or others, in some instances even *demoting* shareholders' interests. *See* Ariz. Rev. Stat. § 10-830; Cal. Corp. Code § 2700; Conn. Gen. Stat. § 33-756(d); Fla. Stat. § 607.0830(3); Ga. Code Ann. § 14-2-202(5); Haw. Rev. Stat. § 414-221(b), (e); Idaho Code Ann.

§§ 30-1602, 30-1702; 805 Ill. Comp. Stat. 5/8.85; Ind. Code Ann. § 23-1-35-1(d)-(g); Iowa Code § 491.101B; Ky. Rev. Stat. Ann. § 271B.12-210(4); La. Rev. Stat. Ann. § 12:92(G); 13-C Me. Rev. Stat. § 831(6); Md. Corps. & Assoc. § 2-104(b)(9); Mass. Gen. Laws ch. 156D, § 8.30(a)(3); Minn. Stat. § 302A.251 subd. 5; Miss. Code Ann. § 79-4-8.30(f); Mo. Rev. Stat. § 351.347; Nev. Rev. Stat. § 78.138(4); N.J. Stat. Ann. § 14A:6-1(2); N.M. Stat. § 53-11-35(D); N.Y. Bus. Corps. Law § 717; N.D. Cent. Code § 10-19.1-50(6); Ohio Rev. Code Ann. § 1701.59(E); Or. Rev. Stat. § 60.357(5); 15 Pa. Cons. Stat. § 1715(a)-(b); 15 Pa. Cons. Stat. § 516(a); R.I. Gen. Laws § 7-5.2-8(a); S.D. Codified Laws § 47-33-4(1); Tenn. Code Ann. § 48-103-202; Vt. Stat. Ann. tit. 11A, § 8.30(a)(3); Wash. Rev. Code § 23B.25.050; Wis. Stat. § 180.0827; Wyo. Stat. § 17-16-830(g).

Pennsylvania was the first to enact such a "constituency statute" in 1983. 15 Pa. Cons. Stat. § 1715(a)(1) (empowering corporations, through their boards and through individual directors, to consider "to the extent they deem appropriate: (1) The effects of any action upon any or all groups affected by such action, including shareholders, employees, suppliers, customers, and creditors of the corporation, and upon communities in which offices or other establishments of the corporation are located. (2) The short-term and long-term interests of the corporation . . . ."). If a corporation is expected to—and held accountable to—make decisions as to the course of action to take in the short run and the long run and how to enhance the lives of those around them (and which lives), it is making value judgments.

And in recent years, over half of the States—Pennsylvania among them—have gone even further and have enacted or are considering legislation permitting for-profit corporations to subject themselves to added accountability and transparency as an adjunct to an overt commitment to the benefit of either the public in general or a specific sector of the public. Such corporations are denominated benefit corporations,[4] flexible purpose corporations,[5] or social purpose corporations.[6] Examples of companies that have made such a commitment are Patagonia and Plum Organics. The parameters of Pennsylvania's benefit corporation provision are found in 15 Pa. Cons. Stat. § 3302, which defines both "general public benefit" and "specific public benefit"—with the latter including:

> (1) providing low-income or underserved individuals or communities with beneficial products or services;
>
> (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;

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[4] *See* Ariz. Rev. Stat. §§ 10-2401-2442; Ark. Code Ann. §§ 4-36-101-401; Cal. Corp. Code §§ 14600-14631; Colo. Rev. Stat. §§ 7-101-501-509; Del. Code Ann. tit. 8, §§ 361-368; D.C. Code §§ 29-1301-01-1304-01; Haw. Rev. Stat. §§ 420D-1-13; 805 Ill. Comp. Stat. 40/1-40/5.01; La. Rev. Stat. Ann. §§ 12:1801-1832; Md. Corps. & Assoc. §§ 5-6C-01-08; Mass. Gen. Laws ch. 156E, §§ 1-16; Nev. Rev. Stat. §§ 78B.010-190; N.J. Stat. Ann. §§ 14A:18-1-11; N.Y. Bus. Corp. Law §§ 1701-1709; Or. Rev. Stat. § 65.001(37); 15 Pa. Cons. Stat. §§ 3301-3331; R.I. Gen. Laws §§ 7-5.3-1-13; S.C. Code Ann. §§ 33-38-110-600; Vt. Stat. Ann. tit. 11A, §§ 21.01-21.14; Va. Code Ann. §§ 13.1-782-792.

[5] *See* Cal. Corp. Code §§ 2500-2517.

[6] *See* Wash. Rev. Code §§ 23B.25.005-25.150.

(3) preserving the environment;

(4) improving human health;

(5) promoting the arts, sciences or advancement of knowledge;

(6) promoting economic development through support of initiatives that increase access to capital for emerging and growing technology enterprises, facilitate the transfer and commercial adoption of new technologies, provide technical and business support to emerging and growing technology enterprises or form support partnerships that support those objectives;

(7) increasing the flow of capital to entities with a public benefit purpose; and

(8) the accomplishment of any other particular benefit for society or the environment.

15 Pa. Cons. Stat. § 3302.

Similarly, Texas, in S.B. 849, refused to restrict a director or officer from "considering, approving, or taking an action that promotes or has the effect of promoting a social, charitable, or environmental purpose"—even if the corporation has not specified a social purpose in the corporation's certificate of formation. And Arizona, which already permits all corporations to "[m]ake donations for the public welfare or for charitable, scientific or educational purposes," is considering amending its statute to permit corporations to promote the interests of the employees and the workforce, subsidiaries or suppliers, the corporation's customers, the community or society, or local or global environment,

> providing low-income or underserved individuals or communities with beneficial products or services; promoting economic opportunities for individuals or communities beyond the creation of jobs in the normal course of business; protecting or restoring the environment; improving human health; promoting the arts, sciences or advancement of knowledge; increasing the flow of capital to entities with a purpose to benefit society or the environment; conferring any other particular benefit on society or the environment.

Corporations: Purposes: Directors and Officers, Ariz. H.R. Rough Draft (Dec. 24, 2013).

It is not an accident that the foregoing lists of factors are largely the same that the Internal Revenue Service considers when deciding whether an organization qualifies for 501(c)(3) status. Support of such causes and entities is to be encouraged. But, as the States have recognized, seeking a status from the Internal Revenue Service is only one way of doing so. Corporations operating pursuant to constituency statutes, or statutes that authorize benefit corporations, flexible purpose corporations, and other such entities, are recognized by the States as making decisions that take into account these pro-public priorities without needing a non-profit platform for doing so.

The rule that the Court of Appeals for the Third Circuit set down has implications for other entities as well, including in particular Limited Liability Companies, which vary by State and contract as to how entity-level decisions are made, but which in many instances vest that decision-making authority in a Manager. In fact, one of the cases stayed pending this Court's decision concerns a Limited Liability

Company owned and managed by two Franciscan organizations. *See Tonn & Blank Constr., LLC v. Sebelius*, No. 12-325 (N.D. Ind.). In only a few States can a Limited Liability Company also be a non-profit entity, let alone be one for federal tax purposes. How can a court justify a categorical rejection of the beliefs, motivation, and conduct of such an entity based solely on whether it has sought and received non-profit status from the Internal Revenue Service (which may be largely unavailable solely because of the form the entity elects)?

This Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems. This Court should not diminish that role absent impelling reason to do so." *Oregon v. Ice*, 555 U.S. 160, 170-71 (2009) (citing *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). At a time when the States are experimenting with new forms of corporate governance and accountability, it is critical that the Court use caution and avoid wholesale condemnation of for-profit entities as incapable of exercising religion, lest it stifle the very conduct the Court of Appeals thought it was affirming—and, worse, stifle it in the guise of policing the free exercise of religion.

Justice Brennan was careful to explain in *School District of Abington v. Schempp*, that "the line which separates the secular from the sectarian in American life is elusive." 374 U.S. 203, 231 (1963) (Brennan, J., concurring). He went on to say:

> The constitutional mandate expresses a deliberate and considered judgment that such matters are to be left to the conscience of the citizen, and declares as a basic postulate of the relation between the citizen and his

> government that the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . .

Id. (quotations omitted).

CONCLUSION

Drawing artificial lines between "secular" and "religious" and between "tax-exempt" and "for-profit" undermines the very purpose of the Free Exercise Clause, which is to embrace the conduct that flows from moral decision-making, without judging the content itself. The Court of Appeals for the Tenth Circuit saw through these false dichotomies, although even that court ascribed unwarranted significance to whether a corporation was closely held. Accordingly, The Rutherford Institute respectfully asks this Court to reverse the decision of the Court of Appeals for the Third Circuit in its entirety, and to affirm the result of the Court of Appeals for the Tenth Circuit, but to make clear that the definition of corporate entities is—as it should be—in the hands of the States and the exercise of religious convictions is in the hands of those who govern those entities in accordance with the States' laws.

Respectfully submitted,

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In The
Supreme Court of the United States

◆

KATHLEEN SEBELIUS, SECRETARY OF
HEALTH & HUMAN SERVICES, *et al.*,
Petitioners,

v.

HOBBY LOBBY STORES, INC., *et al.*,
Respondents,

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH
& HUMAN SERVICES, *et al.*,
Respondents.

◆

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD AND TENTH CIRCUIT

◆

BRIEF OF THE HONORABLE JOSEPH B. SCARNATI III AND THE HONORABLE DONALD C. WHITE, PENNSYLVANIA STATE SENATORS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS IN NO. 13-354 AND PETITIONERS IN NO. 13-356

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Honorable Joseph B. Scarnati III is a four-term Pennsylvania State Senator and serves as the Pennsylvania Senate President Pro Tempore. The Honorable Donald C. White has served in the Pennsylvania State Senate since 2001. These legislators are interested in this case because this Court's decision on who or what qualifies as a "person" who can "exercise" religion for purposes of the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act will have a direct impact on the right of Pennsylvania businesses and individuals to exercise their religious beliefs in the course of their vocational and professional lives. It will also impact the prerogative of Pennsylvania and other States to define the purpose and scope of entities created under their laws. These legislators urge this Court to affirm the decision below in No. 13-354 and reverse the decision below in No. 13-356.

SUMMARY OF ARGUMENT

As summarized below, Senators Scarnati and White fully adopt the positions set forth in the *amicus curiae* brief filed by The Rutherford Institute in this case. Because the principles of corporate law that are at stake here are of tremendous importance to businesses, to the individuals who make up those businesses, and to the States that regulate them, the Pennsylvania legislators submit this *amici curiae* brief in support of the free exercise rights of Conestoga and Hobby Lobby and in opposition to the Government's position.

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[1] This amicus brief is filed with the parties' consent. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by such counsel or any party.

The Third Circuit's opinion is driven by its conception of corporations as machines whose sole purpose is to make money, and an assumption that that fixed purpose disqualifies for-profit corporations from exercising religion. The Court of Appeals, however, ignored the reality that corporations are as varied in their forms and their motives as people are. Secular and religious actions and motivations can, in fact, coexist and mutually inform decisions, whether those decisions are made by an individual or a collection of individuals.

Further, both courts of appeals failed to recognize that the role of determining the scope of rights that may be exercised by corporations properly belongs to the States. The same States that create corporate forms also both enable and require corporations to make moral decisions and to engage in practices that result from those decisions. It follows that to the extent the "morality" giving rise to the decisions is "religious," the practices that result are religious practices. The Third Circuit's opinion assumes that corporations are entities without the capacity for moral judgment. But the States, which created these entities, disagree. In many different areas and increasingly in specific corporate forms, States allow, expect, and often require corporations to exercise moral judgment.

Additionally, not only is an entity's for- or non-profit status not a proxy for whether it may engage in the exercise of religion, the Third Circuit's approach effectively empowers the IRS to determine what entities could come within the scope of Free Exercise protection under the First Amendment by controlling which entities are certified as nonprofits. Such governmental "gatekeeping" is especially offensive to First Amendment principles, which are so vulnerable to loss from content-based restrictions. How can a court justify a categorical rejection of the beliefs, motivation, and conduct of a corporation based solely on whether it has sought and received non-profit status from the Internal Revenue Service? Drawing artificial lines between "secular" and "religious" and between "tax-exempt" and "for-profit" undermines the very purpose of the Free Exercise Clause. The Court of Appeals for the Tenth Circuit saw through these false dichotomies, although even that Court ascribed unwarranted significance to whether a corporation was closely held.

CONCLUSION

For these reasons and those set forth in full in the *amicus* brief of The Rutherford Institute, Senators Scarnati and White respectfully ask this Court to reverse the decision of the Court of Appeals for the Third Circuit in its entirety, and to affirm the result of the Court of Appeals for the Tenth Circuit, and to make clear that the definition of corporate entities, including their ability to exercise religion, remains in the hands of the States.

Respectfully submitted,

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AMICUS
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BRIEF

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AND
BRIEFS

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Nos. 13-354 & 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL., *Petitioners*,
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL., *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF 67 CATHOLIC THEOLOGIANS AND ETHICISTS AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY STORES, INC., AND CONESTOGA WOOD SPECIALTIES CORP.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 67 Catholic theologians and ethicists. A complete list of *amici*, with their qualifications and institutional affiliations for identification purposes, is included in the Addendum to this Brief. *Amici* believe that the regulatory interpretation of 42 U.S.C. § 300gg-13(a) that requires employers to provide insurance coverage for abortifacient drugs and devices, elective sterilization, and contraceptive services ("the Mandate") violates religious freedom. The religious objections to the Mandate of the employers in these cases are well-founded and shared by many Catholic employers, who will be affected by the disposition of this case. Catholic moral and theological principles, which are shared by many other Christian traditions, indicate that providing health insurance coverage for these objectionable services could cause objecting employers to become unacceptably complicit in actions forbidden by their religious faith.

Amici Curiae file this Brief with the consent of all parties.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* represent that, in consultation with *amici*, they authored this brief in its entirety and that none of the parties or their counsel, nor any person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amici* also represent that all parties have consented to the filing of this brief. Counsel for Respondents Hobby Lobby Stores, Inc., et al., in No. 13-354, have provided a written letter of consent to counsel for *amici curiae*, and counsel for all other parties have filed blanket notices of consent with the Court.

SUMMARY OF THE ARGUMENT

The Mandate imposes a substantial burden on the religious freedom of Catholic employers and other religious believers who object on religious grounds to providing insurance coverage for abortifacients, elective sterilization, and/or contraceptives, and for education and counseling designed to encourage the use of such services. This Court must defer to religious employers' interpretation of their own religion, and must accept their conclusion that providing the objectionable insurance coverage would violate their religious principles, unless that conclusion is so bizarre or so clearly nonreligious in motivation as to warrant extreme judicial skepticism.

No such showing is possible in this case, because the employers' unwillingness to comply with the Mandate reflects an eminently reasonable application of Christian religious principles. The Catholic theological tradition, in common with related Christian traditions, has well-developed concepts used to assess whether a believer may "cooperate in"—*i.e.*, facilitate or assist—the religiously objectionable action of another person. Several objective criteria, commonly invoked by the Catholic theological tradition, determine whether such cooperation would cause the believer to share in moral responsibility for that action.

Under these criteria, the Mandate thrusts Catholic and other religious employers into a "perfect storm" of moral complicity in the forbidden actions. It requires employers to cooperate in (1) gravely objectionable actions, (2) by making a substantial and direct causal contribution to those actions, (3) when such actions are less likely to happen without the employers' contribution, (4) through the provision of funds that are specifically designated in advance for the sole purpose of paying for the forbidden actions, (5) in violation of authoritative guidance from the Catholic bishops to avoid close cooperation in such actions, and all (6) without a proportionate reason to justify material cooperation.

First, in cases of material cooperation, the Catholic tradition considers the gravity of the wrongdoing in which the believer may cooperate. Graver wrongdoing requires a more serious reason to justify material cooperation. By mandating coverage for abortifacients, the Mandate requires employers to cooperate in the destruction of human life, which is very gravely objectionable to Catholics and many other Christians. Catholic teaching, in particular, also treats elective sterilization and contraception as seriously wrongful actions. In addition, instructing or encouraging someone else to commit a wrongful act is itself a grave moral wrong—*i.e.*, "scandal"—under Catholic doctrine. By mandating coverage for contraceptive "education and counseling," the Mandate requires employers to finance counseling programs designed to instruct and encourage others to use abortifacients and contraceptives. Forcing Catholic and other religiously objecting employers to cooperate in such counseling programs presents a distinct and equally serious violation of their religious conscience.

Second, in cases of material cooperation, many theologians in the Catholic tradition consider how substantially and directly the believer contributes to the performance of the forbidden action. The more substantial and direct one's involvement, the greater one's share in the moral responsibility for that action. The Mandate requires very substantial and direct participation by employers in actions forbidden by their religious principles. It requires them to finance a large proportion of the cost—both of the services themselves, and of the education and counseling designed to promote such services. The employers' involvement in these objectionable actions is triggered by only one intervening cause, namely the decision of the employee who seeks the objectionable services. By contrast, the causal contribution of an individual taxpayer to any particular objectionable government program is far less substantial and direct than the participation in forbidden actions required by the Mandate.

Third, many Catholic theologians consider whether the objectionable action would have happened anyway without the believer's participation, *i.e.*, whether the believer is a "necessary" or "essential" cause of the objectionable action. It is particularly problematic for a believer knowingly to assist in the destruction of innocent human life when such destruction would not occur without the believer's contribution. The Mandate creates the possibility that religious employers may become necessary or essential causes of such actions. Though contraceptives, including abortifacients, are widely available at relatively low cost from other sources, the Mandate forces the employer to provide insurance that covers the entire cost of such services, which the Government intends to increase usage of them. Moreover, the Mandate is very likely to make employers necessary causes for education programs designed to encourage use of abortifacients and contraceptives.

Fourth, some Catholic theologians consider whether the cooperator is providing the third party with a means that is specifically designed for use in the forbidden action. Providing another person with certificates or coupons to authorize the performance of a morally objectionable action typically makes one morally complicit in that action. The Mandate requires religious employers to provide health insurance coverage for the morally objectionable services, and for contraceptive education and counseling. This is analogous to providing certificates or coupons for abortifacients and contraceptives.

Fifth, the many specifically Catholic employers who are affected by the Mandate have an additional reason for concern. On such matters of faith and morals, Catholic employers are called to obey the teaching authority of the Catholic bishops, who have uniformly condemned the Mandate, and who had already forbidden close cooperation in abortion and sterilization procedures prior to the Mandate.

Because providing the objectionable health coverage would involve substantial, direct, and potentially necessary cooperation in very gravely wrongful actions, including the foreseeable destruction of human life, Catholic and other religiously objecting employers can reasonably conclude that no proportionate reason justifies material cooperation.

Because all these criteria are satisfied, it is eminently reasonable for a Catholic or other religiously objecting employer to conclude that the compliance with the Mandate would gravely burden their religious conscience by forcing them to become complicit in religiously forbidden actions.

ARGUMENT

I. Principles of Catholic Moral Theology Support the Claims of Religiously Objecting Employers That Compliance With the Mandate Would Make Them Complicit in Religiously Forbidden Actions.

In *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981), this Court stated that it would defer to a religious believer's interpretation of the dictates of his or her own religion unless the claim was "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." *Id.* at 715. The judgment of many Catholic and other religious employers that compliance with the Mandate would violate their religious conscience is neither "bizarre" nor "clearly nonreligious in motivation." *Thomas*, 450 U.S. at 715. Rather, it reflects an eminently reasonable application of Christian religious principles, which have enjoyed particularly explicit examination and development in the Catholic theological tradition.

Theologians and ethicists in the Catholic tradition employ a well-developed set of concepts to analyze issues of complicity in the immoral actions of others. These concepts explain why so many Catholic employers have taken the same position as the employers in these cases. Such employers reasonably and sincerely draw a line against providing insurance coverage for abortifacients and contraceptives, while not objecting to other forms of less direct financial support for objectionable actions—such as paying federal taxes that support objectionable government programs, or paying cash to employees who may go on to use the money for objectionable purposes.

First, in ascertaining whether knowingly facilitating or contributing to someone else's forbidden actions is morally permissible, Catholic moral theology speaks of "cooperation" with the forbidden actions. "Cooperation," in this context, is understood broadly as "the participation of one agent in the activity of another agent to produce a particular effect or joint activity." Russell E. Smith, *The Principles of Cooperation in Catholic Thought*, *in* The Fetal Tissue Issue: Medical and Ethical Aspects 81, 84 (Peter J. Cataldo & Albert S. Moraczewski eds., 1994).

Next, the Catholic tradition draws a distinction between "formal" and "material" cooperation. "Formal" cooperation occurs when the believer, in cooperating, shares in the intention that the forbidden action be committed by the other party. *See* Orville N. Griese, *Catholic Identity in Health*

Care: Principles and Practice 387-88 (1987) ("Griese"); Germain Grisez, *The Way of the Lord Jesus, Vol. 3: Difficult Moral Questions* 872-73 (1997) ("Grisez"). "Formal cooperation always is morally unacceptable, because, by definition, it involves bad intending." Grisez, at 873. "Material" cooperation occurs when the believer foresees that his action will facilitate or assist the performance of the objectionable action by the third party, but does not share in the principal agent's intention to commit the action. Grisez, at 873; Griese, at 388. Material cooperation is sometimes permissible, and sometimes impermissible. To determine whether it is permissible, one must balance the good one hopes to achieve by cooperating against the nature of the bad action and the closeness of one's contribution to it. Grisez, at 876. A "proportionate reason"—*i.e.*, some good to be achieved that is significant enough to counterbalance the bad action and the closeness of one's complicity in it—is required to justify material cooperation in a forbidden action. Grisez, at 876; *accord* Gary Atkinson et al., *A Moral Evaluation of Contraception and Sterilization* 79-80 (1979) ("Atkinson").

Several objective criteria are frequently invoked in the Catholic theological tradition to determine whether cooperation in another's bad action is permissible. These criteria are supported by commonsense moral intuitions, and many have close parallels in the manner that our laws allocate legal responsibility. In this case, all of these criteria point in the same direction. Each one indicates that compliance with the Mandate could violate the religious conscience of Catholics and other objecting employers by forcing them to assume an intolerable degree of complicity in forbidden actions.

These criteria include: (1) the gravity of the wrongdoing that the believer facilitates; (2) the magnitude and directness of the believer's causal contribution to that wrongdoing; (3) whether the wrongdoing would have occurred without the believer's cooperation, *i.e.*, whether the believer is a "necessary" or "essential" cause of the objectionable action; (4) whether there is a close fit between the means provided by the believer and the objectionable action; and (5) whether there is a specific directive from Church authorities forbidding the cooperation.

A. The Mandate Forces Employers To Cooperate In At Least Two Distinct Activities That Are Gravely Objectionable Under Catholic Doctrine.

The first criterion for assessing the permissibility of material cooperation is how grave or serious is the wrongdoing that the believer is assisting. The graver the wrongdoing, the more problematic is cooperation in that wrongdoing. In general, "the more serious the harm from the sin, the more significant must be the good sought to justify cooperation." Atkinson, at 80. A proportionately stronger justification is required "the graver ... the evil of the principal agent's act in itself," and "the graver ... is the harm which may be caused to third parties, especially the innocent," by the objectionable action. Bishop Anthony Fisher, O.P., *Cooperation in evil: understanding the issues*, *in* Cooperation, Complicity & Conscience: Problems in healthcare, science, law, and public policy 27, 54 (Helen Watt ed., 2005) ("Fisher").

1. The Mandate requires employers to finance the use of abortifacients, contraceptives, and sterilizations, which are gravely objectionable to Catholics.

The Mandate requires employers to cooperate in actions that are gravely wrongful according to Catholic teachings. First, the Mandate requires employers to finance the use of abortifacients, contraceptives, and sterilizations, by paying for a large share of the premiums for insurance policies covering those services. Each of these actions is seriously wrongful under Catholic teachings.

First, under Catholic doctrine, the use of abortifacient drugs and devices is a moral wrong of the first order. The Catholic Church teaches that "[h]uman life must be respected and protected absolutely from the moment of conception." *Catechism of the Catholic Church* ¶ 2270 (1994) ("Catechism"). "From the first moment of his existence, a human being must be recognized as having the rights of a person—among which is the inviolable right of every innocent being to life." *Id.* Under Catholic doctrine, the destruction of innocent human life—including embryonic human life—is a violation of the Fifth Commandment, "Thou shalt not kill," and thus a serious moral wrong. *Id.* ¶ 1858. "Since it must be treated from conception as a person, the [human] embryo must be defended in its integrity, cared for, and healed, as far as possible, like any other human being." *Id.* ¶ 2274.

The United States Conference of Catholic Bishops has authoritatively applied this teaching against destroying human life to Catholic health care providers:

> Abortion ... is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, includes the interval between conception and implantation of the embryo. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation.

United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* ¶ 45 (5th ed. 2009), *available at* http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf ("Directives").[2] Regardless of the Government's definition of "abortion," the Catholic faith views the destruction of a human embryo at any time after conception—including during "the interval between conception and implantation of the embryo," *id.*—as an abortion, and gravely wrongful. These views, moreover, are shared by many other non-Catholic Christians, including the religious employers in these cases.

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[2] All internet citations were last visited January 24, 2014.

The Catholic Church also deems elective sterilization and contraception to be seriously wrongful. "[E]very action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible" is impermissible. Catechism ¶ 2370. "Any sterilization which ... has the sole immediate effect of rendering the generative faculty incapable of procreation ... remains absolutely forbidden according to the doctrine of the Church." Sacred Congregation for the Doctrine of the Faith, *Responses to Questions Concerning Sterilization in Catholic Hospitals (Quaecumque Sterilizatio)* ¶ 1 (March 13, 1975), *available at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19750313_quaecumque-sterilizatio_en.html.

2. The Mandate requires employers to finance "education and counseling" that will instruct and encourage persons to use abortifacients and contraceptives.

The Mandate also requires religiously objecting employers, through their contribution to the employee health care plan, to finance "patient education and counseling" for their employees in the use of abortifacients and contraceptives. 77 Fed. Reg. 8724, 8725 (Feb. 15, 2012); *see also* 42 U.S.C. §

300gg-13(a)(4); 45 C.F.R. § 147.130(a)(1)(iv) (2013); Health Res. & Serv. Admin., *Women's Preventive Services: Required Health Plan Coverage Guidelines*, http://www.hrsa.gov/womensguidelines/. In the report upon which the Mandate's contraceptive requirements are based, the Institute of Medicine made clear that the intended purpose of the contraceptive education and counseling requirement is to increase the use of contraceptives, including those that function as abortifacients:

> [S]tudies show that postpartum contraceptive counseling increases contraceptive use ..., that counseling increases method use among adolescents in family planning clinics, that counseling decreases nonuse of contraception in older women of reproductive age who do not want a future baby, and that counseling of adult women in primary care settings is associated with greater contraceptive use....

Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 107 (2011); *see also* Gina M. Secura et al., *The Contraceptive CHOICE Project: reducing barriers to long-acting reversible contraception*, Am. J. Obstetrics & Gynecology, Aug. 2010, at 115e.1, 115e.4 (attributing increased use of abortifacient contraceptive methods to increased patient education, among other factors). There can be no doubt that the Government-mandated "education and counseling" programs, which are financed by employer-provided health insurance plans, will be designed to instruct and encourage women to use abortifacients and contraceptives. Whether or not such programs will actually be effective in promoting such usage, religiously objecting employers will be required to support such programs, contrary to their religious beliefs.

The Catholic tradition forbids "scandal," which in the theological context is defined as encouraging or exhorting other persons to engage in wrongdoing: "Scandal is an attitude or behavior which leads another to do evil. The person who gives scandal becomes his neighbor's tempter." Catechism ¶ 2284. "Anyone who uses the power at his disposal in such a way that it leads others to do wrong becomes guilty of scandal and responsible for the evil that he has directly or indirectly encouraged." *Id.* ¶ 2287. Teaching and educating others about how to perform wrongful actions is a particularly serious form of scandal. *Id.* ¶ 2285 ("Scandal is grave when given by those who by nature or office are obliged to teach and educate others.").

By compelling employers to finance a scheme that necessarily includes counseling and education in the use of abortifacients and contraceptives, the Mandate requires religiously objecting employers to cooperate in the grave moral wrong of scandal—*i.e.*, encouraging others to engage in wrongdoing—in addition to their cooperation in the grave moral wrong of their employees' actual use of abortifacients or contraceptives.

B. The Mandate Requires Employers To Make Substantial and Direct Contributions to Morally Objectionable Actions.

Second, in cases of material cooperation, many Catholic theologians consider the magnitude and directness of the believer's causal contribution to the forbidden action. This concept is often expressed by distinguishing between "proximate" and "remote" forms of cooperation. "'Proximate versus remote' refers to how closely ... cooperation is connected with the evil in some way but not as an instrument of its performance." Benedict M. Ashley, O.P. & Kevin D. O'Rourke, O.P., *Health Care Ethics: A Theological Analysis* 195 (4th ed. 1997). Because a more substantial and direct contribution to an objectionable action tends to increase one's share in the moral responsibility for that action, proximate material cooperation requires a greater justification than remote material cooperation. The permissibility of cooperation thus depends in part on "how closely connected with the sinful action are the circumstances in which there is cooperation." Atkinson, at 80. Conversely, "the more an institution is *causally removed* from the immoral procedure or activity, the more acceptable is its material cooperation" in that objectionable action. The Ethicists, The National Catholic Bioethics Center, *Cooperating with Non-Catholic Partners*, *in* Catholic Health Care Ethics: A Manual for Ethics Committees 27/1, 27/3 (Peter J. Cataldo & Albert S. Moraczewski eds., 2009) ("Manual").

To illustrate this principle, consider the case of a religious objector who opposes the death penalty. Each year, she pays her federal taxes, knowing that a portion of her tax money may ultimately be used by others to finance the federal death penalty. Because her own tax money makes, at most, a minuscule and indirect causal contribution to any particular execution, this would typically not trouble her conscience much. But suppose that one year, the government were to direct her to personally finance a large portion of the cost of the drugs for a lethal injection, instead of paying her taxes. She would presumably balk at doing this, even if she knew that the execution would proceed regardless of her participation. Her reluctance would arise from the commonsense intuition that she would be participating far more substantially and directly in the execution than she does by merely paying taxes, and that such close participation would cause her to share in moral responsibility for the execution.

In fact, this example is similar to the facts of *Thomas*. In *Thomas*, the religious objector "testified that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms—for example, as an employee of a raw material supplier or of a roll foundry," but that he could not in good conscience work directly in the manufacture of weapons. *Thomas*, 450 U.S. at 711. The Supreme Court held that this judgment was a valid exercise of religious liberty. *Id*. at 716.

In this case, the Mandate would require Catholic and other objecting employers to make a very substantial and direct causal contribution to their employees' receipt of contraceptive counseling and use of abortifacients. First, under the Mandate, the employer must pay a very significant portion of the cost of the services. Because the Mandate requires that there is no cost-sharing at the time of purchase, *see* 42 U.S.C. § 300gg-13(a), the proportion of the cost financed by the employer is the proportion of the insurance premiums paid by the employer—on average, 82 percent of the premiums for employees with individual coverage, and 72 percent of the premiums for employees with family coverage. The Kaiser Family Foundation, *Employer Health Benefits 2012 Annual Survey: Summary of Findings* 1 (2012), http://kff.org/private-insurance/report/employer-health-benefits-2012-annual-survey/ (noting that these percentages have been "relatively unchanged over the past decade"). Thus, the monetary contribution required by the Mandate, in proportion to the total cost of the objectionable action, is many orders of magnitude greater than (for example) the contribution of an objecting Catholic taxpayer to any particular federal execution.

The employer's provision of health insurance is also a direct manner of cooperating in their employees' contraceptive counseling and use. Contrary to the suggestion of some district courts that the employer's contribution "might, after a series of independent decisions by health care providers and patients covered by [the employer's] plan, subsidize *someone else's* participation" in an objectionable activity, *see, e.g., O'Brien v. U.S. Dep't of Health and Human Servs.*, No. 4:12-CV-476, 2012 U.S. Dist. LEXIS 140097, at *19 (E.D. Mo. Sept. 28, 2012), there is no lengthy chain of mediating decisions separating the employer from the morally objectionable activity in this case. All that is required is for one of the employees to decide to seek information about, or access to, contraceptive or abortifacient agents. With that single triggering decision, the Catholic employer would become complicit in a grave moral wrong. This complicity is not remote, like that of the objecting taxpayer whose contribution to a federal execution is mediated through decisions of Congress, prosecutors, judges, and criminal defendants. Rather, it is substantial and direct complicity, in that the employer directly supports the action, by paying for it. To be sure, the morally objectionable action is ultimately committed by someone else, but so it is in any case of complicity.

The cooperation required by the Mandate, therefore, is quite different from that in the taxpayer-funding cases on which the Government relies in its brief in its Opening Brief in *Hobby Lobby*. *See* Br. for the Pet'rs in No. 13-354, at 34-35 (citing *Tilton* v. *Richardson*, 403 U.S. 672 (1971) and *Board of Educ. v. Allen*, 392 U.S. 236 (1968)). In those cases, the financial contribution of each individual taxpayer to the allegedly objectionable programs contributed a miniscule fraction of the cost of the government's programs, and the programs would almost certainly have still occurred without that contribution. Under the Mandate, by contrast, the employer's contribution to the objectionable action is very substantial—the employer finances the large majority of the cost—and there is a real possibility that the objectionable action might not take place at all without the employer's contribution. *See infra*, Part I.C.

C. The Mandate May Require Employers To Become "Necessary" or "Essential" Causes of Objectionable Actions.

Third, in weighing the material cooperator's degree of moral responsibility for the forbidden action of a third party, Catholic moral theologians consider whether the forbidden action would have happened anyway if the believer had not facilitated it. In the parlance of Catholic theology, one considers whether the believer is a "necessary" or "essential" contributor to the objectionable action. One important factor in assessing material cooperation is "how indispensable is the cooperation for the sinful action to occur." Atkinson, at 80. Cooperation is particularly problematic when one "participate[s] in the evil act by doing something necessary for the actual performance of the evil act," such that "one's action contributes to the active performance of the evil action so much so that the evil action could not be performed without the help of the cooperator." Benedict M. Ashley, O.P. et al., *Health Care Ethics: A Catholic Theological Analysis* 56 (5th ed. 2006); *see also* Manual, at 27/2 (stating that a Catholic hospital would be morally responsible when "immoral procedures would not be taking place but for the collaboration" of the hospital). A much stronger justification is required "[i]f forgoing the [cooperation] certainly or probably would prevent the wrongdoing or impede it and greatly mitigate its bad effects." Grisez, at 882-83. "[T]he more difficult it would be for the principal agent to proceed without the cooperator's involvement," the more serious the justification required to cooperate. Fisher, at 55.

For a religious employer of significant size, there is a reasonable possibility that compliance with the Mandate will cause an increase in the use of abortifacients, contraceptives, and elective sterilizations, which would not occur without the mandated coverage. And it is even more likely that it will cause an increase in the incidence of contraceptive "education and counseling," since such counseling can be provided to female patients of childbearing age even if (and perhaps especially if) they do not deliberately seek out contraceptive services. To be sure, abortifacients and other contraceptives are already widely available from other sources at relatively low cost, so it is not certain that the Mandate will produce a significant increase in contraceptive use. But it is a possibility, and increased usage is in fact the Government's aim in reducing the employee's out-of-pocket cost for the objectionable services to zero. *See* 75 Fed. Reg. 41,726, 41,733 (July 10, 2010); *cf. Baude v. Heath*, 538 F.3d 608, 614 (7th Cir. 2008) ("Anything that raises the cost of an activity will diminish the quantity").

To the extent the Mandate achieves its purpose, then, the Government threatens to force employers to become necessary and essential causes of acts of the destruction of innocent human life. And even if the Mandate fails to increase use of abortifacients and contraceptives, it will still likely compel employers to become essential causes of encouraging contraceptive use through education and counseling.

D. The Mandate Requires Employers To Provide Funding Earmarked In Advance To Be Used For Objectionable Purposes.

Certain Catholic moral theologians also consider whether the means provided by the cooperator is directly ordered to, or specifically tailored for, use in the forbidden action, and they weigh the cooperator's responsibility more heavily when there is such a direct relationship. As one commentator puts it, the cooperator's moral complicity greatly increases where there is an "essential tie" or "intelligible link" between the cooperator's action and the wrongdoing. Melissa Moschella, The HHS Mandate and Judicial Theocracy (Jan. 3, 2013), http://www.thepublicdiscourse.com/2013/01/7403/ ("Moschella").

In cases where the manner of cooperation consists of *paying for* the forbidden action—such as this case—an "essential tie" or "intelligible link" exists when the cooperator provides the wrongdoer with a "certificate" to pay for the wrongful action:

> [P]aying a salary and providing insurance coverage for certain services are far from equivalent. The difference is analogous to the difference between giving cash to someone, and giving, say, a gift certificate to a steakhouse. In the former case, the money you give could be used to buy steak, but there is no

> essential tie between your gift and that particular use of it. In the latter case, you are giving a voucher for the procurement of a *specific and limited range* of goods or services; there is an intelligible link between your gift and the use to which the recipient might put it.

Id. (emphasis in original). In other words, one becomes complicit in wrongdoing when one provides a "gift certificate" or "voucher" to perform the wrongful action, *id.*—even if the wrongdoer would be able to perform the wrongful action without that assistance.

A related question about the permissibility of providing a certificate or voucher for the performance of a wrongful action arose in Germany in the late 1990s. In 1995, Germany legalized abortion during the first trimester, "provided that the woman had a certificate that she had attended ... an approved counseling center" before seeking the abortion. Fisher, at 46-47. The certificate of the counselor was required by law for the woman to receive an abortion. Certain German bishops, while condemning the abortion law, sought to have Catholic counselors participate in the state-approved counseling program. *Id.* at 47. These bishops anticipated that Catholic counselors would tend to dissuade women from having abortions, and that the participation of Catholic counselors would thus reduce the overall number of abortions. *Id.*

In 1998, Pope John Paul II authored a letter to the German bishops, calling on them to "take care that ... ecclesiastical institutions do not become co-responsible for the killing of innocent children" by issuing such counseling certificates that authorized women to receive abortions. *Letter of His Holiness Pope John Paul II to the Bishops of the German Episcopal Conference* ¶ 4 (Jan. 11, 1998), *at* http://www.vatican.va/holy_father/john_paul_ii/letters/1998/documents/hf_jp-ii_let_19980111_bishop-germany_en.html ("Papal Letter"). Though he applauded the intentions and actions of the Catholic pregnancy counselors, *id.* ¶ 6, the Pope expressed grave concern that, by providing women with certificates that authorized the women to receive abortions, Catholic counselors "are involved in carrying out a law that leads to the killing of innocent human beings." *Id.* ¶ 7. Because such involvement made Catholics morally complicit in abortion, the Pope "urgently" exhorted the German bishops to ensure that the practice would cease. *Id.*

Likewise, under the Mandate, employers would become complicit in abortion by providing the equivalent of "certificates" or "vouchers" for employees to receive abortifacients. *See* Moschella. By providing insurance coverage for those services, religiously objecting employers would effectively be providing vouchers or coupons to cover the cost of such services. This action can quite reasonably be viewed as rendering them morally complicit in the act of abortion. Much like the Catholic counselors who issued "abortion certificates" in Germany, Catholic employers in this country could become, in the words of Pope John Paul II, "involved in carrying out a law that leads to the killing of innocent human beings." Papal Letter ¶ 8.

E. Providing the Objectionable Insurance Coverage Would Require Catholic Employers To Disregard Guidance of the Catholic Bishops.

Furthermore, the many specifically Catholic employers affected by the Mandate have an additional reason for concern. For Catholics, the judgment of their bishops on religious matters of faith and morals is entitled to deference, respect, and obedience. The bishops are "authentic teachers, that is, teachers endowed with the authority of Christ, who preach the faith to the people entrusted to them, the faith to be believed and put into practice." Cathechism ¶ 2034. The Catholic's individual conscience "should take account of ... the authoritative teaching of the Magisterium on moral questions," and "[p]ersonal conscience and reason should not be set in opposition to the moral law or the Magisterium of the Church." *Id.* ¶ 2039. Specific guidance from the bishops on moral questions, therefore, is to be treated as highly persuasive by Catholic believers.

In this case, the United States Conference of Catholic Bishops has expressed "vigorous and united opposition" to the Mandate as infringing upon the religious freedom of Catholic employers. United States Conference of Catholic Bishops, Ad Hoc Committee for Religious Liberty, *Our First, Most Cherished Liberty: A Statement on Religious Liberty*, http://www.usccb.org/issues-and-action/religious-liberty/upload/Our-First-Most-Cherished-Liberty-Apr12-6-12-12.pdf. Moreover, prior to the promulgation of the Mandate, the Catholic bishops had already instructed that "Catholic health care organizations are not permitted to engage in immediate material cooperation in actions that are intrinsically immoral, such as abortion, euthanasia, assisted suicide, and direct sterilization." Directives ¶ 70. The teaching of the Catholic bishops on this specific issue provides an additional compelling theological reason for Catholic employers to avoid the conduct compelled by the Mandate. Based on these statements, Catholic employers may reasonably infer that the Catholic bishops have determined that providing the objectionable health insurance coverage would be morally problematic under Catholic doctrine.

F. One May Reasonably Conclude That No Proportionate Reason Justifies the Substantial, Direct, and Necessary Cooperation in Grave Moral Wrongs Required by the Mandate.

As noted above, in certain cases of material cooperation, the Catholic tradition calls for the cooperator to consider whether there is a "proportionate reason" that might justify one's facilitation of another's wrongdoing. Grisez, at 876. As each of the factors discussed above is satisfied, however, an increasingly compelling proportionate reason is required to justify the cooperation. *See* Griese, at 400-01. Where, as here, all the factors discussed above are implicated, it becomes very reasonable to conclude that no proportionate reason would justify the cooperation. This is particularly true where the wrongdoing includes the destruction of innocent human life, viewed as a moral wrong of the highest gravity by the Catholic faith. As discussed above, Pope John Paul II's letter to the German Bishops in 1998 reflected a similar judgment about the absence of proportionate reasons that might justify cooperation in abortion. In Germany, Catholics were participating in the abortion counseling program "in order to be able by goal-directed counseling to save many unborn babies from being killed." Papal Letter ¶ 6. According to the Pope, not even that vitally important purpose was sufficient to justify the grave evil of becoming "involved in carrying out a law that leads to the killing of innocent human beings." *Id.* ¶ 7. *See also* Griese, at 401-02 (noting that "it is difficult to suggest a reason which might justify" proximate and necessary "cooperation in an intrinsically evil procedure" such as abortion). Relatedly, due to the moral gravity of abortion, the Directives of the United States Conference of Catholic Bishops categorically forbid immediate material cooperation in abortion procedures. Directives ¶ 70. Thus, employers can very reasonably conclude that no proportionate reason would justify their provision of health insurance coverage for abortifacients, contraceptives, and sterilizations.

* * *

For these reasons, the Mandate places employers in the midst of a "perfect storm" of moral complicity in actions forbidden by the Catholic faith and other similarly grounded religions. It requires employers to cooperate in (1) actions that are very seriously wrongful under Catholic teaching, (2) by making a very substantial and direct causal contribution to those actions, (3) in circumstances where it is possible that some of these wrongs would not otherwise occur, (4) by furnishing funding that is specifically designated in advance for the sole purpose of paying for the objectionable actions, (5) in the face of authoritative guidance from the Catholic bishops forbidding close cooperation in these wrongs, and all (6) without a proportionate reason to justify their cooperation. Thus, the judgment of many Catholic and other religiously objecting employers that the Mandate substantially burdens their religious freedom reflects an eminently reasonable application of theological principles.

CONCLUSION

For the reasons stated, *Amici* respectfully request that this Court hold that the Mandate imposes a substantial burden on the free exercise of religion by objecting employers.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

Nos. 13-354 & 13-356

Supreme Court, U.S.
FILED
JAN 2 7 2014
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In The
Supreme Court of the United States

◆

KATHLEEN SEBELIUS, et al.,

Petitioners,

v.

HOBBY LOBBY STORES, INC., et al.,

Respondents.

◆

CONESTOGA WOOD SPECIALTIES CORP., et al.,

Petitioners,

v.

KATHLEEN SEBELIUS, et al.,

Respondents.

◆

On Writs Of Certiorari To The United States Courts Of Appeals For The Third And Tenth Circuits

◆

BRIEF OF TEXAS BLACK AMERICANS FOR LIFE AND THE LIFE EDUCATION AND RESOURCE NETWORK (LEARN) AS AMICI CURIAE IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

◆

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INTEREST OF THE *AMICI*

This Court's *amici*, Texas Black Americans for Life and the Life Education And Resource Network (LEARN), are organizations which seek to educate the public to the fact that both abortion and contraception have been used, and continue to be used, as a tool by some who wish to target the African-American community.[1] See http://www.learninc.org/. Throughout this brief your *amici* shall refer to HHS Secretary Sebelius as "Petitioner" and to the business owners and their companies as "Respondent".

◆

SUMMARY OF ARGUMENT

I. This Court recognized in *New York Times v. Sullivan*[2] that the burden which could be imposed by the civil Law of Libel on the New York Times and certain leaders of our Civil Rights Movement (such as Dr. King and his closest assistant, the Rev. Ralph Abernathy) could effectively prohibit Freedom of the Press just as effectively as a criminal prohibition against publishing would, and in fact, even more so. On that basis this Court held that the state law of libel cannot operate in unfettered fashion if it effectively nullifies the First Amendment's Freedom of the Press.

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[1] Counsel of record on this brief is the sole author of this brief, and no person or entity other than your *amici* and counsel of record for the *amici* made a monetary contribution intended to fund the preparation or submission of this brief. This brief is filed with the consent of all parties.

[2] 376 U.S. 254 (1964).

We submit that the imposition of the HHS Mandate,[3] as applied, constitutes every bit as much of a civil burden on the exercise of the Free Exercise of Religion as the state Law of Libel imposed on Freedom of the Press in *Sullivan*, and that accordingly, this Court should apply constitutional principles just as diligently and as thoroughly here as it did in *Sullivan*. This protection is needed especially today.

II. This Court must recognize that it is now faced with the very type of constitutional crisis which Justice O'Connor warned us about in her opinion in *Webster v. Reproductive Health Services*.[4] Justice O'Connor warned us that if the law leaves only one avenue open for one to exercise a constitutional right, and then makes the use of that one way unlawful, such a scheme would be unconstitutional. Because of the way state law operates, there is no practical means whereby the Respondent business owners could engage in their chosen means of earning an income without resort to the corporate form of identity as established by state law. But now Petitioner Sebelius says that in order to conduct their businesses, they must give up their Free Exercise rights. The Respondent business owners, boxed in as they are, are therefore in the very type of predicament which Justice O'Connor recognized could indeed happen.

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[3] 45 C.F.R. § 147.30.

[4] 492 U.S. 490, 522 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

ARGUMENT

I. This Case In Free Exercise Law Requires The Same Analysis And Holding As This Court Reached In Freedom Of The Press Law In *New York Times v. Sullivan*

In *New York Times v. Sullivan* this Court was faced with a novel question of law.[5] *Sullivan* was, of course, a case from 1964 in which the New York Times was faced with an onerous civil judgment stemming from the decision by the New York Times to run an advertisement paid for by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South.[6] Also subject to the judgment was the Rev. Ralph Abernathy, Dr. King's closest confidante, and other clergy leaders of our Civil Rights Movement.[7]

In considering the plight of the New York Times, Dr. King, Rev. Abernathy, and our other Civil Rights leaders, this Court said,

> What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. [footnote omitted][8]

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[5] *New York Times v. Sullivan*, 376 U.S. 254, 256 (1964).

[6] *Sullivan*, 376 U.S. at 256-257.

[7] *Ibid.*

[8] *Sullivan*, 376 U.S. at 277.

This Court then went on to explain the constitutional infirmities of any legal framework which, as a practical matter, would render the First Amendment right of Freedom of the Press meaningless. This Court first took note of the fact that in the civil action which was being reviewed in that case, there was no protection of the type which would normally apply in a criminal case, such as the need for an indictment and proof beyond a reasonable doubt.[9] This Court next noted that the civil penalty which the New York Times faced was one thousand times greater than the penalty under the criminal libel statute of the State of Alabama.[10] This Court then noted that under civil law, the New York Times could be subject to judgments from multiple plaintiffs for one single publication, something which stands in sharp contrast to the protection against double jeopardy found in criminal cases.[11] Finally, in summation, this Court said that the law of civil libel to which the New York Times was subject in that case was,

> a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law[12] (citation omitted) (quotation marks omitted).

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[9] *Ibid.*

[10] *Ibid.*

[11] *Sullivan*, 376 U.S. at 278.

[12] *Ibid.*

This Court's reasoning was simply this: under the First Amendment, the State of Alabama certainly could not make it a criminal offense for the New York Times to publish. And thus, under the First Amendment, the State of Alabama likewise could not, by civil actions, impose even greater burdens on publishing than would be attendant with criminal liability.

In the same manner, in the case at bar, no one could seriously suggest that the federal government could criminalize the Free Exercise of Religion. And, as was the case in *Sullivan*, so also it is true in the case at bar that neither the Respondent corporations nor the Respondent business owners enjoy the protection of the need for an indictment and proof beyond a reasonable doubt. Likewise, the civil penalties which the Respondent corporations could face directly, and which the Respondent business owners would face with equal force indirectly, could be greater than an ordinary criminal fine. And the Respondent corporations, which have multiple employees, would have no protection against double jeopardy, and could thus be subject to multiple judgments by disgruntled employees, each of which might exceed that of an ordinary criminal fine, all because the Respondent business owners, who would feel the real brunt of all this, refuse to violate their consciences. The result of this is that the HHS Mandate[13] constitutes (to borrow the words of this Court) "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."[14]

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[13] 45 C.F.R. § 147.130.

Furthermore, in *Sullivan* there was no state action. In the case at bar, by contrast, the action complained of is that of the Petitioner while acting in her official capacity as an officer of the federal government.

In light of all this, this Court should rule in the same manner as it did in *Sullivan*, by holding that the First Amendment liberty of the Free Exercise of Religion is just as susceptible to being extinguished by civil penalties as the First Amendment right of Freedom of the Press is; therefore, the First Amendment liberty of the Free Exercise of Religion is just as much in need today of the strong protection which this Court applied in *Sullivan* as Freedom of the Press needed back then, and still needs today.

Now, we wish to be perfectly clear about this: in making our argument, we are not saying that *Sullivan* is specifically governing precedent here. All we are saying, rather, is that if this Court is to continue to uphold *Sullivan*, it would make no sense not to extend to the Respondents in the case at bar the same type of protection which this Court extended in *Sullivan*. We ask this Honorable Court to bear in mind that in *Sullivan* there was no prior case which reached the same specific holding which this Court did reach in *Sullivan*; rather, this Court reached the holding which it reached in *Sullivan* simply on the logic and principles of the matter. As we mark the 50th anniversary of this Court's holding in *Sullivan* (March 9, 2014), we ask this Court to do the same here.

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[14] *Sullivan*, 376 U.S. at 278.

There is one more point which we feel we must address. In many ways, it may be the most important point of all. Right now the whole world groans beneath the burden of having to watch while a new wave of oppression and intolerance spreads across the face of the earth. What we had once thought to be a relic of the past not only retains its foothold on humanity, but in fact seems to wax stronger and stronger with each passing day. Christians are imprisoned and executed for their faith, and persons of all persuasions are tortured in North Korea for believing almost anything at all with which the "Dear Leader" disagrees.

If there is one thing above all others which has made America different from the past, it is this: America has produced the most vibrant defense and unabashed promotion of liberty the world has ever known, a spirit truly symbolized by the torch which the proud Lady in New York harbor so boldly holds on high for all the world to see. We pray this Honorable Court, do not let that torch fall from her hand. Especially not now.

II. The Imposition Of The HHS Mandate In The Case At Bar Creates The Type Of Impermissible Barrier To The Exercise Of Constitutional Rights Which Justice O'Connor Warned Us About

The Petitioner's use of state law as an anvil against which she can crush the Respondent business owners with the federal civil hammer presents the type of scenario which Justice O'Connor warned us about in her opinion in *Webster v. Reproductive Health Services* in 1989. In *Webster*, Justice O'Connor first addressed the appellee abortionists' facial challenge to a statute regulating abortion, a challenge which she rejected.[15] Nevertheless, she did warn us that if the law were ever to leave somebody with only one means of exercising a constitutional right, and then prohibited the use of that one means, such a scheme would be unconstitutional.[16] In light of that, we ask this Honorable Court to consider the following analysis for the case at bar:

1.) Due to the way that state law operates, as a practical matter, it is impossible for the Respondent business owners to earn a living through their chosen profession other than by using the corporate form of business identity as defined by state law.

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[15] *Webster*, 492 U.S. at 522-524 (O'Connor, J., concurring in part and concurring in the judgment). (Note: the appellee abortionists, in contrast to the Respondents in the case at bar, wanted a form of government financial assistance.)

[16] *Webster*, 492 U.S. at 523-524 (O'Connor, J., concurring in part and concurring in the judgment).

2.) The Petitioner's argument essentially boils down to this: due to the operation of the state Law of Corporations, together with the HHS Mandate, the Respondent business owners cannot exercise their right to the Free Exercise of Religion under the First Amendment without giving up their chosen means of earning an income; or, to put it conversely, due to the way state law and the HHS Mandate operate together, the Respondent owners cannot continue in their chosen means of earning an income without surrendering to the Petitioner their First Amendment right to the Free Exercise of Religion and without leaving their religious convictions entirely behind.

3.) Thus, if the Petitioner is correct, the use of the state Law of Corporations, along with the HHS Mandate, to advance the personal political goals of the Petitioner (goals which Congress never endorsed) effectively squeezes the Respondent business owners between federal civil law and state law in the very way which Justice O'Connor once warned us about. For if this Court upholds this application of the HHS Mandate, if the Respondent business owners do wish to continue to exercise their constitutional rights, it will then be illegal for them to use the one avenue which the state Law of Corporations leaves open to them to conduct business if their businesses are in fact to remain profitable and survive.

With that in mind, let us consider whether the Respondent business owners' decisions to incorporate, and remain with the corporate form of business identity, was purely voluntary. We submit that it was not purely voluntary because, in light of practical considerations (*e.g.*, pertaining to tax advantages), there is no way that the Respondent owners could conduct their enterprises at the level at which they do now – while remaining competitive with other, similar businesses – without adopting the only form of corporate identity available to them under state law, a form of business identity which, the Petitioner claims, affords them no right to religious liberty.

Yet even if this Honorable Court does find that the Respondent business owners' decisions to incorporate was purely voluntary, and even if this Honorable Court might therefore be disposed to find that they could gain Free Exercise protection by voluntarily choosing to disincorporate and then defend their Free Exercise rights as natural persons, we wish to remind this Honorable Court of this statement from its own jurisprudence,

> A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.[17]

Accordingly, it would be no answer to say that the Respondent business owners are responsible for their own predicament on the grounds that they voluntarily chose the corporate form of business identity, and because they now voluntarily choose to stay with that identity. For this still would not somehow relieve the Petitioner of all responsibility for her actions which impair their Free Exercise rights, even if this Court were to find that there is no coercive element here at all. This Honorable Court should thus find that the imposition of the HHS Mandate in these circumstances is prohibited by the Free Exercise Clause.

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[17] *United States v. Jackson*, 390 U.S. 570, 583 (1968).

◆

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit in *Sebelius, et al. v. Hobby Lobby, et al.* should be affirmed, and the judgment of the United States Court of Appeals for the Third Circuit in *Conestoga Wood Specialties, et al. v. Sebelius, et al.* should be reversed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

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IN THE

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KATHLEEN SEBELIUS, ET AL., *Petitioners*,
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*.

CONESTOGA WOOD SPECIALTIES, ET AL., *Petitioners*,
v.
KATHLEEN SEBELIUS, ET AL., *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Third and Tenth Circuits

BRIEF OF 38 PROTESTANT THEOLOGIANS, SOUTHEASTERN BAPTIST THEOLOGICAL SEMINARY, COALITION OF AFRICAN AMERICAN PASTORS, MANHATTAN DECLARATION, AND INSTEP INTERNATIONAL AS *AMICI CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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INTEREST OF *AMICI CURIAE* [1]

The **Southeastern Baptist Theological Seminary** ("SEBTS") is a seminary of the Southern Baptist Convention located in Wake Forest, North Carolina. The seminary exists to train, educate, and prepare ministers of the gospel for faithful service. In addition, SEBTS is home to the L. Russ Bush Center for Faith and Culture, which seeks to bring the Christian faith to bear upon all areas of the human experience in a spirit of Christian love and respect and to provide a responsible voice in the public square, speaking Christian truth to the issues and concerns facing contemporary culture. The seminary believes that as a matter of long-standing Protestant theology, the government regulations at issue in this appeal jeopardize the ability of Christian believers to exercise their religion in obedience to its demands.

The **Coalition of African American Pastors** ("CAAP") is a nonpartisan association of Protestant African American clergy and Christians who support the role of religion in American public life and encourage Christians of all races and backgrounds to live in accordance to their faith, both in their private and public lives. CAAP is concerned that the government regulations at issue in this appeal substantially burden Christians' ability to do so.

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[1] The parties' counsel were timely notified of and consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

The **Manhattan Declaration** is a coalition of theologians, Christian leaders, and philosophers united to build a movement of Christians who will stand together alongside other men and women of goodwill to advance the sanctity of life, rebuild and revitalize the marriage culture, and protect religious liberty. The theological and philosophical treatise, "The Manhattan Declaration: A Call of Christian Conscience," authored by Princeton professor Robert P. George, Charles W. Colson, and Dr. Timothy George, has been signed by more than 150 American religious leaders and more than 540,000 lay Christians. The Manhattan Declaration fears the regulations giving rise to this appeal threaten both the lives of the unborn and the vitality of American religious liberty.

InStep International ("InStep") is a religious organization in Atlanta, Georgia, that partners with Christian leaders, ministries, and lay Christians to coordinate resources and efforts to spread the gospel of Jesus Christ through teaching, training, and humanitarian efforts both domestically and overseas. The President of InStep, Rev. Gregory Smith, serves in part as a corporate chaplain, providing executive coaching and leadership, to for-profit Christian business leaders seeking to create a faith-friendly corporate culture. InStep believes that the inseparability of a Christian's faith and vocation is consistent with the Bible, the Christian faith, Protestant teaching and denominational requirements, and thereby enables business owners to faithfully exercise their religious beliefs under their First Amendment rights afforded by the United States Constitution.

The **38 individual signatories**, listed in full in the Appendix, are theologians, scholars, and pastors, who study, write, teach, and minister in a broad spectrum of Protestant seminaries, colleges, and churches. They have collectively amassed tens of thousands of hours studying the Holy Scripture and Protestant theology, have taught thousands of seminarians and ministers, written several New York Times Bestselling books, authored hundreds of theology treatises and devotional works, overseen seminaries, headed a number of theological journals, and preached thousands of sermons. Each of the signers affirms that Scripture, Protestant doctrine, and church tradition established throughout the 500-year history of Protestant theology require Christians to conduct themselves in their business and occupational affairs in obedience to Scriptural commands and Christian doctrine, and that the government regulations at issue here substantially burden Christians' ability to comply with this spiritual obligation.

SUMMARY OF ARGUMENT

This brief demonstrates, historically and theologically, that requiring a Protestant Christian to choose between violating the Government's regulations or violating his sincerely held religious beliefs substantially burdens his exercise of religion in violation of the Religious Freedom Restoration Act and the First Amendment to the United States Constitution.

A fundamental aspect of Christian doctrine is its requirement that faith must govern every aspect of a Christian's life. As a matter of scriptural teaching, church tradition, denominational requirement, and conscience, the exercise of the Christian religion must guide and determine a Christian's decisions, choices, words, and deeds, both in private and in every facet of life.

The holistic nature of the Christian faith extends to a believer's vocation. The Christian doctrine of vocation teaches that all work—whether overtly sacred or ostensibly secular—is spiritual activity, that Christians are called by God to specific occupations and businesses, and that Christians must conduct themselves in their vocations in accordance with their Christian beliefs. A Christian may not simply check his faith at the workplace door. Accordingly, Christian business owners, as a matter of scriptural requirement, are obligated to conduct their business as an expression of their faith and in accordance with the dictates of faith and conscience.

The theological requirement that Christians comply with scriptural commands in their occupation prohibits not only direct and personal wrongdoing, but also the enabling, authorizing, or aiding of another in doing what the Christian believes to be sin. Christian doctrine teaches that one who knowingly aids or abets another's wrongdoing has himself done wrong. Accordingly, a statute or regulation requiring a Christian business owner's complicity in conduct that his or her faith teaches is morally wrong forces a Christian into an impossible position and imposes a substantial burden on his or her exercise of religion.

ARGUMENT

I. Christian doctrine requires that faith govern every aspect of a Christian's life.

A fundamental aspect of Christianity is its requirement that the Christian faith govern all aspects of the believer's life. This teaching is drawn directly from the Holy Scripture and stems from the Christian belief that God's sovereignty extends over every area of human endeavor. *See, e.g., Psalm* 24:1 ("The earth is the Lord's and the fullness thereof, the world and those who dwell therein.").[2] In the words of the English theologian and poet Isaac Watts, God's "love, so amazing, so divine, demands my life, my soul, my all." Isaac Watts, *The Poetical Works of Isaac Watts, Vol. IV* 173 (1782).

Accordingly, Christianity has never limited its reach merely to matters of theology and ceremonial observance. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 713 (2012) (Alito, J., concurring) (agreeing with the Court's unanimous opinion that the job duties of a Lutheran minister engaged in education "reflected a role in conveying the Church's message and carrying out its mission" and observing that "[r]eligious teachings cover the gamut from moral conduct to metaphysical truth."); *Spencer v. World Vision, Inc.*, 633 F.3d 723 (9th Cir. 2011) (per curiam) (finding a Christian humanitarian organization "'working with children, families and their communities worldwide to reach their full potential by tackling the causes of poverty and injustice'" was a religious activity); *see*

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[2] All quotations of Scripture herein are taken from the Holy Bible, English Standard Version.

also Confession of Faith in a Mennonite Perspective, 1995, Article 17 ("In *all* areas of life, we are called to be Jesus' disciples.") (emphasis added), *available at* http://www.mennoniteusa.org/about/confession-of-faith-in-a-mennonite-perspective-1995/article-17-discipleship/; *The Baptist Faith & Message 2000*, Article XIII ("God is the source of all blessings, temporal and spiritual; all that we have and are we owe to Him. . . . [Christians] are therefore under obligation to serve Him with their time, talents, and material possessions; and should recognize all these as entrusted to them to use for the glory of God and for helping others."), *available at* http://www.sbc.net/bfm/bfm2000.asp (all links last visited January 22, 2014).

Rather, Christianity teaches that one's faith influences even those areas of life that appear superficially unrelated to worship, prayer, or theology. *See, e.g., Colossians* 3:17 ("And whatever you do, in word or deed, do everything in the name of the Lord Jesus."). Indeed, Christianity teaches there is spiritual significance in *every* part of life, including seemingly mundane acts like eating, drinking, and working. *See 1 Corinthians* 10:31 ("So whether you eat or drink or whatever you do, do all for the glory of God."); *Colossians* 3:23-24 ("Whatever you do, work heartily, as to the Lord."); *Ecclesiastes* 3:1-13 (noting "[f]or everything there is a season, and a time for every matter under heaven" and that "everyone should eat and drink and take pleasure in all his toil—this is God's gift to man"). From the earliest days of Protestant faith in America, theological leaders have proclaimed this principle. *See, e.g.*, Cotton Mather, *Two brief Discourses. One Directing A Christian in his General Calling; Another Directing* *him in his Personal Calling* 64 (B. Green, et al. eds., 1701) ("[L]et every Christian Walk with God, when he Works at his Calling, and Act in his Occupation with an Eye to God, Act as under the Eye of God."). These holistic demands of Christianity require consistency in familial, business, and social relations and are not limited to sacerdotal, ecclesial, or ritual matters.

This integration of a Christian's entire life in relation to God is an outgrowth of the Christian gospel, which provides that God, completely righteous and without sin, by His infinite grace, justifies man who is by nature unrighteous and sinful. This cannot be accomplished by any work or merit by man to somehow achieve good standing with God, but instead is accomplished by and through the work of Jesus Christ's death on the cross. Thus, by faith alone in Christ alone, man is counted righteous by God.

This doctrinal requirement that a Christian must pursue all aspects of his or her life in obedience to Christ compels Christians to do more than give mere intellectual assent. The Christian faith requires not only belief, but also conduct, and this requirement extends to every facet of the Christian's life. *See James* 2:17 ("So also faith by itself, if it does not have works, is dead."); *Romans* 12:1 (urging Christians, "in view of God's mercy," to devote their entire being to Him as "true and proper worship"); *see also Korte v. Sebelius*, 735 F.3d 654, 681 (7th Cir. 2013) (noting that religious belief is not confined to the home and the house of worship because "[r]eligious people do not practice their faith in that compartmentalized way."); Presbyterian Church in America, *Preface to the Book of Church Order*, Part II.4 ("[T]here is an inseparable connection between faith and practice, truth and duty. Otherwise it would be of no consequence either to discover truth or to embrace it."), *available at* http://www.pcanet.org/beliefs/ (last visited January 22, 2014).

Christian doctrine requires a Christian to honor his or her conscience according to the faith. *1 Timothy* 1:19 ("[H]old[] faith and a good conscience. By rejecting this some have made shipwreck of their faith."); *1 Timothy* 3:9 ("[H]old the mystery of the faith with a clear conscience"). Scripture and history are replete with instances in which believers who were presented with a choice either to violate their consciences by complying with the state's demands or to face draconian penalties chose to maintain the integrity of their faith in every aspect of life and accept the consequences. *See generally* John Foxe, *Acts and Monuments* (1563) (recounting anecdotes of early Protestant martyrs). For example, the Old Testament Scripture recounts the stories of three Hebrew men who refused to worship an image of Babylonian King Nebuchadnezzar, despite the threat of execution for noncompliance. *See Daniel* 3:1-30. Shadrach, Meshach, and Abednego were cast "into the burning fiery furnace" for refusing to worship the king's image. *Id.* Whereas the Babylonian government conceived the requirement of bowing down to the image as merely an act of political loyalty, the three young men perceived it as a requirement to violate their faith through idolatry. *Id.*

Similarly, the second-century Christian martyr Polycarp was put to death for his refusal to state "Caesar is Lord." *See* Justo L Gonzalez, *The Story of Christianity*, Vol. 1, 43-44 (1984). To the Roman government, the law was merely a political issue, but to Polycarp, it was an issue of idolatry. Likewise, the Protestant reformer Martin Luther, when asked to recant his beliefs, famously stated to Emperor Charles V, "[M]y conscience is captive to the Word of God. I cannot and I will not recant anything, since it is neither safe nor right to go against conscience. May God help me. Amen." Martin Luther, *Luther's Works, Vol. 33: Career of the Reformer III* (1972).

In sum, because Christian doctrine requires that faith govern every aspect of a Christian's life and teaches that a Christian's conscience is captive to the word of God, a Christian must act in accordance with his beliefs and in integrity of conscience in every aspect of life. Simply stated, the exercise of Christian faith must, as a matter of scriptural teaching, church tradition, and denominational requirement, guide and determine a Christian's decisions, choices, words, and deeds, both in private and in every facet of life.

II. Christian doctrine teaches that an individual's vocation is ordained by God as a spiritual enterprise in which Christians must serve in accordance with their spiritual callings.

Contrary to the government's position in this appeal, there is no dichotomy between commercial work and Christian religious exercise. To the contrary, Christianity teaches the exact opposite: that the holistic nature of the Christian faith encompasses a believer's vocation, imbuing it with spiritual significance. To assert that a Christian can compartmentalize his faith and religious practices separately from his vocation is a gross misapprehension of the guiding religious principles at issue in this case. As explained below, the Christian doctrine of vocation teaches that any occupation to which a Christian is called has a sacred dimension and is a venue on which Christians must conduct themselves in accordance with their Christian beliefs and the dictates of their consciences.

A. The Christian doctrine of vocation teaches that all work is spiritual activity.

Christianity has long taught that work is divinely ordained and that even seemingly commercial endeavors have spiritual significance. The apostle Paul—the most prolific writer of the Christian New Testament—exhorted early Christians to engage in seemingly secular work *because of* its concomitant spiritual dimension. *See, e.g., Ephesians* 4:28 (stating Christians "must labor, doing honest work with his own hands, so that he may have something to share with anyone in need"); *Colossians* 3:23-24 (exhorting Christians in ostensibly secular employment to work diligently "as for the Lord"); *see also Korte*, 735 F.3d at 681 ("There is nothing inherently incompatible between religious exercise and profit-seeking.").

These scriptural commands are reflected in longstanding Christian practice and doctrines, most notably the doctrine of vocation. Ordinary human work is a key theological topic from the beginning of Scripture:

> A biblical understanding of work reaches back to the very beginning of the world. As we look at the doctrine of creation, we find human work

> placed into a context of God's work, of human creation in the image of God, of God's command for people to work as part of his provision for human life, and human cooperation with God in work.

Leland Ryken, *Work and Leisure in Christian Perspective* 128 (1987). Several theological truths shape the foundation of the Christian understanding of vocation. First, God is a worker. He is a creative craftsman, setting out the heavens and the earth and forming mankind from the dust. *Genesis* 1:1, 2:7 (noting that "God created the heavens and the earth" and that "God formed the man from the dust of the ground"). Similarly, Jesus Christ himself, during his time on earth, labored as a carpenter. *See Mark* 6:3. God's creative work has doctrinal implications for human work: "The Christian doctrine of creation at once renders impossible any dichotomy between the earthly and the sacred. The world has value to God and therefore to his creatures who live and work in it." Ryken, *Work and Leisure* at 122.

Second, Christian doctrine teaches that human beings are created in God's image. *See Genesis* 1:27 ("So God created man in his own image, in the image of God he created him."). Accordingly, humans work because God is a worker, and their work is modeled on His. In Christian theology, then, work is never a purely financial transaction, but something rooted in the very nature of the human person. *See* Dorothy Sayers, *Creed or Chaos? Why Christians Must Choose Either Dogma or Disaster (Or, Why It Really Does Matter What You Believe)* 89 (1949) ("[M]an, made in God's image, should make things, as God makes them, for the sake of doing well a thing that is well worth doing."); Timothy Keller, *Every Good Endeavor: Connecting Your Work to God's Work* 38 (2013) ("What is the Christian understanding of work? . . . [It] is that work is not, primarily, a thing one does to live, but the thing one lives to do. It is . . . the medium in which he offers himself to God.").

Third, work is divinely ordained and prescribed by God. In what theologians call "the creation mandate," the Biblical account of creation recounts that in God's first spoken words to His newly created image bearers, He tasked them with tending and stewarding the earth. *See Genesis* 1:28 ("And God blessed them. And God said to them, 'Be fruitful and multiply and fill the earth and subdue it, and have dominion over the fish of the sea and over the birds of the heavens and over every living thing that moves on the earth.'"). The immediacy of this charge indicates the fundamental nature of work in mankind's *raison d'être*. The "link between work and God's creation of the world confirms that work has the character of a natural law. Like gravity, it is simply one of the 'givens' of the world God created." Ryken, *Work and Leisure* at 124.

B. The Christian theology of vocation encompasses both overtly sacred and seemingly secular occupations.

The foundational principles of the spirituality of work apply to the clergy and laity alike, and the Christian doctrine of vocation makes no distinction between "sacred" and "secular" occupations. A particular calling is no less religious because the worker is paid or because the work is ordinary or mundane:

> [N]o one should be ashamed of being called to a vocation through which God blesses people in more tangible ways: waiting on tables, digging foundations, hauling away garbage. Nor should those of us who are blessed by God through these vocations look down upon them. As for those who work with their hands—on a shop floor on a factory line, on a construction site—they are especially honored in the Bible, in a text that says much about vocation, ambition, and the Christian's life in the world: "Aspire to live quietly, and to mind your own affairs, and to work with your hands, as we instructed you, so that you may live properly before outsiders and be dependent on no one (*1 Thessalonians* 4:11-12).

Gene Edward Veith, Jr., *God at Work: Your Christian Vocation in All of Life* 74 (2002). Indeed, the word "vocation"—a term often used merely to mean an occupation—is weighty with spiritual meaning. *See Webster's Third New Int. Dictionary* 2561 (2002) (defining "vocation" as "a summons from God to an individual or group to undertake the obligations and perform the duties of a particular task or function in life"); The Compact Oxford English Dictionary 723 (2002) (defining "vocation" as "[t]he action on the part of God of calling a person to exercise some special function, especially of a spiritual nature, or to fill a certain position" and noting its Latin root *vocare*, meaning "to call" or "summon"); *see also* William Perkins, *A Treatise of the Vocations* 750 (1631) ("A vocation or calling is a certain kind of life, ordained and imposed on man by God for the common good.").

The inseparability of sacred and secular work is particularly relevant to the 82 million Americans who identify themselves as Protestant or as members of a Protestant denomination. *See* U.S. Census Bureau, 2012 Statistical Abstract, *American Religious Identification Survey 2008: Self-Described Religious Identification of Adult Population*, *available at* http://www.census.gov/compendia/statab/cats/population/religion.html (last visited January 22, 2014); *see also* The Pew Forum on Religion & Public Life, *U.S. Religious Landscape Survey* 5 (2008) (noting that 26% of American adult population identifies as Evangelical Protestant, 18% identify as mainline Protestant, and seven percent identify as members of a historically black Protestant church), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf (last visited January 23, 2014).

Historically, the Protestant Reformation of the 16th and 17th centuries brought about a revitalized view of vocation, wherein *all* work done in faith by God's people was sacred, whether accomplished in the church and monastery or in the fields and courthouse. *See* Veith, *God at Work* 19; Ryken, *Work and Leisure* at 68-69 (noting the Reformers "began by rejecting the medieval division of work into sacred and secular" and that "[t]he result of this was to make all work done for God's glory sacred"); Douglas J. Schuurman, *Vocation: Discerning Our Callings in Life* 5 (2004) ("As Luther saw it, the labors of the cobbler and the preacher are equally holy and equally valued by God if undertaken in faith. [B]oth reformers insisted that all legitimate social roles were holy if undertaken in faith.").

Subsequent generations of Protestant theologians likewise emphasized the spiritual significance of "secular" work. For example, the influential American Puritan minister Cotton Mather wrote: "When you Handle the Plough, or Handle the Axe, or use either Nerves or Brains in your Occupation, and whatsoever ye do, you may do all for the Lord Jesus Christ." Mather, *Two brief Discourses* 69. Similarly, according to the Puritan clergyman William Law,

> [W]orldly business is to be made holy unto the Lord, by being done as a service to Him, and in conformity to His Divine will.
>
> * * *
>
> Men of worldly business, therefore, must not look upon themselves as at liberty to live to themselves, to sacrifice to their own humors and tempers, because their employment is of a worldly nature. But they must consider, that, as the world and all worldly professions as truly belong to God, as persons and things that are devoted to the altar, so it is as much the duty of men in worldly business to live wholly unto God, as it is the duty of those who are devoted to Divine service.
>
> * * *

> Men may, and must differ in their employments, but yet they must all act for the same ends, as dutiful servants of God, in the right and pious performance of their several callings. Clergymen must live wholly unto God in one particular way . . . . But men of other employments are, in their particular ways, as much obliged to act as the servants of God, and live wholly unto Him in their several callings.

William Law, *A Serious Call to a Devout and Holy Life* 20 (1728); *see also Hosanna-Tabor*, 132 S. Ct. at 709 (rejecting the supposed dichotomy between religious and secular duties and noting that "[t]he heads of congregations themselves often have a mix of duties, including secular ones"). In sum, as a matter of longstanding and widely recognized Protestant Christian doctrine, all work—whether overtly sacred or seemingly secular—is spiritual activity ordained by God, and every believer's vocation is a spiritual calling.

C. The Christian doctrine of vocation teaches that Christians are called by God to specific occupations and activities.

In addition to the Christian belief that ostensibly secular work is divinely ordained and weighted with spiritual significance, the doctrine of vocation teaches that Christians are called by God not merely to work generally but to specific occupations and activities. *See, e.g., 1 Corinthians* 7:17 ("Only let each person lead the life that the Lord has assigned to him, and to which God has called him. This is my rule in all the churches."); *Esther* 4:14 (noting that Esther's unexpected elevation to Persian nobility was a providential appointment to a station in which she should serve God and others through her unswerving devotion to God and his calling). Indeed, "vocation" is defined in part as "[t]he *particular* function or station to which a person is called by God." The compact Oxford English Dictionary (emphasis added); *see also Webster's Third New Int. Dictionary* 2561 (2002) (defining "vocation" as "a summons from God to an individual or group to undertake the obligations and perform the duties of a *particular task or function* in life") (emphasis added).

This specificity of calling was a theme of the Protestant reformers. Martin Luther taught that every Christian had at least two vocations or callings: "the call to become part of the people of God" and "the call to a particular line of work." William C. Placher, ed., *Callings: Twenty Centuries of Wisdom on Vocation* 206 (2005). Similarly, John Calvin wrote that "each individual has his own kind of living assigned to him by the Lord as a sort of sentry post so that he may not heedlessly wander about throughout life." John Calvin, *Institutes of the Christian Religion* 3.X.6 (1559) (John T. McNeill ed., Ford Lewis Battles trans., 1960).

Like the Reformers, subsequent generations and Protestant denominations continued to recognize the specificity of one's divine occupational calling. For example, the Puritan theologian William Perkins taught that the call of God is often a call to a particular type of ordinary work:

> A personal calling is the execution of some particular office, arising of that distinction which God makes between man and man in every society. First I say, it is *the execution of some particular office*, as, for example, the calling of a Magistrate is to execute the office of government over his subjects, the office of a Minister is to execute the duty of teaching his people, the calling of a Master is to execute the office of authority and government over his servants, the office of a Physician is to put in practice the good means whereby life and health are preserved. In a word, in every estate the practice and execution of that particular office, wherein any man is placed, is his personal calling.

Perkins, *A Treatise of the Vocations* at 754 (emphasis in original); *see also* Mather, *Two brief Discourses* 37-38 ("[E]very Christian hath also a Personal Calling; or a certain Particular Employment, by which his Usefulness in his Neighbourhood is distinguished . . . . It is not only necessary, That a Christian should follow his General Calling, it is of necessity, that he follow his Personal Calling too.").

Contemporary theologians continue to recognize the specificity of one's vocational field: "We can therefore properly say as a matter of secondary calling that we are called to homemaking or to the practice of law or to art history." Os Guinness, *The Call: Finding and Fulfilling the Central purpose of*

Your Life 31 (1998). The twentieth-century Quaker theologian Elton Trueblood, who served as chaplain to both Harvard and Stanford universities, noted that this specificity of calling means that "[m]ost men ought to stay where they are and make their Christian witness in ordinary work rather than beyond it." Elton Trueblood, *Your Other Vocation* 58 (1952).

This specificity of calling magnifies the dilemma faced by a Christian business owner, who is forced to choose between violating his conscience or leaving his business. Because God calls men and women to particular vocations and businesses, *both* of these choices are aptly characterized as violations of conscience. In the absence of accommodation of his religious belief, his choice is not *whether* to violate God's calling and commands, but *how* he will violate them.

D. The Christian doctrine of vocation requires that Christians act in their vocations in accordance with their Christian beliefs.

Christian doctrine teaches that a central task of the Christian is to fulfill his vocational work as spiritual service to God and for the aid of his fellow man. Whether he is an unskilled laborer, a highly educated professional, an executive, or a business owner, a Christian is called to work, and he violates the fundamental tenets of the faith if he checks his faith at the workplace door. The doctrine of vocation is a key element of the Christian's duty to life in the world, because it gives specific content to the manner in which Christian believers love their neighbors, as commanded by Jesus. *See, e.g., Mark* 12:31 ("You shall love your neighbor as yourself."). In other words, in Christian doctrine, the calling to ordinary work is a primary means by which the people of God love their neighbors.

There are important implications to this theological requirement. The doctrine of vocation teaches that God does His work in the world *through* Christians loving and serving others *through* their vocations. Gustaf Wingren, *Luther on Vocation* 8-9 (Carl Rasmussen, tr.) (1957) (" '[God] gives the wool, but not without our labor. If it is on the sheep, it makes no garment.' . . . [I]t must be sheared, carded, spun, etc. In these vocations God's creative work moves on, coming to its destination only with the neighbor who needs the clothing.") (quoting 17 *D. Martin Luthers Werke: Kritische Gesamtausgabe* 414-18 (1883)).

Christianity, however, teaches that Christians are incapable of performing these requisite "good works" on their own. The Westminster Confession of Faith, researched and drafted in the 1640s, and which is among the foundational doctrinal statements of many mainline American Protestant denominations today, provides that "[g]ood works are only such as God hath commanded in his holy Word, and not such as, without the warrant thereof, are devised by men, out of blind zeal, or upon any pretense of good intention." *Westminster Confession of Faith* § 16.1 (1646). They "are the fruits and evidences of a true and lively faith," *id.* § 16.2, and Christians' "ability to do good works is not at all of themselves, but wholly from the Spirit of Christ," *id.* § 16.3.

Christians—including the owners of Hobby Lobby, Mardel, and Conestoga Wood Specialties—

perceive a religious duty to work for the good of their employees, the communities in which they are located, and their families. *See The Baptist Faith & Message 2000*, Article XV ("All Christians are under obligation to seek to make the will of Christ supreme in our own lives and in human society.), *available at* http://www.sbc.net/bfm/bfm2000.asp (last visited January 22, 2014).

Christian doctrine has long taught that Christians of every occupation must practice their business in accordance with their general calling to be Christian:

> Every particular calling must be practiced in and with the general calling of a Christian. It is not sufficient for a man in the congregation and in common conversation to be a Christian, but in his very personal calling he must show himself to be so. As for example . . . [a] Schoolmaster must not only be a Christian in the assembly, when he hears the Word and receives he Sacraments, but he must also show himself to be a Christian in the office of his teaching. And thus must every man behave himself in his particular calling.

Perkins, *A Treatise of the Vocations* at 756-57. Furthermore, because a Christian's occupational endeavors are a fulfillment of God's call, those acts must be in conformity with His commands, and a

Christian must abstain from any action in his work contrary to his faith:

> If the duties and obligations of these spheres serve the neighbor, they should be fulfilled "as to the Lord" . . . . If the duties and obligation of these spheres harm the neighbor, they should be rejected for the sake of the Lord, who died for all. Those spheres should be transformed, if at all possible, so that they issue in actions that serve the neighbor. One is not called to be a Christian "in general"; one is called to be a Christian in the concrete social locations one presently occupies.

Schuurman, *Vocation* at 29; *see also* Mennonite Church USA Confession of Faith, Art. 23, *The Church's Relation to Government and Society* ("We may participate in . . . society only in ways that do not violate the love and holiness taught by Christ and do not compromise our loyalty to Christ."), *available at* http://www.mennoniteusa.org/about/confession-of-faith-in-a-mennonite-perspective-1995/article-23-government/ (last visited January 19, 2014).

In sum, according to Christian thinking, Christians—including the owners of for-profit businesses—are called by God to work in particular occupations and businesses and to do so as an expression of their faith and in accordance with the dictates of their faith and conscience.

III. Christian doctrine states it is a sin for a Christian to enable or aid another in doing what the Christian believes to be sin.

Christian doctrine, like the civil and criminal law of this nation, teaches that one who knowingly aids or abets another's wrongdoing has himself done wrong. *See, e.g., 1 Corinthians* 8:9-13 (warning Christians to take care not to be a "stumbling block" to others and noting that "sinning against your brothers and wounding their conscious when it is weak, you sin against Christ"); *Romans* 14:13-14 ("Therefore let us not pass judgment on one another any longer, but rather decide never to put a stumbling block or hindrance in the way of a brother" and thus cause them to sin); *Matthew* 18:6 ("[W]hoever causes one of these little ones who believe in me to sin, it would be better for him to have a great millstone fastened around his neck and to be drowned in the depth of the sea."); *The Larger Catechism of the Westminster Assembly* 245 (1841) ("That what is forbidden or commanded to ourselves, we are bound, according to our places, to endeavour that it may be avoided or performed by others."); *see also Gilardi v. U.S. Dept. of Health and Human Servcs.*, 733 F.3d 1208, 1215 (D.C. Cir. 2013) (noting that "even attenuated participation may be construed as a sin") (citation omitted).

This principle applies with particular force to situations in which a Christian's action or inaction involves the taking of life. *See, e.g., The Large Catechism by Martin Luther* (1529), reprinted in *Triglot Concordia: The Symbolical Books of the Ev. Lutheran Church* (1921) ("So also, if you see any one innocently sentenced to death or in like distress, and do not save him, although you know ways and means to do so, you have killed him."); Thomas Vincent, *An Explanation of the Assembly's Shorter Catechism* 171-72 (1806) ("We are forbidden to kill . . . others, either directly . . . or indirectly, by doing any thing that tendeth thereunto. . . . We may be guilty of the murder of . . . others, indirectly, by doing any thing that tendeth to take away . . . others lives.").

Courts and legislatures have long recognized that one's sincere religious beliefs may prevent him from approving, authorizing, or aiding another in something the believer considers to be wrong, even if the believer is not himself committing the underlying wrong. For example, Congress exempts religious conscientious objectors not only from combat roles but from participation "in any form" in war. 50 U.S.C. App. § 456(j); *Hanna v. Secretary of the Army*, 513 F.3d 4 (1st Cir. 2008) (upholding permanent injunction exempting Coptic Christian physician from active duty because she could not perform her chosen profession in the military context without violating her deeply held religious beliefs). Also, physicians and hospitals with a religious objection to abortion are exempt not only from performing abortion but also from assisting, making facilities available, or even making referrals for abortion. 42 U.S.C. § 300a-7; 42 U.S.C. § 238n. Similarly, "eleven states and the federal government have adopted some type of statute or regulation to ensure that individuals are not forced to participate in executions against their will." Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 Emory L.J. 121, 139 (2012).

The courts, like the legislatures, have recognized that one's religious belief may prevent him from any attenuated authorization or complicity in conduct he considers to be wrong. *See, e.g., Thomas v. Anchorage Human Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999) (recognizing a Christian landlord's sincere religious belief that unmarried cohabitation was sin merited exemption from state and local housing laws), vacated *en banc* as not ripe for judicial review, 220 F.3d 1134 (9th Cir. 2000); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (same); *State by Cooper v. French*, 460 N.W.2d 2, 7 (Minn. 1990) (same).

The statutory and judicial religious exemptions enumerated above are notable for several reasons. First, none of them make the applicability of the exemption dependent on the religious believer's tax status, *i.e.*, whether the religiously motivated conduct involves commercial or non-profit activities. *See, e.g., Desilets*, 636 N.E.2d at 238 ("The fact that the defendants' free exercise of religion claim arises in a commercial context . . . does not mean that their constitutional rights are not substantially burdened."). Second, they recognize that religious belief not only prevents the believer from engaging directly in sin but also prevent any participation, authorization, or enabling of what he considers to be sin. *See* Rienzi, 62 Emory L.J. at 139 (noting that statutory exemptions from participating in capital punishment "protect the individual not only from direct involvement—such as personally administering a lethal injection or turning on the electric chair—but also less direct involvement such as preparing the individual and apparatus used, supervising other people who will do these things, or even attending the execution.") (citation omitted). Finally, many of these exemptions involve situations involving the taking of human life, recognizing that to compel an individual to participate in what he believes to be an unjustified taking of life imposes a grievous burden on his exercise of his beliefs.

IV. Requiring a Christian to choose between violating the Government's regulations or violating his sincerely held religious beliefs substantially burdens his exercise of religion.

The Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq*., prohibits the federal government from substantially burdening "a person's exercise of religion," *id.* at § 2000bb-1(a), unless applying that burden is the "least restrictive means of furthering . . . [a] compelling governmental interest," *id.* at § 2000bb-1(b). In enacting RFRA, Congress sought to restore the compelling interest test for defenses to claims that a facially neutral law of general applicability "substantially burdens" the free exercise of religion—a test that had been abandoned by the Supreme Court in *Employment Division, Department of Human Resources v. Smith,* 494 U.S. 872 (1990). *See* 42 U.S.C. § 2000bb(b)(1) ("The purposes of this chapter are: (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is *substantially burdened*.") (emphasis added). Thus, RFRA creates a statutory right to exemption from laws that substantially burden sincere religious beliefs, even if the law is neutral and generally applicable, unless the government can prove that "strict scrutiny" is met. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).

The existence of a substantial burden is most apparent when the government forces a person or group to "perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (finding that compulsory formal secondary education was an undue burden on the free exercise of Amish parents' religion). Further, a substantial burden can arise indirectly if the receipt of benefits is conditioned on the performance of conduct proscribed by a religious faith, or benefits are denied because of conduct required by a religious faith. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981) (determining that a denial of unemployment benefits to an employee who had a religious objection to war was a burden on his religion).

As a threshold matter, the religious objection or conduct at issue must be both sincere and religious. *See United States v. Seeger*, 380 U.S. 163, 184–86 (1965) (holding an objection to military conscription must be protected only if it arises from sincerely held religious beliefs rather than personal morals). The religious belief is not, however, required to be central to the person's faith, 42 U.S.C. § 2000cc-5(7)(A), nor is it required to be a correct interpretation. *See United States v. Lee*, 455 U.S. 252, 257 (1982) ("Courts are not arbiters of scriptural interpretation."); *but see Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989) (finding that "hav[ing] less money available" for religious purposes due to an exemption from tax breaks is not a substantial burden on religion). Instead, a party must only show an "honest conviction" that the pressure from the government substantially conflicts with his religion.

Thomas, 450 U.S. at 716. Rather than questioning the validity of the belief, the court undertaking the substantial burden analysis under RFRA should focus on the intensity of the coercion applied by the government, requiring that the restrictive law protect "interests of the highest order." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993).

Christian doctrine requires a Christian worker or business owner to conduct his business in line with his beliefs. *See* Part II.D, *supra*. Furthermore, under the doctrine of vocation, a Christian should not be required to find a new job or change his business—to which he has been specifically called by God—solely because of governmental intrusion. *See* Part II.C, *supra; see also The Baptist Faith & Message 2000*, Article XVII ("Civil government being ordained by God, it is the duty of Christians to render loyal obedience thereto in all things not contrary to the revealed will of God. . . . The state has no right to impose penalties for religious opinions of any kind."), *available at* http://www.sbc.net/bfm/bfm2000.asp (last visited January 23, 2014). To force a Christian business owner to choose between paying crippling fines by conducting his business in line with his religious tenets or sacrificing his core values in order to preserve his business is exactly the type of coercion the substantial burden test encompasses.

This Court has previously recognized that sincerely-held religious beliefs subject to government pressure at the workplace can result in a substantial burden on religion. *See Thomas*, 450 U.S. at 716 (finding a substantial burden existed when an employee, who had a religious belief against producing war materials, was denied unemployment benefits after quitting because of a transfer to a tank turret production factory); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding that denial of unemployment benefits placed a substantial burden on a Seventh-day Adventist who quit her job after being forced to work on a Saturday).

Significantly, in the Affordable Care Act ("ACA"), Congress has recognized this substantial burden by establishing exemptions for other religious groups cornered into making this choice. *See* 45 C.F.R. § 147.131 (2013) (allowing HRSA to exempt religious employers from requirement to cover contraceptive services under group health plan); *see generally* 78 Fed. Reg. 39870 (July 2, 2013) ("[G]roup health plans established or maintained by certain religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the otherwise applicable requirement to cover certain contraceptive services"). The inherent discrimination involved in the Government's recognition of exempt groups only compounds the burdensome nature of the fines imposed by the Government's regulations on non-exempt groups that share exactly the same religious views. *See Sherbert*, 374 U.S. at 406 (recognizing that a prohibition against requiring employees to work on Sunday compounds the unconstitutionality of forcing a Sabbatarian to work on Saturday).

In sum, the government's regulations substantially burden a Christian business owner's exercise of his religion by imposing draconian fines on him as a result of his acts that are specifically mandated by Christian doctrine.

CONCLUSION

For the reasons set forth above, *amici* respectfully request this Court hold that RFRA allows a for-profit corporation to abstain from providing its employees with certain abortifacient contraceptives based on the religious objections of the corporation's owners.

Respectfully submitted,

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January 28, 2014

APPENDIX

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[1] Identification of organizations, institutions, and businesses with which individual *amici curiae* are affiliated does not imply endorsement by the respective organizations, institutions, and businesses.

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AMICUS
CURIAE
BRIEF

Supreme Court, U.S.
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Nos. 13-354, 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL.,
Petitioners,
v.
HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF THOMAS MORE LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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QUESTION PRESENTED

Whether the federal government can assume the power to require a private business and its owners, under threat of substantial fines, to purchase a product that violates their religious beliefs and furnish this product to their employees.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae* Thomas More Law Center respectfully submits this brief in support of Respondents in Case No. 13-354, Hobby Lobby Stores, Inc., Mardel, Inc., David Green, Barbara Green, Mart Green, Steve Green, Darsee Lett; and Petitioners in Case No. 13-356, Conestoga Wood Specialties Corp., Norman Hahn, Elizabeth Hahn, Norman Lemar Hahn, Anthony Hahn, and Kevin Hahn.[1]

Amicus Curiae Thomas More Law Center ("TMLC") is a national, public interest law firm that defends and promotes America's Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of human life. TMLC accomplishes its mission through litigation, education, and related activities.

SUMMARY OF ARGUMENT

The contraceptive-coverage Mandate of the Patient Protection and Affordable Care Act of 2010 (the "Mandate") is an unprecedented attack on religious liberty. This case is not about competing rights; there is only one right at issue here – the right to religious freedom. The employers who are fighting the Mandate are protected by the First Amendment and the Religious Freedom Restoration Act ("RFRA") from being forced, under threat of ruinous government fines, to fund products and services that violate their sincerely held religious beliefs. Conversely, there is no constitutional right to "free" contraception or abortion. The employers are not objecting to their employees' private decision to use these drugs, they are objecting to being forced by the government to pay for insurance plans that facilitate or contribute to these decisions. The employers object to being used to further a government objective that violates their sincerely held religious beliefs.

---

[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Court Rule 37.6, counsel for *Amicus Curiae* TMLC authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than TMLC, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

Through the Mandate, the government is unnecessarily denying religious business owners their livelihood for following the precepts of their faith. This is not the purpose of government, and it violates the constitutional protections put in place by the founders of this country. Exempting religiously objecting employers from the Mandate will not appreciably harm the government in pursuing its broadly stated goals of improving public health and gender equality.

ARGUMENT

The United States was founded upon a set of noble and workable principals that formed the basis for the Bill of Rights. Paramount was the recognition that for a citizenry to be truly free, they must be allowed to think, to speak, and to worship God without government interference or unjustified restriction. The Declaration of Independence was signed by mostly wealthy men who could have accepted their government's demands and continued living comfortable lives. But these patriots recognized that to do so would have been to allow injustice to prosper. They risked their fortunes and their lives to create a country where people could be free to live and to worship consistent with their own conscience, and to provide for their families without unnecessary and crippling burdens created by an all-powerful government. The citizens currently before the Court challenging the Mandate can appreciate the struggles those early patriots faced. They too cannot allow injustice to prosper and are risking their fortunes and their livelihoods to defend the constitutional freedoms that define this country.

Congress, in discussing the need for the RFRA, recognized that

> [t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

H.R. Rep. No. 103-88, 103d Cong. 1st Sess., (1993) (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943)). Accordingly, the rights at issue in this case are not subject to the whims of politicians or the uneven tide of popular opinion. But although the free exercise of religion is an unalienable right that is protected in the First Amendment to the Constitution and in the RFRA, the ever expanding federal government seeks to trample this right in pursuit of a political agenda.

The government claims it is necessary to coerce religiously objecting employers to provide insurance coverage for contraceptive and abortifacient products and services in order to promote the "compelling interests in public health and gender equality." Hobby Lobby Pet. Br. at 15. But the government fails to demonstrate how forcing Hobby Lobby Stores Inc., Mardel, Inc. Conestoga Wood Specialties Corp. and the families that own and operate these companies to provide contraceptive insurance coverage for their employees is necessary or the least restrictive means to achieve public health and gender equality. The government cannot justify its attempt to restrict the religious liberty of its citizens in pursuit of these broadly stated goals. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431-32 (2006) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963) & *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

The families and their businesses that are fighting this unjust law represent the American dream. Through hard work, and their faith in God and each other, these citizens have realized success. They have created jobs, provided goods and services to their communities, contributed to the economy, engaged in charitable works, and improved not only their own lives, but those of their employees and other citizens. Despite all this, the government seeks to intrude on their decision-making and to impose the will of unelected officials that contraceptive and abortion-inducing drugs be available "without cost sharing" to all women. The government demands that religiously-objecting employers ignore fundamental tenets of their faith to provide insurance coverage for drugs and devices that have the ability to end a newly-formed human life. This substantial burden on religious freedom cannot be justified or tolerated under the RFRA or this Court's constitutional jurisprudence.

I. THE MANDATE DENIES FUNDAMENTAL RIGHTS

In discussing the need for the RFRA, Congress recognized "[m]any of the men and women who settled in this country fled tyranny abroad to practice peaceably their religion. The Nation they created was founded upon the conviction that the right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American." S. Rep. No. 103-111, 103d Cong., 1st Sess. (1993). The United States Constitution is based on the notion that each individual possesses inherent dignity and that as a result of this dignity, there are limits to what the government can do to, or demand from, its citizens. The Mandate ignores these limits, and demands that certain citizens suppress their own religious beliefs to purchase contraceptive insurance coverage for other citizens.

Religiously objecting employers are forced to choose between complying with federal law and violating their consciences, or disobeying the law and incurring substantial penalties. These employers simply wish to continue providing health insurance in compliance with their sincerely held religious beliefs, free of government interference.

A. The Mandate Creates a Substantial Burden on Religious Exercise

Regulations issued under the Affordable Care Act ("ACA") require all health insurance plans to provide coverage, without cost-sharing, for "preventative care," which the government has decided includes "all FDA-approved contraceptive methods and procedures." These drugs and services were included as "preventative care" under the ACA after the government directed the Institute of Medicine ("IOM") to compile a report with recommendations regarding what drugs and services should be covered as preventative care for women. The dissenting member of the IOM committee warned that "[t]he process set forth in the [Affordable Care Act] was unrealistic in the time allocated to such an important and time-sensitive undertaking" and that "[r]eaders of the Report should be clear on the fact that the recommendations were made without high quality systematic evidence of the preventative nature of the services considered" and that "evidence that the use of the services in question leads to lower rates of disability or disease and increased rates of well-being is generally absent." Inst. Of Med., Clinical Preventative Services for Women: Closing the Gaps 232 (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Jan. 26, 2014). Rather than being a science-based review, the committee's review process "tended to result in a mix of advocacy" where the "process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee's composition." *Id.*

Despite this warning, the government adopted the IOM recommendations. The approved contraceptive methods and procedures include abortion-inducing drugs and devices, which the employers before the Court object to providing or facilitating through their insurance plans because it is contrary to their sincerely held religious beliefs. *See* HRSA, Women's Preventative Services: Required Health Plan Coverage Guidelines, *available at* http://www.hrsa.gov/womensguidelines (last visited Jan. 23, 2014).

The religiously-objecting employers' operation of their health insurance plans according to their religious beliefs constitutes the exercise of religion under RFRA. The RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). This includes not merely worship, but actions in accordance with one's faith. Through the Mandate, the government is forcing its citizens to either violate their conscience by providing coverage for abortifacient drugs and devices, or accept the demise of their livelihood because of crippling government fines. This is a substantial burden.

The government attempts to deny this burden exists by arguing that because the businesses are profit-seeking, they cannot exercise religion, and that the individual business owners are not harmed because it is only their business that is required to act and will be fined for non-compliance. Under this theory, the government can demand anything from a for-profit business, no matter how abhorrent or devastating those demands may be to the people that animate the business. But employers do not lose their free exercise rights simply because they chose to arrange their business, which they run consistent with their faith, under the corporate form. And as the Tenth Circuit recognized in its review of this matter "Congress did not exclude for-profit corporations from RFRA's protections." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1129 (10th Cir. 2013); *see* 42 U.S.C. § 2000bb-3(b); *see also Conestoga Wood Specialties Corp. v. Secretary of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 407-08 (3d Cir. 2013) (Jordan, J., dissenting).

The government submits that the individual employers before the Court do not have standing to challenge the Mandate because "[a]s owners, the Greens are distinct from the corporation. As managers, they have an additional, but equally distinct role. A manager takes actions on behalf of the corporation itself, not on behalf of himself as an individual." Hobby Lobby Pet. Br. at 29. This position ignores reality. An individual does not relinquish constitutional rights based on his or her employment position, nor is one absolved of responsibility for his or her actions, either spiritually or legally, simply because the actions were taken on behalf of someone else. Here, the employers before the Court believe that life begins from the moment of conception, and that it would be immoral for them to facilitate use of drugs and devices that end human life from this point forward. The government's Mandate necessarily requires them to do just that by purchasing employee health insurance that makes abortifacient drugs available to their employee's free of "cost-sharing" by the employee.

The government substantially burdens religious exercise by "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. Of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). This is exactly what the Mandate does by requiring religiously objecting employers to include abortifacient items in their healthcare plans and by imposing significant financial penalties if employers refuse. *See* 26 U.S.C. §§ 4980D(b)(1) & 4980H(c)(1).

RFRA strictly prohibits the federal government from substantially burdening a person's exercise of religion, "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), except when the government can demonstrate "that application of the burden to the person–(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b); *O Centro Espirita*, 546 U.S. at 424. The government cannot establish either of these necessary elements.

B. The Mandate Does Not Further a Compelling Interest

To demonstrate that the substantial burden on the religiously objecting employers' religious liberties is justified, the government must "specifically identify an 'actual problem' in need of solving," and show that substantially burdening the objecting parties is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n,* 131 S.Ct. 2729, 2738 (2011) (citations omitted). The government has the burden of proof and "ambiguous proof will not suffice." *Id.* at 2739 (citation omitted).

The regulations at issue here allegedly "advance[] the compelling government interest in safeguarding public health and ensuring that women have equal access to health care." 78 Fed. Reg. 39,872 (July 2, 2013). The government submits that providing women with the abortifacient drugs at issue in this case, without requiring them to pay for it themselves, will advance this interest. The government's objective is to increase the use of abortifacient drugs and devices, which religiously objecting employers sincerely believe are harmful to women and destroy innocent life. The government fails to demonstrate that forcing objecting citizens to pay for insurance coverage for these abortifacients will further its stated goals.

The RFRA demands that the government do more than allege a general public interest that the objectionable regulations supposedly further. The "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro Espirita,* 546 U.S. at 430-31 (citing 42 U.S.C. § 2000bb-1(b). The government has not, and cannot, demonstrate that requiring religiously objecting employers to provide health insurance that makes abortifacient drugs and devices available to their employees "without cost sharing," would further the government's stated interest of "safeguarding public health," or "ensuring that women have equal access to health care." As the Seventh Circuit noted when addressing the Mandate's application to religiously objecting employers, "[t]here are many ways to promote public and gender equality, almost all of them less burdensome on religious liberty." *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013). The D.C. Circuit in *Gilardi v. United States Dep't of Health & Human Servs.*, noted that "'gender equality' is a bit of a misnomer" and that [m]ore accurately described, the interest at issue is resource parity–which, in the analogous abortion context, the Supreme Court has rejected as both a fundamental right and as an equal-protection issue." 733 F.3d 1208, 1221 (D.C. Cir. 2013) (citing *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.")). In sum, the employees who the Mandate supposedly benefits, do not have a constitutional right to "free" birth control or abortion. *See Harris*, 448 U.S. at 316 ("regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade,* it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."). And the government cannot invent a right to "free" contraception or abortifacients by forcing employers to surrender their constitutionally and statutorily protected right to religious freedom to purchase employee insurance coverage for these products.

II. THE MANDATE CANNOT BE JUSTIFIED UNDER EXISTING CASE LAW

The Court has previously recognized that "[t]he issue of abortion is one of the most contentious and controversial in contemporary American society. It presents extraordinarily difficult questions that . . . involve 'virtually irreconcilably points of view.'" *Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (O'Connor. J., concurring). Yet, rather than respect the rights of citizens to form their own view on this issue, and to act according to their conscience, the government, via the Mandate, is forcing one viewpoint on religiously objecting Americans.

Citizens who believe that life begins at conception are being forced to use their companies and resources to provide insurance coverage for drugs and devices that will end life after this critical point. The government's statement that federal law defines pregnancy as beginning at implantation and does not classify the drugs at issue as "abortion-causing" is irrelevant. Hobby Lobby Pet. Br. 10. The employers sincerely believe that life begins at conception, and should be protected from this point forward, and the government cannot show that this belief is irrational or not entitled to deference. "Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views." *Sherbert*, 374 U.S. at 402 (internal citations omitted).

The government's objective is to increase the use of contraceptive and abortifacient drugs and devices, which the religiously objecting employers challenging the Mandate sincerely believe are harmful to women and destroy innocent human life. The government lacks any constitutional authority to pursue this objective by commandeering the resources of private businesses and compelling those businesses and their owners, under threat of ruinous fines, to pay for coverage of abortifacient drugs for their employees. The objections of hard-working, entrepreneurial, religious Americans to being used in this way cannot be ignored without doing violence to this country's entire concept of justice. The government cannot force one of its citizens to violate the commands of their faith simply because doing so will arguably make an aspect of someone else's life easier.

If the Mandate is allowed to survive this Court's review, then the right to abortion and contraception that the Court has previously recognized is no longer based on a right to privacy and to freedom from governmental interference in individual decisions. Cases dealing with abortion and contraception have, until now, primarily focused on what the government can and cannot prevent a woman from doing to her body or to her unborn child. *See e.g. Griswold v. Connecticut,* 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Gonzales v. Carhart*, 550 U.S. 124 (2007). Conversely, the Court is now asked to decide whether the federal government can command action from private individuals, who want nothing to do with a woman's choice to end her pregnancy, to facilitate this decision by ensuring that drugs and devices that will end newly-conceived life are covered by their employee insurance plans and are presented to the woman free of charge.

The Court has previously stated "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, conception, family relationships, child rearing, and education." *Casey*, 505 U.S. at 851 (citing *Carey v. Population Services International*, 431 U.S. 678, 685 (1977)). If our laws protect the right to use, purchase, and facilitate contraception and abortion, they must also protect the right not to. It seems obvious that the government cannot force its citizens to use contraception or abortifacients, similarly obvious should be that the government cannot force its citizens to furnish these things to others.

In finding that a state could not prohibit individuals' use of contraception, Justice Goldberg recognized:

> [t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the most valued by civilized men.

Griswold, 381 U.S. at 494 (Goldberg, J., concurring) (quoting *Olmstead v. United States*, 277 U.S. 438, 478

(1928) (Brandeis, J., dissenting)). The right to be let alone – to be free of the government's unreasonable demands that they forfeit their religious freedom due to the means they have chosen to earn a living – is all that the employers in the matter before the Court are seeking.

These religiously-objecting employers cannot pay for, or otherwise facilitate, the use of life-ending drugs and devices without forsaking the dictates of their faith. Thus, the government is forcing individuals and families to either use the companies that they have built and run consistent with their religious beliefs, to fund drugs and devices that violate tenets of their faith, or to watch as their companies, and all the jobs those companies provide, are destroyed by crippling fines. The government may not command such an impossible choice. *See Sherbert,* 374 U.S. at 404.

The Court stated in *Planned Parenthood v. Casey*:

> [m]en and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. . . . It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty.

Casey, 505 U.S. at 850-51 (internal citations omitted). The Mandate intrudes upon objecting employers' protected religious liberty. Conversely, the employees' right to use the drugs and devices at issue is not in jeopardy simply because their employer does not agree to provide insurance covering these things.

The Mandate requires religiously objecting employers such as Hobby Lobby, Inc., Mardel, Inc., the Green family, Conestoga Wood Specialties Corp., and the Hahn Family to choose – they can follow their conscience and accept financial ruin, or they can obey the government and risk eternal consequences. These citizens must not be forced to sacrifice their faith in exchange for their right to earn a living in this country. The Constitution and the RFRA protect Americans from such a dramatically unjust abuse of government power.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Tenth Circuit and reverse the decision of the Third Circuit.

Respectfully submitted,

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BRIEF OF THE U.S. WOMEN'S CHAMBER OF COMMERCE AND THE NATIONAL GAY & LESBIAN CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF KATHLEEN SEBELIUS ET AL.

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INTEREST OF THE *AMICI CURIAE*[1]

The U.S. Women's Chamber of Commerce is a non-profit organization designed to unify the collective strength of women in the U.S. economy. Using a platform of influence, innovation, and opportunity, the Women's Chamber works with and for its members to grow successful businesses and careers. The Women's Chamber supports strong education and employment opportunities with fair pay and advancement, and promotes work environments that are hospitable to women and families, in an effort to transform the economics of the labor market and dismantle barriers that stifle sustainable economic growth. The Women's Chamber often files briefs to inform courts of legal and policy issues of concern to its membership.

The National Gay & Lesbian Chamber of Commerce is the largest global not-for-profit advocacy organization dedicated to expanding the economic opportunities and advancements of the LGBT business community. The chamber works to ensure implementation of pro-business, LGBT-inclusive policies at the federal, state, and local levels of government. The chamber often participates in litigation at the state and federal level on issues important to its members.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Corporations are not merely aggregations of individuals – they are separate legal entities that hold rights and responsibilities distinct from those of their owners and operators. At the heart of these cases is the question whether for-profit corporations have the right to exercise religion under the Religious Freedom Restoration Act ("RFRA"). Until the decisions of some of the lower courts in these cases, no court had ever answered that question in the affirmative. Nor should this Court, for such a holding could result in a host of unintended consequences that would thwart effective corporate governance and management.

First, a decision holding that a corporation may exercise religion as a "person" under RFRA would substantially complicate corporate governance, even for those companies that intend to remain secular. Individuals and organizations motivated by religion could seek to influence corporate governance in a number of ways, including proxy contests and shareholder derivative actions designed to establish or alter a target company's religious identity. Indeed, in recent years, close to one-quarter of shareholder proposals to Fortune 200 companies have been advanced by religious organizations, public policy groups, or social investment funds seeking to influence corporate policy. Nor would close corporations be immune from disruption. Stakeholders in close corporations often disagree about corporate policy. Adding RFRA accommodations to management discussions could create further dissension among shareholders, with majority shareholders of one view taking steps to squeeze out minority shareholders of another. Even if such efforts are unsuccessful, corporations will be forced to invest significant time and resources to defend against them.

Second, a holding recognizing corporate free-exercise rights, by allowing for-profit corporations to become vehicles for religious expression, threatens to draw corporate stakeholders into divisive debates over contentious social issues and thereby jeopardize effective corporate management. Such a ruling would force certain companies to navigate internal debates with employees over important benefits and protections based on religious objections – from compliance with minimum coverage requirements for employer-sponsored health plans, to federal antidiscrimination and wage laws, and more. These debates could sow dissension between labor and management based on religious differences and imperil efforts to create a welcoming and diverse workplace.

Third, a ruling that invites some corporations but not others to avoid compliance with generally applicable federal rules on religious grounds would result in an uneven regulatory playing field. It is unlikely that Congress ever contemplated such a result when it enacted RFRA, and this Court should not interpret the Act to produce such market-skewing results.

ARGUMENT

Corporations are the primary engines of growth for the American economy. They are responsible for generating more than $2 trillion of the U.S. gross domestic product and for the employment of 87 million Americans. *See* Bureau of Economic Analysis, News Release, Table 9 (Dec. 20, 2013) (*available at* http://www.bea.gov/newsreleases/national/gdp/2013/pdf/gdp3q13_3rd.pdf) (last visited Jan. 15, 2014); U.S. Small Business Admin., Firm Data (2007), (*available at* http://archive.sba.gov/advo/research/us_lfo.pdf) (last visited Jan. 27, 2014).

Corporations are legal constructs characterized by distinct rights and responsibilities that arise under a host of federal and state laws. At its core, the corporate form allows individuals to operate collectively as a distinct legal entity in pursuit of a common enterprise. *See, e.g.*, *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (noting that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs").

One of the questions at the heart of this case is whether the right to exercise religion under RFRA is a right that for-profit corporations hold, and may assert, as independent entities.[2] *Amici* respectfully submit that the answer to that question has always been no, and it should remain so given the disruptive and unintended consequences that would result from changing course.

Prior to these cases, no court had ever held that a for-profit corporation possesses religious free exercise rights.[3] There is good reason for that rule. Recognizing such rights would generate costly and destabilizing disputes between corporate stakeholders, inject religious questions into corporate management, and create an uneven regulatory playing field among corporate actors in the marketplace. These conflicts will result in substantial distractions for companies of all types and sizes, diverting resources away from the core functions of American business: to innovate, maximize shareholder value, create jobs, and grow the U.S. economy.

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[2] *Amici* do not dispute that this Court and others have recognized the free-exercise rights of non-profit and religious organizations. The sole focus of this brief is whether RFRA should be interpreted to permit for-profit corporations to exercise religion.

[3] *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1169 (10th Cir. 2013) (en banc) (Briscoe, C.J., concurring in part and dissenting in part) ("[N]ot a single case, until now, has extended RFRA's protections to for-profit corporations."); *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377, 384 (3d Cir. 2013) ("[W]e are not aware of any case preceding the commencement of litigation about the Mandate, in which a for-profit, secular corporation was itself found to have free exercise rights."); *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1213, 1215 (D.C. Cir. 2013) (opinion of Brown, J.) ("[T]he Court has never seriously considered such a claim by a secular corporation" and "for now,

I. Recognizing a Corporate Right to Exercise Religion Would Substantially Complicate Corporate Governance.

Amici are committed to the defense and promotion of corporate rights and responsibilities that facilitate the efficient organization, management, and operation of American business. Corporate religious free-exercise is not one of those rights. A decision to bestow free-exercise rights on for-profit corporations would not advance corporate interests. Rather, it would imperil them by opening new avenues for individuals to use the corporate form to wage battles over quintessentially individual religious beliefs.

Corporate law provides a roadmap for how religious disputes could interfere with a secular company's core business operations. Religious organizations are already active participants in corporate governance debates. *See* James R. Copland & Margaret M. O'Keefe, *Proxy Monitor 2012: A Report on Corporate*

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we have no basis for concluding a secular organization can exercise religion."); *Korte v. Sebelius*, 735 F.3d 654, 695 (7th Cir. 2013) (Rovner, J., dissenting) ("[T]oday the court holds . . . that a secular, for-profit corporation possesses its own right to the free exercise of religion. . . . It is an unprecedented holding . . . .").

Governance and Shareholder Activism, at 7 (2012) (*available at* http://www.proxymonitor.org/pdf/pmr_04.pdf) (last visited Jan. 15, 2014) (reporting that 25 percent of shareholder proposals to Fortune 200 companies in recent years were made by religious organizations, public policy groups, or social investment funds "with express interests beyond mere share-price maximization"). It is reasonable to assume that such activities would expand if this Court were to hold that for-profit corporations as entities can exercise religion.[4] Such a ruling could create new disputes about any given corporation's religious identity, including whether such an identity exists, how it should be determined, and what accommodations, if any, should be sought on its basis.

Attempts to influence corporate governance could take several forms. An activist investor or organization might, for instance, solicit proxy votes designed to exercise a corporation's religious identity by changing the composition of corporate boards, amending bylaws, or otherwise guiding corporate decisions.[5] If successful, such actions could cause traditionally secular corporations to seek exemptions from federal laws based on the free exercise of religion.

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[4] A similar result followed this Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). *See* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 938 (2013) (reporting that public company shareholder proposals on political spending have become "more common than proposals on any other topic" following *Citizens United*); James R. Copland & Margaret M. O'Keefe, *Proxy Monitor 2013: A Report on Corporate Governance & Shareholder Activism*, at 12 (2013) (*available at* http://www.proxymonitor.org/pdf/pmr_06.pdf) (last visited Jan. 27, 2014) (reporting that Fortune 250 companies have faced an increasing number of shareholder proposals related to their political spending or lobbying since *Citizens United*).

[5] *Cf.* Lockheed Martin, Form 8-K, at 3 (Apr. 27, 2009) (*available at* http://www.sec.gov/Archives/edgar/data/936468/000119312509088494/d8k.htm) (last visited Jan. 27, 2014) (reporting on

Shareholders might also file religiously motivated derivative actions seeking RFRA exemptions on behalf of the corporation.[6] The creation of corporate free-exercise rights could lead these shareholders to assert that corporate management has an obligation to prevent harm to the exercise of corporate religion by seeking these exemptions. Even if such suits ultimately failed to persuade a court on the merits, they could force directors to take a side in the religious fight pursuant to the demand requirement.[7] In other words, boards would either have to give in to the demands of shareholders to bring suits to vindicate corporate religious interests, or refuse such suits and thereby anger religiously motivated shareholders. While derivative suits are common to the operation of modern American corporations,[8] as far as *amici*

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shareholder proposal from The Sisters of Mercy of the Americas, *et al.*, to require the company to report to shareholders on "certain information relating to the Corporation's space-based weapons program"); Bruce Edward Walker, Faith-Based Proxy Resolutions and GMOs (Mar. 25, 2013) (*available at* http://blog.acton.org/archives/52209-faith-based-proxy-resolutions-and-gmos.html) (last visited Jan. 16, 2014) (reporting on religious groups' shareholder resolutions before Dow Chemical, E.I. Du Pont de Nemours and others to report on plans to remove genetically modified organisms from their products).

[6] "A derivative proceeding generally may be described as an equitable remedy in which a shareholder asserts on behalf of a corporation a claim not belonging to the shareholder, but to the corporation." 13 FLETCHER CYC. CORP. § 5939.

[7] "[I]n the usual case, a shareholder seeking to assert a claim on behalf of the corporation must first exhaust intracorporate remedies by making a demand on the directors to obtain the action desired." *Id.* § 5963.

[8] *See* Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749, 1760

are aware, they have not yet been used as vehicles to advance shareholders' religious interests.

It is likely that many efforts to advance religious interests through the corporate form would fail on the merits. But even so, corporations would have to invest significant time and resources to defend against them. Intra-corporate disputes and boardroom conflicts "can disrupt company operations and lead to huge financial costs and losses." Eric M. Runesson & Marie-Laurence Guy, *Mediating Corporate Governance Conflicts and Disputes*, Global Corporate Governance Forum, at 16 (2007). Indeed, even proxy contests that do not result in litigation can drain millions of dollars from corporate treasuries. *See Bus. Roundtable v. S.E.C.*, 647 F.3d 1144, 1150 (D.C. Cir. 2011) (citing a U.S. Chamber of Commerce estimate placing proxy contest costs for large companies between $4 million and $14 million); *see also* Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model*, 107 J. FIN. ECON. 610, 624 (2013) (reporting that a shareholder activism campaign ending in a proxy fight has average costs exceeding $10 million).[9]

The fact that the corporate parties before this Court are closely held does not eliminate the risk of unintended consequences that could follow a decision

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(2010) (concluding, based on an empirical study of 182 shareholder derivative suits in federal court over a twelve-month span, that shareholder derivative suits are "a much bigger player in the world of shareholder litigation than scholars have recognized").

[9] Corporations are responsible for costs associated with the inclusion of shareholder proposals in proxy statements. 17 C.F.R. § 240.14a-8. And while the corporation and the soliciting dissident are each responsible for their costs incurred in waging the proxy contest, reimbursement may be granted to dissidents with shareholder approval. *See* 17 C.F.R. § 240.14a-101.

to recognize corporate free-exercise rights. First, close corporations make up the vast majority of firms in the United States, so any rule that is limited to such firms will still have significant reach.[10] Second, while the shareholders of the companies before this Court are apparently unanimous in their religious beliefs, the same cannot be said of all closely held corporations. Stakeholders in close corporations can and often do disagree about corporate policy.[11] If RFRA accommodations become a common topic of management discussions, intractable religious debates might slow corporate decision making. Even if these disputes are resolved internally, valuable minority shareholders could be removed from boards of directors, lose their management positions, or face dilution of their shares. And if such disputes cannot be resolved, close corporations could become embroiled in costly litigation.

Moreover, even a rule limited to closely held corporations could inadvertently drag other types of corporations into religious disputes. While the difference between family-owned, closely held, and publicly traded corporations may well "seem[] obvious," *Hobby Lobby*, 723 F.3d at 1137 (majority opinion) because the former normally lack "separation of ownership from control and multimember boards of directors," *Korte*, 735 F.3d at 682 n.17, the relevance of that difference is not immediately apparent for purposes of interpreting the word "persons" under

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[10] Venky Nagar *et al.*, *Governance Problems in Closely Held Corporations*, 46 J. FIN. & QUANTITATIVE ANALYSIS 943, 944 (2011).

[11] *Cf.* 1 F. Hodge O'Neal & Robert B. Thompson, *Oppression of Minority Shareholders & LLC Members* § 2.2 (describing, among others, objections to particular decisions and protracted policy disagreements as reasons for conflict in closely held corporations).

RFRA.[12] A holding by this Court that close corporations are "persons" capable of exercising religion under RFRA will invite future litigants, potentially at great cost to defendants, to argue that publicly traded corporations are too.

Though these cases concern disputes regarding contraception, a wide range of religious disputes is at stake. Permitting for-profit corporations to sue to obtain religious exemptions here could "reach far beyond contraception and . . . invite employers to seek exemptions from any number of federally-mandated employee benefits to which an employer might object on religious grounds." *Korte*, 735 F.3d at 689 (Rovner, J., dissenting). In future cases, corporations could choose, or be compelled, to seek exemptions from other employee health-care coverage requirements,[13] federal wage and hours rules,[14] family leave

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[12] *See, e.g.*, *Gilardi*, 733 F.3d at 1224-25 (Randolph, J., concurring in part and concurring in the judgment) (declining to reach the issue of whether a corporation can practice religion, and noting some of the difficult questions that such a holding would raise, including: "Can publicly traded corporations be religious? If so, do they take on the religions of their shareholders as a matter of course?"); *Hobby Lobby*, 723 F.3d at 1173 (Briscoe, C.J., concurring in part and dissenting in part) (noting that the majority "emphasize[s] the fact that Hobby Lobby and Mardel are closely held corporations . . . [b]ut . . . offers no explanation as to why that factor is key in affording Hobby Lobby and Mardel rights under RFRA . . [a]nd . . . fails to explain whether (or why) registration as a publicly held corporation deprives a for-profit corporation of rights under RFRA.").

[13] For instance, Chief Judge Briscoe noted that:

> A Jehovah's Witness could choose to exclude blood transfusions from his corporation's health-insurance coverage. Catholic-owned corporations could deprive their employees of coverage for end-of-life hospice care, and for medically necessary hysterectomies. Scientologist-owned corporations could refuse to offer their employees coverage for antidepressants or emergency psychiatric treatment. And corpora-

requirements,[15] immigration laws,[16] employment discrimination prohibitions,[17] and more.

In sum, creating a corporate right to exercise religion would invite disruptive governance disputes and shareholder actions regarding corporate religious identity. These actions would likely apply to a diverse range of corporations, and would assuredly expand beyond questions concerning contraception. Ultimately, the time and resources required to navigate these contentious social debates would distract corporations from their core business missions.

II. Recognizing Corporate Free-Exercise Rights Would Jeopardize Effective Corporate Management.

Amici's corporate members and partners compete at home and abroad for investment capital, talent, and customers. Successful competition in today's

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> tions owned by certain Muslims, Jews, or Hindus could refuse to provide coverage for medications or medical devices that contain porcine or bovine products – including anesthesia, intravenous fluids, prosthesis, sutures, and pills coated with gelatin.

Hobby Lobby, 723 F.3d at 1174 n.8 (Briscoe, C.J., concurring in part and dissenting in part) (citation omitted). Similarly, Judge Rovner observed that a United Methodist corporation could refuse to cover therapies based on stem cells derived from human embryos and a Christian Scientist corporation could refuse to provide employee health insurance altogether. *Korte*, 735 F.3d at 689-91 (Rovner, J., dissenting).

[14] *See Hobby Lobby*, 723 F.3d at 1181 n.3 (Matheson, J., concurring in part and dissenting in part).

[15] *See Korte*, 735 F.3d at 691-93 (Rovner, J., dissenting).

[16] *See Hobby Lobby*, 723 F.3d at 1181 n.3 (Matheson, J., concurring in part and dissenting in part).

[17] *See id.* at 1181 n.3 (Matheson, J., concurring in part and dissenting in part); *Gilardi*, 733 F.3d at 1242 (Edwards, J., concurring in part and dissenting in part).

economy requires employees, management, and shareholders to pursue common interests. Corporate free-exercise rights could be counterproductive to those interests by encouraging religiously motivated employees or shareholders to stake their claim to a corporation's religion, thereby allowing previously secular corporations to become vehicles for religious expression. Such consequences will draw companies into divisive management debates involving contentious social issues.

Corporate employers negotiate with employees individually and collectively on a host of issues that meaningfully affect employee rights. Under the National Labor Relations Act ("NLRA"), covered employers must collectively bargain with the representatives of their employees with respect to wages, hours, and other terms and conditions of employment, including health insurance and benefits. *See* 29 U.S.C. § 158(d). Employers not subject to collective bargaining rules still negotiate these subjects with their employees. In both scenarios, federal law sets minimum requirements regarding labor conditions and employee benefits, including minimum coverage requirements for health insurance plans.

A rule recognizing corporate free-exercise rights would force certain companies – at the behest of their shareholders or employees – to navigate internal debates over whether to abide by federal standards or to seek accommodations based on corporate religious identity. If a corporation can exercise religious views under RFRA, it will not be able simply to cite the minimum coverage requirements that federal law mandates. Instead, corporations will face requests (or demands) to assert religious objections to each and every item subject to minimum coverage requirements when negotiating health insurance plans' terms with employees. Negotiations could also be skewed by possible corporate exemptions from other federal statutes that protect workers, such as the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. § 206(d), among others.

The recognition of corporate free-exercise rights could open the door to costly new lawsuits. Employees might allege a refusal to negotiate in good faith, *see* 29 U.S.C. § 158(d), if management unilaterally sought an exemption from providing certain benefits. Employees could also bring suits claiming violations of the Establishment Clause if the Government or a court decides to accommodate a corporation's religion by affording it a RFRA exemption.[18]

Injecting religion into labor relations could divide employers from employees, and employees from each other. Because receiving an exemption could have significant concrete effects on each party's interests, these debates would further complicate already sensitive discussions about employee protections and benefits. And, because employees have divergent views on these matters as well, making such differences the center point of employer-employee relations could foment conflict among employees.

The talent, motivation, and morale of the workforce are critical drivers of corporate success, and competitive benefits packages are critical to attracting top talent. A perception that employers are chipping away at benefits based on religious beliefs will alienate those who do not share those beliefs. Such consequences would be particularly damaging at a time when religious diversity in the workplace is increasing, and nearly half of American workers have socially diverse workplaces.[19] A loss of workplace diversity would not only reduce employee satisfaction and productivity – key drivers of corporate performance[20] – it would also risk sapping the innovation and creativity that is critical to America's global economic leadership.

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[18] *See* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. __ (forthcoming 2014) (*available at* http://ssrn.com/abstract=2328516) (last visited Jan. 15, 2014).

In sum, the potential conflicts that could arise among employees and management over corporate religious exercise would be harmful to corporate interests and to the American economy as a whole.

III. Widespread For-Profit Corporate Religious Exercise Would Create an Uneven Regulatory Playing Field.

Widespread corporate religious exercise among for-profit companies would create an uncertain and uneven regulatory playing field. For-profit corporations that succeed in receiving accommodations could reap potentially significant financial benefits unavailable to secular competitors. A regime that permits corporations to reduce or avoid the costs of complying with generally applicable federal rules on religious grounds will create an unfair competitive environment.

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[19] Tanenbaum Center for Interreligious Understanding, *What American Workers Really Think About Religion: Tanenbaum's 2013 Survey of American Workers and Religion* 9 (2013) (measuring "social diversity" by frequency of workplace social interactions with religious and racial minorities and LGBT persons).

[20] James K. Harter, Frank L. Schmidt & Theodore L. Hayes, *Business-Unit-Level Relationship Between Employee Satisfaction, Employee Engagement, and Business Outcomes: A Meta-Analysis*, 87 J. APPLIED PSYCHOL. 268 (2002); Daniela M. de la Piedra, *Diversity Initiatives in the Workplace: The Importance of Furthering the Efforts of Title VII*, 4 MOD. AM. 43, 45 (2008).

This Court has previously recognized that exempting religious entities from business regulation can have market-distorting effects. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 298 (1985).[21] If the corporate parties in this case prevail, there will likely be a flood of similar suits filed to obtain similar exemptions based on corporate religious beliefs. For example, a corporation adhering to the tenets of the Church of Christ, Scientist – which believes that illness may only be cured by prayer and supplication to God, not medicine – arguably could obtain an exemption from providing employee health coverage for anything other than religious healing, and thereby drastically cut expenses relative to its competitors.[22] Likewise, secular companies could be forced to compete with companies exempt from the obligation to comply with certain provisions of the NLRA[23] or FMLA.[24] If successful, these suits would force secular for-profit corporations (including large publicly traded entities) to compete in the same marketplace with corporations that enjoy exemptions from regulations that they deem objectionable on religious grounds.

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[21] In *Tony & Susan Alamo*, the Court held that the minimum wage, overtime, and recordkeeping requirements of the Fair Labor Standards Act apply to workers engaged in the commercial activities of a religious foundation, even where the foundation's businesses are "infused with a religious purpose." The Court rejected the foundation's attempt to avoid the burdens imposed by FLSA because "the Foundation's businesses serve the general public in competition with ordinary commercial enterprises, . . . [and] the payment of substandard wages would undoubtedly give [the Foundation] and similar organizations an advantage over their competitors." 471 U.S. at 299. The Court recognized that FLSA was intended to prevent exactly this kind of "'unfair method of competition.'" *Id.* (quoting 29 U.S.C. § 202(a)(3)); *see also Donovan v. Tony & Susan Alamo Found.*, 722 F.2d 397, 400 (8th Cir. 1983) ("By entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees."), *aff'd*, 471 U.S. 290 (1985); *cf. United States v. Lee*, 455 U.S. 252, 261 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

It is not possible to predict the full range of laws from which religiously motivated companies might seek exemptions. What is certain, however, is that permitting for-profit corporations to advance such claims would produce uncertainty and asymmetry in the federal regulatory environment. There is no indication that Congress ever contemplated that RFRA would create significant regulatory imbalances. This Court should not interpret the Act in a manner that would produce this kind of market disruption.

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[22] *See Korte*, 735 F.3d at 690-91 (Rovner, J., dissenting).

[23] *Gilardi*, 733 F.3d at 1242 (Edwards, J., concurring in part and dissenting in part).

[24] *See Korte*, 735 F.3d at 691-93 (Rovner, J., dissenting).

CONCLUSION

The judgment of the Tenth Circuit should be reversed and the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

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KATHLEEN SEBELIUS, ET AL., *Petitioners*

v.

HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP., ET AL.
Petitioners

v.

KATHLEEN SEBELIUS, ET AL., *Respondents.*

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE* [1]

Amicus curiae United States Conference of Catholic Bishops (the "Conference") is an assembly of the leadership of the Catholic Church in the United States. The Conference seeks to unify, coordinate, encourage, promote, and carry on Catholic activities in the United States; to organize and conduct religious, charitable, and social welfare work at home and abroad; to aid in education; to care for immigrants; and generally to further these goals through education, publication, and advocacy. To that end, the Conference provides and promotes a wide range of spiritual, educational, and charitable services throughout this country and around the world.

During the promulgation of the regulations at issue in this litigation (the "Mandate"), the Conference has steadily voiced its opposition to any rule that would require faithful Catholics and other religiously motivated business owners to choose between providing coverage for products and speech that violate their religious beliefs, and exposing their businesses to devastating penalties.[2] Despite the Conference's repeated efforts to work and dialogue toward a solution, the Government has steadfastly refused to create a satisfactory exemption, either for individuals seeking to run their businesses in accordance with their faith or for nonprofit religious organizations beyond houses of worship. As a consequence, employers are forced to facilitate the provision of coverage they find religiously objectionable, whether it be for the abortion-inducing drugs and devices at issue in this litigation, or also for the similarly mandated contraceptives, sterilization procedures, and related education and counseling at issue in related litigation.

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than Amicus and its counsel, has made a monetary contribution to the preparation or submission of this brief.

The current impasse is disturbing for several reasons. In the first place, it reflects a departure from the Government's longstanding practice of safeguarding the rights of organizations and individuals to act in accordance with their religious beliefs. The Conference has consistently supported those rights, particularly in the area of protecting the dignity of all human life. The fact that this dispute has played out in the context of the Affordable Care Act is all the more frustrating because the Catholic Church has long been a leading provider of, and advocate for, accessible, life-affirming health care, and has supported a positive role for government in helping to ensure such care.

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[2] *See, e.g.*, Comments of U.S. Conference of Catholic Bishops (Sept. 17, 2010), *available at* http://old.usccb.org/ogc/preventive.pdf; Comments of U.S. Conference of Catholic Bishops (Aug. 31, 2011), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-to-hhs-on-preventive-services-2011-08.pdf; Comments of U.S. Conference of Catholic Bishops (May 15, 2012), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf; Comments of U.S. Conference of Catholic Bishops (Mar. 20, 2013), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf.

Moreover, the Conference is deeply troubled by the manner in which the Government has invited courts to improperly and erroneously delve into matters of religious doctrine during the course of litigation surrounding the Mandate. Indeed, the test repeatedly championed by the Government would transform the Religious Freedom Restoration Act's substantial burden analysis into an exercise in amateur moral theology. The Constitution, however, does not permit federal courts or government officials to be the ultimate arbiters of matters of faith. As the authorities ultimately responsible for the accurate proclamation of Catholic doctrine within their respective dioceses, the bishops who constitute the membership of the Conference thus have a unique interest in ensuring the proper application of the substantial burden test. It is that test that is the primary focus of this amicus brief.

Indeed, the Conference is particularly concerned about the proper application of the substantial burden test, because the manner in which this Court articulates that test will have implications for Catholic nonprofit organizations—including those that have filed lawsuits across the country against the Mandate's so-called "accommodation" for nonprofit entities.[3] Rather than exempting objecting nonprofit entities completely from the scope of the Mandate, under the "accommodation," the Government has instead required those entities to

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[3] To date, courts have enjoined application of the Mandate against nonprofit entities in eighteen out of the nineteen cases to decide the question. *See Catholic Diocese of Beaumont v. Sebelius*, No. 1:13-cv-709, 2014 WL 31652 (E.D. Tex. Jan. 2, 2014) (enjoining Mandate); *Roman Catholic Diocese of Fort Worth v. Sebelius*, No. 4:12-cv-314 (N.D. Tex. Dec. 31, 2013) (Doc. 99) (same); *Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12 cv-92, 2013 WL 6858588 (E.D. Mo. Dec. 30, 2013) (same); *Diocese of Fort Wayne-S. Bend v. Sebelius*, No. 1:12-cv-159, 2013 WL 6843012 (N.D. Ind. Dec. 27, 2013) (same); *Grace Schs. v. Sebelius*, No. 3:12-cv-459, 2013 WL 6842772 (N.D. Ind. Dec. 27, 2013) (same); *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 6838893 (S.D. Tex. Dec. 27, 2013) (same); *S. Nazarene Univ. v. Sebelius*, No. 13-1015, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013) (same); *Geneva Coll. v. Sebelius*, No. 2:12-cv-00207, 2013 WL 6835094 (W.D. Pa. Dec. 23, 2013) (same); *Reaching Souls Int'l, Inc. v Sebelius*, No. 13-1092, 2013 WL 6804259 (W.D. Okla. Dec. 20, 2013) (same); *Legatus v. Sebelius*, No. 12-12061, 2013 WL 6768607 (E.D. Mich. Dec. 20, 2013) (same); *Roman Catholic Archdiocese of N.Y. v. Sebelius*, No. 12-2542, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013) (same); *Zubik*

(continued...)

v. Sebelius, No. 2:13-cv-01459, 2013 WL 6118696 (W.D. Pa. Nov. 21, 2013) (same); *Ave Maria Found. v. Sebelius*, No. 2:13-cv-15198 (E.D. Mich. Dec. 31, 2013) (granting temporary restraining order) (Doc. 12); *Little Sisters of the Poor v. Sebelius*, No. 13-cv-2611, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *injunction pending appeal granted*, No. 13A691 (U.S. Jan. 24, 2014); *Mich. Catholic Conf. v. Sebelius*, No. 1:13-cv-1247, 2013 WL 6838707 (W.D. Mich. Dec. 27, 2013), *injunction pending appeal granted*, No. 13-2723 (6th Cir. Dec. 31, 2013); *Catholic Diocese of Nashville v. Sebelius*, No. 3:13-1303, 2013 WL 6834375 (M.D. Tenn. Dec. 26, 2013), *injunction pending appeal granted*, No. 13-6640 (6th Cir. Dec. 31, 2013); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-1261, 2013 WL 6672400 (D.D.C. Dec. 19, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013); *Roman Catholic Archbishop of Wash. v. Sebelius*, No. 13-1441, 2013 WL 6729515 (D.D.C. Dec. 20, 2013), *injunction pending appeal granted*, No. 13-5371 (D.C. Cir. Dec. 31, 2013). *But see Univ. of Notre Dame v. Sebelius*, No. 3:13-cv-1276, 2013 WL 6804773 (N.D. Ind. Dec. 20, 2013), *injunction pending appeal denied*, No. 13-3853 (7th Cir. Dec. 30, 2013).

take numerous steps to authorize third parties to provide the objectionable coverage to their employees. As the Conference informed the Government well before the accommodation was finalized, *supra* note 2, this does not resolve the religious objection to compliance with the Mandate, because even under the accommodation, objecting entities are still required to violate their religious beliefs by playing an integral role in the delivery of the mandated coverage to their employees. The Government, nonetheless, has attempted to argue that the refusal to comply with the accommodation imposes only a "de minimis" burden on religious exercise and that any burden is too "attenuated" to be substantial. For reasons articulated more fully below, that standard fundamentally misunderstands the substantial burden inquiry and would require an unconstitutional inquiry into a plaintiff's religious beliefs.

Thus, to ensure that numerous Catholic and other religious nonprofit organizations are not forced to act in violation of their religious beliefs, it is of vital importance that this Court reaffirm that in assessing whether a law imposes a substantial burden on religious exercise, courts should steer well clear of deciding religious questions. Once a plaintiff represents that taking a particular action—whatever that may be—violates his or her religious beliefs, a court's only task is to confirm the sincerity and religiosity of that representation, and then to determine if the Government has placed substantial pressure on the plaintiff to violate his or her beliefs.

SUMMARY OF ARGUMENT

At bottom, the question pending before this Court is straightforward: absent interests of the highest order, can the Government force entities or individuals to take actions that violate their sincerely held religious beliefs? Under the Religious Freedom Restoration Act ("RFRA"), the answer is clearly no. The Government attempts to argue otherwise, contending both that for-profit companies cannot exercise religion, and that in any event, the Mandate does not substantially burden the exercise of religion. Both of these arguments are without merit.

1. The notion that for-profit entities cannot exercise religion rests on an unduly narrow view of religious liberty. Such an approach would jeopardize the religious exercise of millions of Catholics who sincerely believe they are called to live out their faith in all aspects of their lives, including in the workplace. Religion is not something that can or should be divorced from the commercial sphere. Indeed, it is religion that often serves to direct that sphere toward the common good.

2. The Government's claim that the Mandate does not substantially burden the religious exercise of objecting individuals or the businesses they own rests on a fundamentally flawed understanding of the substantial burden test. That test requires courts to (1) identify the sincere religious exercise at issue, and (2) determine whether the government has placed "substantial pressure on an adherent to modify his behavior and to violate his beliefs."

Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981); *see also Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 428 (2006) (noting that a "prima facie case under RFRA" exists when a law "(1) substantially burden[s] (2) a sincere (3) religious exercise"). In identifying the relevant exercise of religion, a court must accept how plaintiffs "dr[a]w the line" as to the nature and scope of their religious beliefs. *Thomas*, 450 U.S. at 715. After plaintiffs' beliefs have been identified, the court must then determine whether the challenged regulation substantially pressures plaintiffs to violate those beliefs. *Id.* at 717; *see also Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)

Here, the Government would have this Court disregard the "line" drawn by Hobby Lobby and Conestoga[4] and instead conclude that any injury is too "attenuated" to be cognizable. According to the Government, Hobby Lobby and Conestoga would subsidize their employees' use of abortion-inducing drugs and devices only after a series of independent decisions by third parties, and only after funds have flowed through a variety of accounts. Pet. Br. at 32–34 (No. 13-354). This, however, is a moral judgment masquerading as legal analysis. Rather than asking the *legal* question of whether the Mandate substantially pressures Hobby Lobby and Conestoga to act contrary to their beliefs, the Government makes the *religious* judgment that providing the mandated coverage does not really violate Hobby Lobby's and Conestoga's beliefs. The Government, in effect, would have this Court conclude—"despite protestations to the contrary from the religious objectors who brought th[is] lawsuit"—that the "step[s]" between the provision of the mandated coverage and the use of that coverage shield Hobby Lobby and Conestoga from any moral responsibility for their actions. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 457 (1988); Pet Br. at 34 (No. 13-354). Ultimately, the Government's position amounts to nothing more than the assertion that Hobby Lobby and Conestoga—who sincerely believe they cannot in good conscience provide the mandated coverage—"misunderstand their own religious beliefs." *Lyng*, 485 U.S. at 458.

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[4] Unless context indicates otherwise, references to "Hobby Lobby and Conestoga" refer to all Respondents in 13-354 and all Petitioners in No. 13-356.

Whatever the merits of the Government's moral analysis, this quintessentially religious inquiry lies well beyond executive or judicial competence. The Government's subtle, yet radical, transformation of the substantial burden analysis from a measure of the government's coercive mechanism into a judicial exploration of moral theology "cast[s] the Judiciary in a role that [it was] never intended to play." *Id.* It "cannot be squared with the Constitution or with [this Court's] precedents," *id.*, which clearly establish that "[i]t is not within the judicial function" to determine whether a plaintiff "has the proper interpretation of [his] faith," *United States v. Lee*, 455 U.S. 252, 257 (1982). Far from inviting courts to wade into matters of religious doctrine, the substantial burden test is limited to an inquiry into the degree of pressure the Government places on an individual to violate his beliefs.

Thus, the question for this Court is not whether compliance with the Mandate is a *substantial violation* of an objecting employer's beliefs; instead, the question is whether the Mandate *substantially pressures* objecting employers to violate their beliefs as they, the employers, understand them. While courts can question whether the pressure placed on individuals to violate their beliefs is "substantial," under no circumstances may they assess whether a particular action transgresses those beliefs. That "line" is for the church and the individual, not the state, to draw, "and it is not for [courts]" to question. *Thomas*, 450 U.S. at 715.

Here, once the moral "line" is properly identified, it becomes readily apparent that the Mandate places substantial pressure on Hobby Lobby and Conestoga to cross that line. In accordance with their religious beliefs, Hobby Lobby and Conestoga cannot provide coverage for abortion-inducing drugs and devices. As the Mandate forces them to do precisely what their religion forbids, it is beyond question that it imposes a substantial burden on Hobby Lobby's and Conestoga's religious exercise. This burden, moreover, cannot possibly be justified by a compelling interest, nor is the Mandate the least restrictive means to achieve the Government's stated ends.

ARGUMENT

I. RELIGIOUS EXERCISE CANNOT, AND SHOULD NOT, BE EXCLUDED FROM THE MARKETPLACE

Before deciding whether Hobby Lobby's and Conestoga's exercise of religion is substantially burdened, this Court must answer the predicate question of whether RFRA protects the free exercise rights of for-profit entities or their owners. For many of the reasons ably articulated in Conestoga's brief, the Conference firmly believes the answer to that question must be yes. Pet. Br. 16–32 (No. 13-356).

Moreover, the notion that religious believers or the companies they own cannot or do not exercise religion rests on an unduly cramped definition of religious liberty and runs contrary to the manner in which Christians have understood their faith for centuries. Religion is not confined to the four walls of a church or to the private life of a believer. Rather, Christians in particular believe that they are commanded by Scripture to "do everything for the glory of God." 1 Cor. 10:31 (NABRE). "Only when their faith permeates every aspect of their lives do Christians become truly open to the transforming power of the Gospel."[5] Thus, "[a]ny tendency to treat religion as a private matter must be resisted."[6] Or as Pope Francis has recently observed, "religion [cannot] be relegated to the inner sanctum of personal life, without influence on societal and national life." Pope Francis, *Evangelii Gaudium* ¶ 183.

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[5] Pope Benedict XVI, Address to the Bishops of the United States (April 16, 2008), *available at* http://www.vatican.va/holy_father/benedict_xvi/speec

Accordingly, a Catholic cannot in good conscience "profess . . . beliefs in church on Sunday, and then during the week . . . promote business practices or medical procedures contrary to those beliefs."[7] He cannot claim to respect the teachings of the Church, and then operate his business in a way that "ignore[s] or exploit[s] the poor and the marginalized, . . . promote[s] sexual behavior contrary to Catholic moral teaching, or . . . adopt[s] positions that contradict the right to life of every human being from conception to natural death."[8] In other words, for Catholics—as well as for many other believers—faith is not something to be checked at

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(continued...)

hes/2008/april/documents/hf_ben-xvi_spe_20080416_bishops-usa_en.html.

[6] *Id.*

[7] Pope Benedict XVI, Address to the Bishops of the United States (April 16, 2008), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080416_bishops-usa_en.html.

[8] *Id.*

the door of their businesses or ignored when determining how to conduct their corporation's affairs. To the contrary, their faith plays an indispensable role in all aspects of their lives.

The Government, however, maintains that the believer loses the right to live out his faith the instant he enters the marketplace or incorporates a business. The implications of this argument are staggering. In short, the Government purports to have the power to tell believers to "stop being Catholic" or to lay aside their Christian faith upon entering the commercial sphere. This far-too-narrow view of religious freedom would have believers compartmentalize their faith in violation of basic Christian teachings, and creates an artificial divide based on the Government's perception of the sacred and the secular.

Such a divide is not only unwarranted; it is also undesirable. In fact, the "split between the faith which many profess and their daily lives deserves to be counted among the more serious errors of our age." *Gaudium et Spes* ¶ 43. As the Pontifical Council for Justice and Peace has observed,

> [d]ividing the demands of one's faith from one's work in business is a fundamental error which contributes to much of the damage done by businesses in our world today, including overwork to the detriment of family or spiritual life, an unhealthy attachment to power to the detriment of one's own good, and the abuse of economic power in order to

make even greater economic gains.[9]

After all, it is religion that reminds many businesses and their owners that "[p]rofit is a regulator of the life of a business, but it is not the only one; other human and moral factors must also be considered which, in the long term, are at least equally important for the life of a business." Pope John Paul II, *Centesimus annus* ¶ 35. It is religion that instructs companies to ensure that the "pursuit of profit [is] in harmony with the irrenounceable protection of the dignity of the people who work at different levels in the same company."[10] And it is religion that "recognizes the positive value of the market and of enterprise, but which at the same time points out that these need to be oriented towards the common good." Pope John Paul II, *Centesimus annus* ¶ 43.

Ultimately, for many people of faith, religion is not something that can or should be divorced from the manner in which they operate their businesses. By suggesting otherwise, the Government is substituting its view of religion for that of the believer, and adopting an "extraordinary" standard whereby "[r]eligious exercise is protected in the home and the house of worship but not beyond." *Korte v. Sebelius*, 735 F.3d 654, 681 (7th Cir. 2013). "[F]ree-exercise rights are not so circumscribed," however, and this Court should not accept the Government's invitation to "leave religious exercise wholly unprotected in the commercial sphere." *Id.*

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[9] Pontifical Council for Justice and Peace, *Vocation of the Business Leader* ¶ 10 (November 2012), *available at* http://www.stthomas.edu/cathstudies/cst/conferences/Logic%20of%20Gift%20Semina/Logicofgiftdoc/FinalsoftproofVocati.pdf.

[10] Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* ¶ 340.

II. THE MANDATE SUBSTANTIALLY BURDENS HOBBY LOBBY'S AND CONESTOGA'S RELIGIOUS EXERCISE

Congress enacted RFRA to enlarge the scope of legal protection for religious freedom. In *Employment Division v. Smith*, 494 U.S. 872 (1990), this Court held that neutral and generally applicable laws burdening religious practices did not trigger heightened scrutiny under the Free Exercise Clause. Responding to that decision, Congress enacted RFRA "to restore the compelling interest test" set forth in *Sherbert*, 374 U.S. 398, and *Yoder*, 406 U.S. 205. 42 U.S.C. § 2000bb(b)(1). Accordingly, RFRA prohibits the Government from "substantially burden[ing] a person's exercise of religion" unless the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000bb-1(a)–(b).

Under RFRA, therefore, courts must first assess whether the challenged law imposes a "substantial[] burden" on the plaintiff's "exercise of religion." *Id.* As every appellate court to consider the question in the context of the Mandate has concluded, where sincerity is not in dispute, this initial inquiry requires courts to (1) identify the religious exercise at issue, and (2) determine whether the government has placed "substantial pressure"—i.e., a substantial burden—on the plaintiff to abstain from that religious exercise. *Korte*, 735 F.3d at 682–85; *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1216–18 (D.C. Cir. 2013); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137–41 (10th Cir. 2013) (en banc); *see also O Centro*, 546 U.S. at 428; *Thomas*, 450 U.S. at 718.

Here, instead of first identifying the religious beliefs at issue, and then assessing whether the Mandate pressures objectors to violate those beliefs, the Government would have this Court assess whether the Mandate requires Hobby Lobby and Conestoga to violate their religious beliefs at all—or at least, whether it requires them to "substantially" violate those beliefs. Such determinations, however, lie well beyond this Court's competence. As Hobby Lobby and Conestoga explained below, they sincerely believe that they cannot operate their businesses in the manner required by the Mandate without violating their religious beliefs. Failure to accept Hobby Lobby's and Conestoga's representations regarding their beliefs and, even more egregiously, making an inherently religious judgment about the extent to which the Mandate violates those beliefs, would run roughshod over well-established precedent that has repeatedly warned courts not to delve into religious matters. Once it is acknowledged that sponsoring the mandated coverage violates Hobby Lobby's and Conestoga's sincerely held religious beliefs, it becomes readily apparent that the Mandate imposes a substantial burden on their religious exercise.

A. The Refusal to Provide the Mandated Coverage Is a Protected Exercise of Religion

RFRA defines "exercise of religion" to include "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A) (emphasis added). "This definition is undeniably very broad, so the term 'exercise of religion' should be understood in a generous sense." *Korte*, 735 F.3d at 674. As this Court has recognized, religious exercise includes "not only belief and profession but the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877.

Whether a belief or practice is entitled to protection is "not to turn upon a judicial perception of the particular belief or practice in question." *Thomas*, 450 U.S. at 714. Instead, courts must accept plaintiffs' description of their beliefs, regardless of whether the court, or the Government, finds them "acceptable, logical, consistent, or comprehensible." *Id.* at 714–15 (refusing to question the moral line drawn by plaintiff); *see also Lee*, 455 U.S. at 257 (same).[11] In other words, it is left to the plaintiff to "dr[a]w a line" regarding the actions his religion deems permissible, and once that line is drawn, "it is not for [a court] to say [it is] unreasonable." *Thomas*, 450 U.S. at 715.

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[11] *See also, e.g.*, *United States v. Ali*, 682 F.3d 705, 710–11 (8th Cir. 2012) (finding error where the district court questioned claimant's "interpretation

The reason for this approach is obvious: "[c]ourts are not arbiters of scriptural interpretation." *Id.* at 716. It is not "within the judicial function and judicial competence" to determine whether a belief or practice is in accord with a particular faith. *Id.*; *see also Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 699 (1989) ("It is not within the judicial

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(continued...)

of Islamic doctrine"); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010) (explaining that "the issue is not whether the lack of a halal diet that includes meats substantially burdens the religious exercise of any Muslim practitioner, but whether it substantially burdens Mr. Abdulhaseeb's own exercise of his sincerely held religious beliefs"); *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008) (stating that plaintiff's representations brought his "dietary request squarely within the definition of religious exercise"); *Wyhe v. Reisch*, 581 F.3d 639, 656 (8th Cir. 2009) (rejecting government attempts to question claimant's representation that a particular item was necessary to celebrate a religious festival); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (rejecting government efforts to dispute plaintiff's representation that a medical test would violate his religion).

ken to question . . . the validity of particular litigants' interpretations of [the] creeds [of their faith]."). Accordingly, this Court has "[r]epeatedly and in many different contexts" "warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Indeed, since *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), it has been clear that secular authorities may not decide the meaning of religious doctrine or beliefs. *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 115–16 (1952). As this Court recently and unanimously reiterated, each religion is entitled to "shape its own faith," free of judicial interference. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

Thus, given the inability of Article III courts to make judgments regarding religious matters, when identifying the relevant religious exercise for purposes of RFRA, judicial competence extends only to determining "whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious." *United States v. Seeger*, 380 U.S. 163, 185 (1965). Put a different way, it suffices that a plaintiff has an "honest conviction that [the actions required of him are] forbidden by his religion." *Thomas*, 450 U.S. at 716.

Here, there can be no doubt that Hobby Lobby and Conestoga possess just such an "honest conviction." Indeed, there is no dispute that Hobby Lobby and Conestoga sincerely believe they may not take the specific actions necessary to comply with the Mandate. This analysis remains the same regardless of whether the exercise at issue is that of the corporate or individual claimants. Because RFRA protects "any exercise of religion," 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A), the precise nature of the religious exercise at issue is irrelevant to the substantial burden analysis. The Court's only task at this stage is to determine whether the asserted exercise—whatever that may be—is sincere and religious. Thus, it is immaterial that the individual claimants exercise their religion by refusing to "order[] their companies to provide insurance coverage for drugs or devices whose use is inconsistent with their faith," *Hobby Lobby*, 723 F.3d at 1152 (Gorsuch, J., concurring), while the corporate claimants object to directly purchasing and providing the coverage, *id.* at 1140 (majority op.). What matters is that under either scenario, the claimants have an "honest conviction" that the actions they must take are "forbidden by [their] religion." *Thomas*, 450 U.S. at 716. [12]

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[12] Of course, a religious exercise need not be "compelled by" a claimant's faith to be protected under RFRA. 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). Thus, RFRA would apply even to actions merely motivated by religious belief. In any event, RFRA plainly protects religious exercise where, as here, the claimant believes he is compelled by his religion to refrain from taking the actions at issue.

B. The Mandate Imposes a Substantial Burden on Hobby Lobby's and Conestoga's Religious Exercise

Once Hobby Lobby's and Conestoga's refusal to comply with the Mandate is identified as a protected religious exercise, the "substantial burden" analysis is straightforward. As this Court has held, the Government "substantially burdens" the exercise of religion if it coerces an individual "to perform acts undeniably at odds with fundamental tenets of [his] religious beliefs," *Yoder*, 406 U.S. at 218, or otherwise "put[s] substantial pressure on [him] to modify his behavior and to violate his beliefs," *Thomas*, 450 U.S. at 717–18. In *Yoder*, for example, this Court found that a $5 penalty imposed a substantial burden on Amish plaintiffs who refused to follow a compulsory secondary-education law. 406 U.S. at 208, 218. Likewise, in *Thomas*, the denial of unemployment compensation substantially burdened the pacifist convictions of a Jehovah's Witness who refused to work at a factory manufacturing tank turrets. 450 U.S. at 713–18.

Here, the Mandate plainly imposes a "substantial burden" on Hobby Lobby's and Conestoga's religious exercise. Failure to take the actions required by the Mandate will subject Hobby Lobby and Conestoga to potentially fatal fines of $100 a day per affected beneficiary. 26 U.S.C. § 4980D(b). If they drop health coverage altogether, they will be subject to annual fines of $2,000 per full-time employee after the first thirty employees, *id.* § 4980H(a), (c)(1), and/or face ruinous practical consequences due to their inability to offer employees the crucial benefit of health coverage. These penalties, which could involve millions of dollars in fines, clearly impose the type of pressure that qualifies as a substantial burden.

In short, Hobby Lobby and Conestoga are faced with a stark choice: violate their religious beliefs or pay potentially crippling fines. This Court has repeatedly held that coercing a plaintiff to act in violation of his religious beliefs is the very definition of a substantial burden. *Thomas*, 450 U.S. at 717 (stating that the inquiry "begin[s]" with an assessment of whether a law "*compel[s]* a violation of conscience"); *Sherbert*, 374 U.S. at 404 (same); *see also Yoder*, 406 U.S. at 218. Indeed, when presented with this exact choice and these exact penalties, every appellate court to reach the question has concluded that "there can be little doubt that the contraception mandate imposes a substantial burden on . . . religious exercise." *Korte*, 735 F.3d at 683; *see also Gilardi*, 733 F.3d at 1218 ("If that is not 'substantial pressure on an adherent to modify his behavior and to violate his beliefs,' we fail to see how the standard could be met." (quoting *Thomas*, 450 U.S. at 718)); *Hobby Lobby*, 723 F.3d at 1141 (holding that the Mandate imposed a substantial burden on religious exercise by "demand[ing]," on pain of onerous penalties, "that [plaintiffs] enable access to contraceptives that [they] deem morally problematic"). As the Seventh Circuit explained: "[t]he contraception mandate forces [Hobby Lobby and Conestoga] to do what their religion tells them they must not do. That qualifies as a substantial burden on religious exercise, properly understood." *Korte*, 735 F.3d at 685.

C. The Government Fundamentally Misunderstands the Nature of the Substantial Burden Inquiry

The Government, however, ignores the straightforward analysis laid out above. Instead, it invites this Court to engage in moral theology disguised as legal inquiry. Conceding that Hobby Lobby's and Conestoga's "sincere religious beliefs are, of course, entitled to respect," Pet. Br. at 32 (No. 13-354), the Government nonetheless proceeds to provide a laundry list of facts in an effort to show that Hobby Lobby and Conestoga are many "step[s] removed" from the actual use of abortion-inducing drugs or devices, *id.* at 34. Among other things, the Government notes that the monies used to finance the objectionable coverage will be "placed into an undifferentiated fund," and that decisions about "whether to claim such benefits" will be "made by independent third parties." *Id.* at 33. Indeed, for reasons of confidentiality, Hobby Lobby and Conestoga will never "even know whether any employee was using the contraceptives to which [they] object." *Id.* According to the Government, this means that "the relationship between [Hobby Lobby's and Conestoga's] claimed injury and the challenged governmental action is too attenuated" to merit relief. *Id.* at 32; *see also id.* at 34 ("RFRA does not protect against the burden on religious exercise that 'arises when one's money circuitously flows to support the conduct of other free-exercise-wielding individuals who hold religious beliefs that differ from one's own.'" (quoting *O'Brien v. U.S. Dep't of Health & Human Servs.*, 894 F. Supp. 2d 1149, 1159 (E.D. Mo. 2012))).[13]

While these facts may lead some religious adherents to conclude, upon their own moral analysis, that compliance with the Mandate does not violate their own beliefs, that is not true of the claimants here. In any event, those facts are completely irrelevant to the legal question of whether the Mandate substantially burdens Hobby Lobby's and Conestoga's religious exercise. As explained by the Seventh Circuit, any contention that the burden is too attenuated "focuses on the wrong thing—the employee's use of contraception—and addresses the wrong question—how many steps separate the employer's act of paying for contraceptive coverage and an employee's decision to use it." *Korte*, 735 F.3d at 684. To argue that "any complicity problem is insignificant or nonexistent" because "several independent decisions separate the employer's act of providing the mandated coverage from an employee's eventual use of contraception" is to "purport[] to resolve the religious question underlying [this] case[]." *Id.* at 685. But for the reasons discussed above, "[n]o civil authority can decide that question." *Id.*; *Gilardi*, 733 F.3d at 1217 (rejecting the attenuation argument); *Hobby Lobby*, 723 F.3d at 1137 (same); *supra* Part II.A. If Hobby Lobby and Conestoga interpret the "creeds" of their faith to prohibit provision of the mandated coverage, "[i]t is not within the judicial ken to question" "the validity of [their] interpretation[]." *Hernandez*, 490 U.S. at 699. Simply put, courts have no competence to determine the point at which degrees of attenuation render conduct morally permissible, or the point at which promoting and facilitating morally objectionable activity is immoral in itself regardless of whether that offer is taken up by others. Indeed, this Court has squarely rejected such analysis.

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[13] In the process, the Government asserts that the "substantial-burden question is a legal one for a court." Pet. Br. at 32 (No. 13-354). This is most certainly true. But that legal question is whether the law at issue places substantial pressure on Hobby Lobby and Conestoga "to modify [their] behavior and to violate [their] beliefs." *Thomas*, 450 U.S. at 717–18. In other words, because RFRA protects "any exercise of religion" and because the Constitution bars the judiciary from weighing in on matters of theology, this Court must defer to Hobby Lobby and Conestoga's description of their religious exercise at step one of RFRA's substantial burden analysis. *Supra* Part II.A. But the Court must still proceed to step two, where it answers the legal question of whether the Government has placed substantial pressure on Hobby Lobby and Conestoga to violate their religious beliefs. *Supra* II.B.

For example, in *Thomas*, the Court held that the denial of unemployment compensation to a man who refused to work at a factory that manufactured tank turrets substantially burdened his pacifist convictions as a Jehovah's Witness. 450 U.S. at 713–18. Rather than questioning whether working in a factory—as opposed to being handed a gun and sent off to war—was too attenuated a breach of those beliefs, this Court recognized "that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715. Likewise, in *Lee*, the Court rejected the Government's contention that payment of social security taxes into the general treasury was too indirect a violation to "threaten the integrity of" the Amish belief that it was "sinful not to provide for their own elderly and needy." 455 U.S. at 255, 257. Instead, it readily accepted the representation of the Amish plaintiff that "the payment of the taxes" "violate[d] [his] religious beliefs." *Id.* at 257.

As in *Thomas* and *Lee*, this Court should accept at face value Hobby Lobby's and Conestoga's earnest belief that they cannot in good conscience comply with the Mandate. But instead of accepting that representation, the Government would have this Court conduct its own analysis of whether compliance with the Mandate should be taken to violate those convictions. In other words, rather than analyzing whether the Mandate puts substantial pressure on Hobby Lobby and Conestoga to abandon their religious opposition to providing the mandated coverage, the Government would have this Court evaluate whether compliance with the Mandate amounts to a substantial violation of their religious beliefs.

This distinction is not without a difference: the former analysis involves an exercise of legal judgment, while the latter analysis involves an inherently religious inquiry. While a court may rule on the legal question of whether the Mandate places substantial pressure on claimants to abandon their opposition to the mandated coverage, whether providing that coverage makes an employer "complicit in a grave moral wrong" is "a question of religious conscience for [Hobby Lobby and Conestoga] to decide." *Korte*, 735 F.3d at 683, 685; *supra* Part II.A. Here, Hobby Lobby's and Conestoga's answer to the latter question must be respected, regardless of whether a court finds it to be "logical, consistent, or comprehensible." *Thomas*, 450 U.S. at 714.[14]

For similar reasons, the claim made by some courts that providing coverage for abortion-inducing drugs and devices is no different from the payment of wages—which can ultimately be used to purchase those drugs and devices—must also be rejected. *See, e.g.*, *O'Brien*, 894 F. Supp. 2d at 1160 (stating that "the contribution to a health care plan has no more than a de minimus [sic] impact on the plaintiff's religious beliefs than paying salaries and other benefits to employees," which they may then use to purchase contraceptives). That "argument requires impermissible line drawing, and [should be] reject[ed] out of hand." *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1296 n.9 (D. Colo. 2012), *aff'd*, No. 12–1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013). The question of whether one action (paying wages that may then be used to purchase abortion-inducing drugs and devices) is morally indistinguishable from another (providing coverage for abortion-inducing drugs and devices) is one for religious authorities and individuals, not the courts. *Hobby Lobby*, 723 F.3d at 1142 ("[T]he question here is not whether the reasonable observer would consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity."). Whether a competing moral analysis stems from a coreligionist or the Government, it is not the business of the judiciary to determine whether claimants "correctly perceive[] the commands of their [own] faith." *Thomas*, 450 U.S. at 716. Indeed, even were the line between salary and health coverage "unreasonable," it would not be for a court to second guess an employer that had drawn that line. *Id.* at 715–16 (refusing to question a line between manufacturing raw material for use in the production of tanks and using that material to fabricate tanks).

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[14] The Government attempts to buttress its argument by analogy to this Court's Establishment Clause jurisprudence. Pet. Br. at 33 (No. 13-354) (citing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)). But the question of whether or not individual choice vitiates government endorsement of religion for purposes of the Constitution says nothing about whether the degrees of separation at issue here vitiate moral responsibility for purposes of claimants' faith.

But in any case, the line here is eminently reasonable. Employees may use their paycheck to procure an abortion, aspirin, apple pie, or anything else. An employee's salary simply belongs to the employee, and the employer has no input into its use. But when an employer purchases coverage for abortion-inducing drugs and devices, it effectively hands its employees a free ticket that can only be redeemed for those drugs or devices. The employer is thus made complicit in the purchase of products to which it objects.[15] In that respect, mandating that employers purchase objectionable coverage for their employees is qualitatively different from leaving it to the employees to use their paychecks as they see fit.

The Government's reliance on this Court's decision in *Bowen v. Roy*, 476 U.S. 693 (1986), is similarly misplaced. That case stands for nothing more than the proposition that an individual cannot challenge an "'activit[y] of [a third party], in which [he] play[ed] *no role*.'" *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) (emphasis added). In *Bowen*, for example, this Court held only that an individual's religious beliefs could not be used "to dictate the conduct of the Government's internal procedures." 476 U.S. at 700. Specifically, the Appellee's religious exercise was not substantially burdened because his objection was to the conduct of a third party; namely, to the government's use of a social security number to administer his daughter's public welfare benefits. *Id.*

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[15] *See* Comments of U.S. Conference of Catholic Bishops at 12 (May 15, 2012) (explaining that the purchase of health benefits is "different" from paying wages because the former is "earmarked" and the latter is not), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/comments-on-advance-notice-of-proposed-rulemaking-on-preventive-services-12-05-15.pdf.

Here, in contrast, the provision of the mandated coverage is not an activity of a third party in which Hobby Lobby and Conestoga play no role. After all, Hobby Lobby's and Conestoga's stated objection is to the requirement that *they themselves* provide coverage for abortion-inducing drugs and devices. *Supra* Part II.A. In other words, Hobby Lobby and Conestoga are being compelled to act in violation of their religious beliefs. This is the epitome of a substantial burden. *Thomas*, 450 U.S. at 717 (stating that the inquiry "begin[s]" with an assessment of whether a law "*compel[s]* a violation of conscience"); *Sherbert*, 374 U.S. at 404 (same); *Yoder*, 406 U.S. at 218 (same). True, they are not "prevented from keeping the Sabbath" or "participating in a religious ritual," *O'Brien*, 894 F. Supp. 2d at 1159, but for purposes of this Court's inquiry, it is *equally improper* to require them to provide the mandated coverage. Again, by its very terms, RFRA protects "*any* exercise of religion." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added).[16]

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[16] If anything, *Bowen* supports Hobby Lobby and Conestoga's position. The Appellee in that case objected not only to the government's use of his daughter's social security number, but also to the *separate* requirement that *he provide* the government with that number in order for her to receive benefits. 476 U.S. at 701–12 (opinion of Burger, C.J.). Though it did not decide the question

It is likewise error to assert that exempting employers from covering religiously-objectionable services would be tantamount to imposing the employers' beliefs on their employees. Pet. Br. at 39 (No. 13-354). The refusal to pay for services that violate one's religion hardly forces one's religious practices upon others. Indeed, this suggestion gets things exactly backwards. Hobby Lobby's and Conestoga's employees remain free to use whatever drugs and devices they want, whether Hobby Lobby and Conestoga pay for them or not. But the Mandate forces Hobby Lobby and Conestoga to pay for the choices of their employees, even though doing so conflicts with their sincerely held religious beliefs.

In fact, RFRA's legislative history confirms that it was enacted precisely to prevent the Government from compelling persons and organizations to provide religiously-objectionable products and services to others—the exact religious exercise at issue in this litigation. For example, Nadine Strossen, then president of the ACLU, testified in support of RFRA, noting that the statute

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(continued...)

due to a dispute over mootness, a majority of the Court would have held that this requirement—which required action on the part of the Appellee—imposed a substantial burden on Appellee's religious exercise. *See id.* at 715–16 (Blackmun, J., concurring in part); *id.* at 724–33 (O'Connor, J., concurring in part, dissenting in part); *id.* at 733 (White, J., dissenting).

safeguarded "such familiar practices" as "permitting religiously sponsored hospitals to decline to provide abortion or contraception services" to others. *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 192 (1992) (statement of Nadine Strossen). Members of Congress made similar statements during debate on the floor. 139 Cong. Rec. 9685 (1993) (statement of Rep. Hoyer) (noting that a "Catholic teaching hospital lost its accreditation for refusing to provide abortion services" to others and that RFRA provides "an opportunity to correct [this] injustice[]"); *id.* at 4660 (statement of Rep. Green) (same). Ultimately, there can be little doubt that RFRA was intended precisely to protect individuals and entities from being forced to facilitate the use of religiously-objectionable products and services by others.

III. THE MANDATE CANNOT SURVIVE STRICT SCRUTINY

As the Mandate substantially burdens Hobby Lobby's and Conestoga's exercise of religion, the "burden is placed squarely on the Government" to demonstrate that the regulation satisfies strict scrutiny. *O Centro*, 546 U.S. at 429–31; 42 U.S.C. § 2000bb-1. And as every court to consider the question in the context of the Mandate has concluded, the Government cannot meet this demanding standard.[17]

A. The Mandate Does Not Further a Compelling Government Interest

Under RFRA, the Government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro*, 546 U.S. at 430–31. "[B]roadly formulated" or "sweeping" interests are inadequate. *Id.* at 431; *Yoder*, 406 U.S. at 221. Rather, the Government must show with "particularity how [even] admittedly strong interest[s]" "would be adversely affected by granting an exemption." *Yoder*, 406 U.S. at 236; *see also O Centro*, 546 U.S. at 431. The Government, therefore, must demonstrate a specific compelling interest in dragooning "the particular claimant[s] whose sincere exercise of religion is being substantially burdened" into serving as the instruments by which its purported goals are advanced. *Id.* at 430–31. This, it has not begun to do.

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[17] *E.g.*, *Korte*, 735 F.3d at 685–87; *Gilardi*, 733 F.3d at 1219–24; *Hobby Lobby*, 723 F.3d at 1143–45; *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0648, 2013 WL 3297498, at *16–18 (M.D. Fla. June 25, 2013); *Geneva Coll. v. Sebelius*, 929 F. Supp. 2d 402, 433–35 (W.D. Pa. 2013); *Monaghan v. Sebelius*, 931 F. Supp. 2d 794, 806–07 (E.D. Mich. 2013); *Triune Health Group, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 12-6756 (N.D. Ill. Jan. 3, 2013) (Doc. No. 50); *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106, 125–29 (D.D.C. 2012); *Newland*, 881 F. Supp. 2d at 1297–98.

When promulgating the Mandate, the Government proffered two generalized interests: (i) "public health" and (ii) "ensuring that women have equal access to health care." 78 Fed. Reg. 39,870, 39,872 (July 2, 2013). "[B]oth interests as articulated by the government are insufficient . . . because they are 'broadly formulated interests justifying the general applicability of government mandates.'" *Hobby Lobby*, 723 F.3d at 1143 (citation omitted). Such "sketchy and highly abstract" interests cannot be "compelling," as it is impossible for the Government to "demonstrate a nexus" between those interests and applying the Mandate to these particular claimants. *Gilardi*, 733 F.3d at 1220. In short, "[b]y stating the public interests so generally, the government guarantees that the mandate will flunk the test." *Korte*, 735 F.3d at 686.

Moreover, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal citation omitted); *see also O Centro*, 546 U.S. at 433. Here, the Government cannot claim an interest of the "highest order" because the Mandate exempts millions of employees—through "grandfathering" provisions, the narrow exemption for "religious employers," and the enforcement exceptions for small employers. *Korte*, 735 F.3d at 686. Simply put, "the interest here cannot be compelling because the contraceptive-coverage requirement presently does not apply to tens of millions of people." *Hobby Lobby*, 723 F.3d at 1143; *Gilardi*, 733 F.3d at 1222–23.

The Government's interest also cannot be compelling because, at best, the Mandate would only "[f]ill" a "modest gap" in contraceptive coverage. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 (2011). The Government acknowledges that contraceptives are widely available at free and reduced cost and are covered by "over 85 percent of employer-sponsored health insurance plans." 75 Fed. Reg. 41,726, 41,732 (July 19, 2010). In such circumstances, the Government cannot claim to have "identif[ied] an actual problem in need of solving." *Brown*, 131 S. Ct. at 2738 (internal quotation marks and citation omitted). As this Court has observed, the Government "does not have a compelling interest in each marginal percentage point by which its goals are advanced." *Id.* at 2741 n.9.

Finally, under RFRA, the Government must identify an "actual problem" in need of solving with respect to the particular claimants filing suit, not among the general population. *Supra* pp. 33–34. The Government has not begun to meet this burden, relying instead on the broad proposition that "lack of access to contraceptive services has proven in many cases to have serious negative health consequences for women and newborn children." 78 Fed. Reg. at 39,887. In the first place, according to the D.C. Circuit, "the science [behind that claim] is debatable and may actually undermine the government's cause." *Gilardi*, 733 F.3d at 1221. And, to say that lack of access to contraception can have negative health implications does not establish a significant lack of access among Hobby Lobby's and Conestoga's employees or that the Mandate would significantly increase contraception use or decrease unintended pregnancies among those employees. [18] The Government provides no evidence on these points and thus cannot show that enforcing the Mandate against objecting organizations is "actually necessary" to achieve its aims. *Brown*, 131 S. Ct. at 2738.

B. The Mandate Is Not the Least Restrictive Means of Furthering the Government's Asserted Interests

Under RFRA, the Government must also show that the regulation "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Under that test, "if there are other, reasonable ways to achieve those [interests] with a lesser burden on constitutionally protected activity, [the Government] may not choose the way of greater interference. If it acts at all, it must choose less drastic means." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). A statute or regulation is the least restrictive means if "no alternative forms of regulation would [accomplish the compelling interest] without infringing [religious exercise] rights.'" *Sherbert*, 374 U.S. at 407. To meet its burden, the Government must engage in a "serious, good faith consideration of workable . . . alternatives." *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (citation omitted).

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[18] In fact, recent scholarship suggests otherwise. Helen M. Alvare, *No Compelling Interest: The "Birth Control" Mandate and Religious Freedom*, 58 Vill. L. Rev. 379, 396–411, 425–30 (2013).

Once again, every court to have considered the question has concluded that "there are viable[, less restrictive,] alternatives . . . that would achieve the substantive goals of the mandate." *Gilardi*, 733 F.3d at 1222; *see also Korte*, 735 F.3d at 686–87; *Hobby Lobby*, 723 F.3d at 1144.[19] Indeed, "[t]here are many ways to promote public health and gender equality, almost all of them less burdensome on religious liberty" than forcing religious objectors to provide the mandated coverage in violation of their sincere beliefs. *Korte*, 735 F.3d at 686. These include the same alternatives Hobby Lobby and Conestoga proposed here: "The government can provide a 'public option' for contraception insurance; it can give tax incentives to contraception suppliers to provide these medications and services at no cost to consumers; it can give tax incentives to consumers of contraception . . . services." *Id.*; *Gilardi*, 733 F.3d at 1222 (same). While the Conference in no way recommends these alternatives, and may oppose them as a matter of policy, the mere fact that they remain available to the Government shows that the Mandate cannot survive RFRA's narrow-tailoring requirement. In light of these alternatives, there is no justification for forcing Hobby Lobby and Conestoga to violate their religious beliefs.

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[19] *E.g.*, *Beckwith*, 2013 WL 3297498, at *18 n.16; *Monaghan*, 931 F. Supp. 2d at 808.

CONCLUSION

At bottom, the Government's argument that the Mandate does not substantially burden the religious exercise of Hobby Lobby and Conestoga reflects a misunderstanding of the religious objection at issue. Hobby Lobby and Conestoga object not only to the use of abortion-inducing drugs and devices, but also to taking actions themselves that facilitate or promote their use. *Hobby Lobby*, 723 F.3d at 1140. This concept of responsibility for facilitating an immoral act committed by another is not unique to religious believers. Just as an individual may be held accountable for aiding and abetting a crime he did not personally commit, 18 U.S.C. § 2, so too may an individual violate the moral law if in certain circumstances he or she cooperates in or promotes the commission by others of acts contrary to their beliefs. As Judge Gorsuch explained,

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others. For some, religion provides an essential source of guidance both about what constitutes wrongful conduct and the degree to which those who assist others in committing

> wrongful conduct themselves bear moral culpability.

Hobby Lobby, 723 F.3d at 1152 (Gorsuch, J., concurring). Hobby Lobby and Conestoga "are among those who seek guidance from their faith on these questions," *id.*, and their faith has led them to the firm and sincere conclusion that the actions required of them by the Mandate cross the "line" between permissible and impermissible facilitation of wrongful conduct, *Thomas*, 450 U.S. at 715. For the reasons described above, that line is indisputably theirs to draw, and it is not for this Court or the Government to question. *Id.* By placing substantial pressure on Hobby Lobby and Conestoga to cross this line, primarily in the form of crushing fines, the Government has substantially burdened their exercise of religion.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

Nos. 13-354; 13-356

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IN THE
Supreme Court of the United States

SEBELIUS, SECRETARY OF HEALTH
& HUMAN SERVICES, *et al.*,
Petitioners,
v.
HOBBY LOBBY STORES, INC., *et al.*,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., *et al.*,
Petitioners.
v.
SEBELIUS, SECRETARY OF HEALTH
& HUMAN SERVICES, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND THIRD CIRCUITS

BRIEF *AMICUS CURIAE* OF WESTMINSTER THEOLOGICAL SEMINARY IN SUPPORT OF HOBBY LOBBY AND CONESTOGA WOOD SPECIALTIES CORP.

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QUESTIONS PRESENTED

Do Hobby Lobby and Conestoga have free exercise rights that are protected under the Religious Freedom Restoration Act?

Does the regulatory Mandate promulgated by the Departments of Health & Human Services, Labor and Treasury that requires non-exempted employers to take action to provide their employees cost-free access to abortifacient drugs and devices contravene such employers' right to free exercise under the Religious Freedom Restoration Act when such employers oppose providing that access on the basis of their undisputed good faith religious convictions?

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INTEREST OF THE *AMICUS*[1]

Westminster Theological Seminary ("Westminster") is an exclusively graduate level Christian seminary in the Reformed tradition. It is opposed on the basis of its religious faith to taking any action to make abortifacients available to its employees, but, because it is neither a church nor an integrated auxiliary of a church, it is obligated to do so by the Mandate imposed by the regulatory Final Rule[2] to which Hobby Lobby and Conestoga also object. Westminster has brought its own legal challenge in the United States District Court for the Southern District of Texas, Houston Division seeking protection from enforcement of the Mandate against it on the basis of the same statute and constitutional provisions that have been raised by the for profit employers in these matters.[3]

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus, or its counsel, made a monetary contribution intended to fund its preparation or submission. All of the parties, other than Hobby Lobby Stores, Inc., have filed blanket waivers with the Court consenting to the submission of all amicus briefs. The consent of Hobby Lobby Stores, Inc. is submitted herewith.

2. 45 C.F.R. 147.130(A)(1)(IV) (HHS); 29 C.F.R. 2590.715-2713(A)(1)(IV) (Labor); 26 C.F.R. 54.9815-2713(A)(1)(IV) (Treasury) (collectively, the "Final Rule").

3. On December 27, 2013, that Court granted Westminster's motion for summary judgment on RFRA grounds and enjoined the government defendants from enforcing the Mandate against Westminster or its insurers. Case 4:12-cv-03009 Documents 133 and 134.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Westminster submits this *Amicus Curiae* Brief (a) in support of religious liberty, (b) in opposition to the intrusion on such liberty imposed by the Final Rule's requirement that Westminster, as well as Hobby Lobby and Conestoga, take action to provide their employees cost-free access to abortifacient drugs and devices (the "Mandate"), (c) in support of Hobby Lobby's and Conestoga's assertion of free exercise rights under the Religious Freedom Restoration Act ("RFRA") and (d) in support of the relief Hobby Lobby and Conestoga are seeking.

This Brief is in three basic parts. It first describes Westminster Theological Seminary and how it compares to Hobby Lobby and Conestoga, and then addresses (a) Hobby Lobby's and Conestoga's rights to be protected under RFRA and (b) the three key elements under RFRA[4] as they bear on whether the Mandate should be enforced against Hobby Lobby, Conestoga or Westminster.

Westminster Theological Seminary

Westminster is an exclusively graduate level Christian theological seminary in the Reformed tradition. It was founded in 1929 by a nucleus of theretofore faculty members of Princeton Theological Seminary when Princeton Seminary veered from its historical commitment to orthodox Reformed theology toward a more liberal doctrinal orientation. Ever since that year, Westminster's mission has been to carry forward the legacy of what has come to be known as "Old Princeton," a legacy devoted to preparing ministers of the Word grounded in a commitment to the inerrancy and authority of the Bible as the Word of God and to the Westminster Confession of Faith and its Larger and Shorter Catechisms as accurately reflecting the system of doctrine to be found in Scripture.

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[4] Whether the Mandate (1) substantially burdens religious exercise; (2) furthers a compelling governmental objective; and (3) is the least restrictive means of furthering the compelling interest. 42 U.S.C. § 2000bb–1.

A key element of Westminster's legacy and mission is that every human life is created in God's image and is impressed with that image at the moment of conception. Grounded in that understanding, Westminster also believes that taking a human life is an assault on God's image and thus on God, Himself. Westminster therefore opposes abortion and opposes the drugs and devices that are known to have abortifacient effect that the Final Rule now mandates be covered in whatever health plan Westminster provides to its employees. Westminster does not oppose all contraceptives, but it does oppose drugs and devices that prevent implantation of a fertilized human egg into the mother's uterine wall. In short, Westminster's theological conviction on this point is the same as that held by Hobby Lobby and Conestoga.

Moreover, Hobby Lobby and Conestoga illustrate the living out of faith that Westminster endeavors to inculcate. According to Westminster's theology, the church is not a building. It is the people of God, trusting and depending on Him in life and striving to honor Him by living lives of worshipful service and by obeying His commands. In

Westminster's view, the religiously grounded policies that impel Hobby Lobby and Conestoga to conduct their businesses in the God-fearing, Christ-honoring way they do is just the kind of heavenly citizenship, functioning on this side of heaven, that Westminster seeks to equip leaders of the church to promote.[5] As Westminster sees it, operating businesses in obedience to religious principles, as Hobby Lobby and Conestoga plainly do, is religious exercise in its fullest sense. Indeed, according to the Bible, work is to be performed not just to be paid, but to be in service to the Lord.[6]

Westminster differs structurally and functionally from Hobby Lobby and Conestoga in that Westminster is an educational, non-profit institution, indeed an institution that is devoted entirely to preparing students to serve Christian churches and their related ministries, primarily churches in the Reformed tradition, as ministers, teachers and counselors. Westminster operates a Christian book store, but it otherwise sells no products. It offers an entirely theological education to those pursuing God's call on their lives to serve His church and who meet Westminster's exacting academic and character standards. But Westminster sees itself in Christian brotherhood with Hobby Lobby and Conestoga, committed in the same way to the sanctity of life, to understanding work as an aspect of worship and in being opposed in the same way to the government's attempt to force them to betray the Christian faith that so marks their operations.

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[5] 5. It is plain that religious principles suffuse the whole of Hobby Lobby's and Conestoga's business operations, not just their support for the sanctity of life and their opposition to being forced to facilitate its destruction.

[6] 6. Col. 3:23-24 -- "Whatever you do, work heartily, as for the Lord and not for men ... You are serving the Lord Christ."

ARGUMENT

I. The Government's Challenge to Hobby Lobby's and Conestoga's Rights to RFRA's Protections is Incongruous

The government raises the issue of whether for-profit corporations can have free exercise rights that are protected by RFRA. In Westminster's view, there are four points of incongruity in the government's contention that they cannot, any of which should be fatal to the government's position.

A. The Final Rule's Exemption for Churches is not Tailored to Protecting Religious Exercise

The first point of incongruity arises from within the Final Rule that mandates that Hobby Lobby and Conestoga act contrary to their religious convictions by providing cost-free abortifacients to their employees. The Final Rule exempts churches and their integrated auxiliaries from the challenged Mandate.[7] Inherent in exempting "Religious employers" ("churches" and their "integrated auxiliaries")[8] is clearly a nod toward protecting religiously grounded objections to providing all or some contraceptives. In other words, the driving assumption for the exemption is that forcing the exempted parties to comply with the Mandate would derogate their First Amendment and RFRA rights by requiring them to violate their faith convictions.[9] But, despite what the government claims is the reason for the exemption, the exemption, itself, does not accommodate any faith convictions, much less address whether complying with the Mandate would violate any such convictions.[10] The exempted parties are

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[7] 45 C.F.R. 147.131(A) ("Religious employers. In issuing guidelines under Sec. 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a ``religious employer'' is an

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organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended."). http://www.hrsa.gov/womensguidelines/ ("Effective August 1, 2013, a religious employer is defined as an employer that is organized and operates as a non-profit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code. HRSA notes that, as of August 1, 2013, group health plans established or maintained by religious employers (and group health insurance coverage provided in connection with such plans) are exempt from the requirement to cover contraceptive services under section 2713 of the Public Health Service Act, as incorporated into the Employee Retirement Income Security Act and the Internal Revenue Code.")

[8] Per the definitions in section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code as they are referenced in the Final Rule.

[9] This intention is further confirmed by the terms of the Final Rule's "accommodation" for non-church religious organizations if they self-certify that they object on religious grounds to providing abortion-causing drugs and devices.

[10] As developed hereinafter, there are churches, even whole denominations, that are exempt from the Mandate but that do not oppose abortion or abortifacients.

exempted only and entirely on the basis that they (a) are organized as a particular type of entity with respect to income taxes and (b) operate as churches. They are not exempted because of any particular faith convictions they may hold and certainly not because they are opposed to abortions or abortion-causing drugs. In other words, the contours of the exemption do not relate to the purpose the exemption purportedly serves.

By contrast, the government does not contest that Hobby Lobby and Conestoga hold faith convictions that they would violate by complying with the Mandate, but they are not exempt, and the reason they are not exempt is because they (a) are distinct from their individual owners, (b) pay federal income taxes and (c) do not operate within the definition of churches under the Internal Revenue Code. Therefore, it is incongruous in the extreme that the Final Rule would exempt churches, simply because they are entities that are organized and operate in one way, but would deny Hobby Lobby and Conestoga exemption precisely because they are organized and operate in a different way, all with no regard to whether the Final Rule offends their faith convictions or not.[11] In neither granting the exemption in the one instance nor denying the exemption in the other instance, does the Final Rule accommodate any entity's religious convictions.

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[11] Moreover, the distinction between non-profit and for profit entities arose more than a century after the Bill of Rights and should, therefore, not ground any discrimination under the First Amendment. http://www.irs.gov/pub/irs-soi/tehistory.pdf.

B. The Government's Position is Inconsistent as Between Free Exercise and Establishment Rights

The second point of incongruity in the government's position that Hobby Lobby and Conestoga have no religious liberty rights arises from the interplay within the First Amendment between the Free Exercise and Establishment Clauses. This Court has frequently found violations of the Establishment Clause by state action that displayed religious preference over the views of organizations as well as individuals. In other words, under the Establishment Clause, organizations are as entitled to seek protection from alleged violations as are individuals, and they are entitled to it without regard to whether they are churches or integrated auxiliaries of churches.[12] Yet, when it comes to the Free Exercise Clause of the same First Amendment, the government would have it that only individuals (and organized churches) may seek protection under its provision. To Westminster, it would hardly seem possible that non-church organizations could have the right to protection under one clause of the First Amendment, but not another. That should especially be so as to Hobby Lobby and Conestoga, which, although not churches in the traditional, organizational sense, exercise their religious faith in the way they function, including how they go about making a living, precisely where the

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[12] *McGowan v. Maryland*, 366 U.S. 420, 443 (U.S. 1961) ("Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious **organizations or groups** and ***vice versa***. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"). (bold emphasis added; italicized emphasis in original).

Christian faith is to be the most manifest and to have its most consequential effect. Those for-profit entities, along with many others, are exercising religious faith in the most basic and fundamental way it can be exercised, not hidden away within cloistered walls, in communication only with people who are like-minded, but openly, into the world, shining the light of faith as Christ commanded all Christians to do, as a beacon on a hill, for all to see, not hidden behind a bushel. Jesus said to His followers, "You are the light of the world. . . . Let your light shine before men in such a way that they may see your good works, and glorify your Father who is in heaven."[13] Hobby Lobby and Conestoga are "work[ing]" in just the way Christ commanded, for "the world" to "see" those "good works" and so glorify God. That is exercise of religion. Unless it is free, it cannot be exercise at all.

C. The Government's Position Invades and Assesses Religious Belief

The government's arch-argument for denying RFRA protection to for-profit corporations is misplaced; it even turns on a governmental assessment of religious beliefs that, itself, violates religious liberty. The government purports to deny Hobby Lobby and Conestoga any protection under RFRA because, in the eyes of the law, as corporations, they are separate persons from their owners. And they are separate regarding civil liability. Indeed, the primary rationale for doing business in corporate form is to limit the businesses' owners' liability to the amount of their capital investment in their business. But there is nothing about that arrangement that prevents the owners from operating those businesses according to whatever those owners' value systems, including their religious convictions, may be. In fact, for Christians, how they operate their businesses is an expression of their religious worship.

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[13] Matt. 5:14-16.

The Great Commandment to Christians is to "love the Lord your God with all your heart and with all your soul and with all your mind and with all your strength.[14] "Strength" there implicates work. Moreover, servants [here analogous to Hobby Lobby and Conestoga] are commanded to work for their masters [here analogous to their owners] "with sincerety of heart as you would obey Christ."[15] The point is that for the government to separate Christian owners from their work in terms of what in the government's view constitutes "religious exercise" as protected by RFRA, constitutes an invasion and assessment of the content of religious belief that it is well established government may not do.[16] RFRA broadly defines "religious exercise" to "include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'"[17] Hobby Lobby's and Conestoga's operations of their businesses according to their religiously guided policies is, according to their and their owners' Christian faith, an exercise of religion. For the government to contend that a Christian's work is not religious exercise necessarily invades the validity of that faith conviction.[18] In short, it is a far leap, even an impermissible leap, for government to deny protected religious liberty based on how business owners limit their civil liability.[19]

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[14] Mark 12:30. See also, Matt. 22:37 and Luke 10:27. This commandment is not limited to Christians. It also appears in the Old Testament. Deut. 6:5.

[15] Eph. 6:5. See also, Col. 3:22 and 1 Pet. 2:18.

[16] *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) ("[T]he statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'")(internal citations omitted).

[17] 42 U.S.C. § 2000bb-2(4), *as amended by* 42 U.S.C. § 2000cc-5(7)(A); *see also Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004).

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[18] For example, Westminster is committed to the Westminster Confession of Faith and its Larger and Shorter Catechisms as accurately expressing the system of doctrine provided by Scripture. Chapter XIX of the Confession of Faith provides that the law of God is "a rule of life informing them of the will of God, and their duty, it directs and binds them to walk accordingly." "Walk[ing]" according to God's moral law includes what is done in work. Moreover, according to Chapters XIX and XX, those who act contrary to God's law are subject to discipline by church government. In this instance, that means the owners of Hobby Lobby and Conestoga are exposed to discipline by their churches for what is done by their businesses.

[19] The government's argument is also flawed from a secular perspective. There are different kinds of for-profit entities, and the different kinds harbor different degrees of separation from their owners. "C" corporations pay taxes separately from their owners. "S" corporations and limited liability companies do not. Limited liability companies do not even have owners. They have members, and the members directly manage the companies. To accept the government's "separation" argument for denying religious liberty protection to Hobby Lobby and Conestoga would invite hinging religious liberty on distinctions in corporate forms that would seem to have little relevance to the point in issue. Moreover, the "separation" point applies equally to religious entities that are organized as corporations. Some of them are exempted from the force of the Mandate. Westminster, itself, is a corporation. The "separation" point must fail. The only practical difference

D. The Government's Position Impermissibly Shrinks RFRA's Scope

Hobby Lobby and Conestoga are citizens who should enjoy the Constitution's guarantees of liberty, including that of freely living out their faith, and Westminster submits they are entitled to protection from the Mandate by the provisions of RFRA. Since much of the life of this Country is lived out through corporate activities, if Hobby Lobby and Conestoga are denied religious liberty protection in these cases, it will substantially diminish the salutary role the Founders envisioned free exercise would have, and that it currently does have, in the life of this Nation.

Not only would a founding thread of this Nation be impaired if for-profit corporations were denied protection of religious liberty here, the idea that the government would sacrifice that seminal thread not simply to enable women to abort their possible pregnancies without cost, but to coerce religiously committed employers to encourage their employees to abort their pregnancies by providing cost-free ways to do so, is unthinkable to Westminster.

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between Hobby Lobby and Conestoga and "religious" corporations is that Hobby Lobby and Conestoga pay federal income taxes. That is a mark of citizenship. It should not be disqualifying from constitutional and statutory protections.

II. The Mandate Substantially Burdens Religious Excercise

On pain of fines and penalties that would destroy Westminster if imposed, save only the recent injunction that protects it, the Mandate would require Westminster, along with Hobby Lobby and Conestoga, to take action to provide its employees cost-free access to abortifacient drugs and devices – means of destroying human life. It is action that would violate Westminster's core faith convictions.

Westminster is constrained to note at the outset on this point that it is stunned the federal government would be so determined to induce women to terminate their possible pregnancies that it would endeavor to force Hobby Lobby and Conestoga, as well as Westminster, to participate in that scheme with respect to their employees. Hobby Lobby's and Conestoga's ability to operate their businesses as they do, as well as Westminster's ability to teach as it does, depends on their constitutional (and RFRA) guarantees of religious liberty. The sanctity of life is at the heart of what Westminster stands for. Westminster believes that the second Person of the triune God took on human nature and lived as a man in perfect obedience to the Father and died sacrificially that humans could have life and have it abundantly and eternally. The government, the guarantor of Westminster's freedom to believe, and live out its belief, that every life is sacred, now means to coerce Westminster into opposing life. Two businesses now before this Court, as well as many others for whom they stand, function at the high level of citizenship they do because their policies are Christ-centered. That is what drives them to the high ethical standards they keep.

It is what impels them to respect their customers and employees regardless of their gender, their race or their station in society. It is virtually incomprehensible and deeply concerning to Westminster to see the government, whose citizenry is being so well served by the way these companies conduct their business, and, in Westminster's view, by the way it, itself, labors to prepare its students for their service to the Lord, coercing these companies and Westminster to betray the faith convictions that cause them to be what they are and to do what they do. The coercion at this point is also concerning to Westminster as a portent of what further encroachment on religious liberty may yet be in store.

This Honorable Court has previously concluded that the Constitution carries a penumbra that harbors a right of privacy that gives women the constitutional prerogative to terminate their pregnancies. Westminster has always disagreed with that conclusion, but it has also always been free to voice its opposition to that conclusion. It has never been forced to support that conclusion. Now, though, the Mandate brings a new dimension for Westminster, a dimension that coerces Westminster to act against its religious convictions. And the coercion is extreme. It entails an avalanche of fines and penalties so severe that, if they are levied on Westminster, would cause Westminster, itself, to die. That is far different from granting individual women the prerogative to terminate their pregnancies. If this Court rejects the protective relief Hobby Lobby and Conestoga are seeking, it would not be a holding that enables liberty. It would be a holding that denies liberty. And not only that, it would be a holding that would contribute to the coercion on those entities (and Westminster) to participate in the government's effort to terminate human lives and thereby betray their devotion to the Lord of life.

Save only the injunction recently entered, the Mandate places Westminster in a position reminiscent of Polycarp, a second century bishop in the Christian church who was charged by the Roman government with the criminal offense of being a Christian but who was offered a reprieve if he would only utter two words: "Caesar Kurios" – "Caesar is Lord." Understanding that saying those words would violate his faith, and by virtue of his leadership position in the church would undermine the church, Polycarp refused to say those words, and the Roman government burned him at the stake. So it is with Westminster. Its government is attempting to require it to act contrary to its faith convictions and, by virtue of its position of leadership in service to the Christian church, to undermine its faithfulness to the church it is dedicated to serve. If Westminster does not comply, the government threatens to destroy it. Coercion on Westminster to violate the integrity of its faith is burden enough. The threat of its destruction only makes it worse. The burden the Mandate imposes on Westminster could hardly be more substantial. Possibly varying only in degree, the same is true for Hobby Lobby and Conestoga.

III. The Mandate Does Not Further Any Legitimate Governmental Objective

Having imposed a substantial burden on Westminster's (and Hobby Lobby and Conestoga's) religious exercise, the federal government is required under RFRA to demonstrate that imposing that burden is the least restrictive means by which the government can further valid, even compelling, governmental objectives. The government has asserted that it means for the Mandate to serve two objectives: (1) to promote the health of women and (2) to promote gender equality.[20] Leaving aside for the moment whether either of those is a valid governmental objective, it appears to Westminster that the Mandate does not and cannot further either of those objectives.

A. The Mandate Does Not Promote Women's Health

As for women's health, the government does not suggest that abortifacients protect women from any health risk of pregnancy. All abortifacients do is avoid or terminate pregnancies. Pregnancies carry health risks, but pregnancies, themselves, are not diseases. They are not maladies. They are rather at the fulcrum of perpetuating life. The government certainly knows this and so asserts a more narrow contention. The government's notion of how the Mandate promotes women's health arises from the purported observation that some women who have carried unwanted pregnancies have engaged in self-destructive behaviors that the government relates to their not wanting their pregnancies.[21] Therefore, as the government's argument goes, the Mandate promotes women's health because making abortifacients cost-free will enable women who want to be sexually active but do not want to be pregnant will avoid the risks of self-destructive behaviors by stopping pregnancies that may later contribute to their engaging in such behaviors. The motivation to use the abortifacients, however, would be to avoid pregnancy. That is what abortifacients do. But pregnancies, themselves, are not, themselves, a health problem, and are certainly not the health problem the government purports to identify. The health problem consists rather in the self-destructive behaviors the government says have been known to attend unwanted pregnancies. The motivation by those using abortifacients is to avoid pregnancy, not to avoid their own supposed, possible, subsequent self-destructive behaviors that might attend an unwanted pregnancy. Therefore, by contending that using abortifacients will guard against the adverse health effects of self-destructive behaviors by avoiding pregnancy, the government, in effect, is purporting to protect women's health without their knowing it.

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[20] 45 CFR Parts 147 and 156 [CMS-9968-F] RIN 0938-AR42 ("[T]he contraceptive coverage requirement serves two compelling governmental interests. The contraceptive coverage requirement furthers the government's compelling interest in safeguarding public health by expanding access to and utilization of recommended preventive services for women. ... The government also has a compelling interest in assuring that women have equal access to health care services.").

[21] 45 CFR Parts 147 and 156 [CMS-9968-F] RIN 0938-AR42 ("As documented in the IOM report, 'Clinical Preventive

The government's argument is a stretch, even at that point, but there is more. For the Mandate to have any chance of furthering the government's objectives, women who have been sexually active and think they might be pregnant but do not want to be, must actually use the abortifacients. The Mandate, however, does not require anyone to actually use them. What the Mandate requires

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Services for Women: Closing the Gaps,' women experiencing an unintended pregnancy may not immediately be aware that they are pregnant, and thus delay prenatal care. They also may be less motivated to cease behaviors during pregnancy, such as smoking and consumption of alcohol, that pose pregnancy-related risks.").

is that employers provide health plans to their employees that make abortifacients available to those employees on a cost-free basis.

But all of these abortifacients are already readily available. They are on drug store shelves everywhere. Any woman (or girl) who wants to use one of them can easily do so. Therefore, if the Mandate is to further the government's purported objectives, it must be that making the abortifacients available without cost is the factor that actually induces women who have been sexually active and think they may be pregnant, but do not want to be, to go to a store and acquire one of the abortifacients and use it, when they would not have taken that action if those products came with a cost. At that point, the government's contention becomes one of sheer speculation. And sheer speculation cannot suffice for what RFRA requires the government to demonstrate.

The category of women whom the government contends the Mandate will induce to use abortifacients because they are cost-free when they otherwise would not consists of women who have been sexually active and who do not want to be pregnant but who have not availed themselves of any of the other widely available means of contraception. But if it is the cost-free aspect that would induce women to use abortifacients when at a cost they would not, then the same expectation would attach to women's use of other contraceptives – that is, the cost-free aspect of other contraceptives would prompt women to use those contraceptives. Yet it usually only makes sense to use abortifacients if women have not used some other form of contraception. It is improbable, to say the least, that if contraceptives are all made available without cost, as the Final Rule requires, women who want to be sexually active but not be pregnant would not be induced by that cost-free aspect to use one form of contraception but then would be induced by that same cost-free aspect to use an abortifacient. That is nonsensical. There is self-evidently very little reason, if any, to expect the cost-free aspect of abortifacients to cause the targeted category of women to use them when those women would have already demonstrated that the cost-free aspect of other forms of contraception did not induce them to use any of those other such forms.

If anything, women who have not used a previous form of contraceptive, but who have been sexually active and think they may be pregnant but do not want to be – the so-called "emergency" situation – and who want to resort to an abortifacient to escape that emergency, would not be deterred from doing so by some level of monetary cost. That is especially so for women affected by the Mandate, because the Mandate is addressed to employers and, as a result, all of the women affected necessarily have paying jobs. Therefore, in all likelihood, any woman affected by the Mandate who finds herself in the "emergency" of possibly being pregnant and not wanting to be, and who wants to use an abortifacient to address her emergency, will not forego using it because of its cost. In short, the Mandate to provide cost-free abortifacients has not been shown, and almost certainly cannot be shown in actuality, to further the objective of protecting women from engaging in self-destructive behaviors that are purportedly sometimes associated with unwanted pregnancies. The chain of assumptions on which the government relies is no better than highly speculative. At a realistic level it would appear to defy human nature.

B. The Mandate Does Not Promote Gender Equality

The same infirmity that impeaches the government's argument for the health of women also impeaches its argument for gender equality. If the cost-free aspect of abortifacients cannot reasonably be expected to prompt women to use them for supposed health reasons, it can no more be expected to prompt women to use them for gender equality reasons. But beyond that, government has no valid objective to promote gender equality in the broad terms it describes as a reason to require employers to make abortifacients available cost free to their employees.

What government can legitimately do for the sake of equalizing between citizen classifications must be narrowly tailored to address their "legal rights," not some broad social dynamic.[22] This principle applies to governmental efforts at gender equality.[23] And, within its legitimate sphere of protecting pregnant women from discrimination, the government has already acted by enacting The Pregnancy Discrimination Act of 1978.[24] As its name connotes, that statute recognizes that pregnancy is a gender distinctive, and the statute operates not to eliminate pregnancy's gender distinctiveness but to prohibit discrimination related to it.[25] The Mandate, however, does not note, or guard against, any discrimination against women because they are or may be pregnant. The Mandate rather skates past any threat of discrimination to remove the inherent gender difference between men and women when it comes to pregnancy – by

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[22] *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-309 (1978) ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating ***where feasible***, the disabling effects ***of identified discrimination***. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by ***specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past***. We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative ***findings of constitutional or statutory violations***. See, *e. g.*, *Teamsters* v. *United States*, 431 U.S. 324, 367-376, 97 S. Ct. 1843 (1977); *United Jewish Organizations*, 430 U.S., at 155-156, 97 S.

Ct. 996 (1977); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308, 86 S. Ct. 803 (1966). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since ***the legal rights of the victims must be vindicated***. ... ***Without such findings of constitutional or statutory violations***, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another."). (emphasis added).

[23] *Califano v. Webster*, 430 U.S. 313, 317 (1977) ("[W]e have rejected attempts to justify gender classifications as compensation for past discrimination against women ... when the statutory structure and its legislative history revealed that the classification was not enacted as compensation for past discrimination.").

[24] 42 U.S.C. § 2000e (k) (providing in pertinent part: "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment--related purposes ....").

[25] Racial differences are similar, and the federal government has acted similarly regarding them, not by purporting to eliminate the differences between races, but to prohibit discrimination related to those differences.

providing a cost free means of removing pregnancy, itself. Government may legitimately pursue the former. It may not legitimately pursue the latter.[26]

By contending that the Mandate supports a governmental stake in gender equality is to flip the whole principle of protecting women from discrimination on its head. The Mandate does not purport to protect women from discrimination based on their being women or based on their being pregnant. What it purports to do is to provide women a cost free way to avoid exercising an aspect of their womanhood - their unique capacity to bear children. Promoting gender equality in that way does not, and cannot, legitimize the Mandate.

But beyond that, abortifacient use can never achieve gender equality when it comes to pregnancy avoidance. Abortifacients can terminate an existing pregnancy. There is nothing a man can ingest that will terminate a pregnancy. In short, the whole idea that government can create gender equality by making abortifacients available to women, with or without cost, is fantastical. It is simply an impossible pursuit for government.

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[26] The government cites *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) to justify its version of gender equality as a compelling governmental interest under the Mandate. In that case the Court addressed a Minnesota statute that prohibited the Jaycees from a rule of all male membership on the basis that the rule "deprive[d] persons of their individual dignity and denie[d] society the benefits of wide participation in political, economic, and cultural life." As the Court stated, the point was to redress a "stigmatizing injury, and the denial of equal opportunities that accompanies it" when women "suffer[] discrimination on the basis of their sex." The point was to ***protect women from discrimination*** based on their gender, including all the fullness of what their gender entails, ***not*** to promote women's ability ***to avoid discrimination*** by removing an aspect of that fullness such as their ability to bear children.

But even if the government could demonstrate that the Mandate actually furthers a legitimate governmental objective, RFRA requires the government also to demonstrate that the Mandate is the way that (a) will least restrict Westminster's (and Hobby Lobby's and Conestoga's) religious exercise and (b) will induce women (i) who have been sexually active and think they may be pregnant but do not want to be (ii) to use abortifacients (iii) because they are cost-free (iv) when otherwise they would not. It is clearly not the least restrictive way.

IV. The Mandate is Not the Least Restrictive Means to Further the Government's Stated Objectives

All churches and their integrated auxiliaries are exempt from the Mandate. None of their employees will have cost-free access to abortifacients via government coercion of their employers to provide it. Therefore, if the Mandate is to be sustained, it must be that removing all employees of all organized churches and their integrated auxiliaries from the Mandate's reach, without regard to whether their employers have a religious objection to providing cost-free abortifacients to those employees, is consistent with the Mandate's furthering the government's objectives. But if it is, it is difficult to see why coercing religious employers who are not structurally part of a traditional form of church, and therefore are not exempt, would be vital to furthering those objectives.[27]

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27. The Final Rule also offers what it calls an "accommodation" to "eligible employers" – non-profit employers who provide a "self-certification" of their qualifications to be spared the Mandate's

Moreover, churches and their integrated auxiliaries have supposedly been exempted to protect their free exercise of religion.[28] But when it comes to belief in the sanctity of life, no church could hold that belief more dear than Westminster, Hobby Lobby and Conestoga indisputably do. If anything, Westminster (and Hobby Lobby and Conestoga) have a far more discernable aversion to abortifacients than do churches, at least measured against the sole criterion that they are churches.

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force, mainly by stating that they oppose abortifacients on religious grounds. It is a perverted scheme, because by the very act of self-certifying to a religious objection to abortifacients, such employers actually cause abortifacients to be provided to their employees on the cost-free terms the Mandate requires. In the Final Rule's own terms, such self-certification "***complies*** . . . with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage." 26 CFR §54.9815-2713A (emphasis added). The perversion further underscores the irrationality of the Final Rule's supposedly religiously deferential classifications. It "accommodates" only superficially. In reality, it "accommodates" nothing. But, if it is perceived as a real accommodation, it further reveals that protecting religiously objecting employers from the Mandate is consistent with furthering the government's professed objectives, so classifying Hobby Lobby and Conestoga differently and denying them that protection, despite their religious objections, is not rationally consistent with furthering those objectives.

[28] "[T]he regulations advance [the government's stated] interests in a narrowly tailored fashion that protects certain nonprofit religious organizations with religious objections to providing contraceptive coverage from having to contract, arrange, pay, or refer for such coverage." 45 CFR Parts 147 and 156 [CMS-9968-F].

It is well known that many institutional churches have little, if any, opposition to abortion. Indeed, Presbyterianism provides a clear example. In 1929, Princeton Theological Seminary was a Presbyterian denominational seminary. It was governed by what was then the United Presbyterian Church in the United States of America, which has since merged with the former Presbyterian Church in the United States to constitute the now Presbyterian Church (USA) ("PCUSA"). As an outgrowth of the turn for liberalism Princeton Theological Seminary made in 1929 that triggered Westminster's founding, the PCUSA is today very tolerant of abortion.[29] The Unitarian church is as well.[30] And there are others. Yet, the Final Rule exempts all churches within those denominations, not because they have any doctrinal aversion to abortifacients (they have none), but simply because they are churches in a structural sense. Therefore, by exempting churches who do not oppose abortifacients, but refusing to exempt Westminster, an institution that entirely serves the church but is opposed to abortifacients, the Final Rule denies employees of employers who do not oppose using abortifacients the cost-free aspect of using them and requires the cost-free aspect of using them to be provided to employees of employers who staunchly oppose them. There is no rational justification for such a distinction, at least not a justification that relates to the government's supposed objectives. If rationality is required to sustain classifications between groups to which a law's benefits or burdens either do or do not apply, and it is,[31] then the Final Rule's classifications that exempt the categories it does and imposes its force on the categories it does, cannot be sustained. Exempting churches, simply because they are churches without any connection to what their faith convictions may be regarding the sanctity of life as it bears on using abortifacients, but refusing to exempt employers such as Hobby Lobby and Conestoga, and certainly such as Westminster, that have long exhibited their conviction that every life, from conception, is made in God's image and should not be destroyed, is even more nonsensical. But either way, such irrational distinctions cannot effectively ground any restriction on religious exercise, much less provide the "least restrictive" imposition on religious exercise.

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[29] The PC (USA) is rather accepting of abortion. It more honors a "woman's right to choose" than it does the sacredness of human life. See the PC (USA)'s statements on abortion at http://www.presbyterianmission.org/ministries/101/abortion-issues/ (last visited on January 14, 2014) ("Humans are empowered by the spirit prayerfully to make significant moral choices, including the choice to continue or end a pregnancy.").

[30] http://www.uua.org/statements/statements/14499.shtml (last visited on January 14, 2014) ("[T]he 1987 General Assembly of the Unitarian Universalist Association reaffirms its historic position, supporting the right to choose contraception and abortion as legitimate aspects of the right to privacy.").

Once the government recognizes, as it has in the very terms of the Final Rule by exempting organized churches and their integrated auxiliaries, that whatever interest the government has in providing cost-free access to abortifacients can be furthered without coercing employers to act contrary to their core religious convictions, it can no longer be sensibly argued that not exempting other religiously based objectors is essential to furthering the government's objectives. It can most assuredly no longer be sensibly argued that exempting some entities simply because they are organized as churches, without regard to whether the Mandate conflicts with their religious beliefs, is rationally consistent with refusing to exempt non-church employers who do oppose abortifacients and coercing those employers to act contrary to their core faith convictions. At a minimum, such a topsy-turvy exemption scheme is not the way for the government to induce women to use abortifacients that is the least restrictive on religious exercise.

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[31] *Johnson v. Robison*, 415 U.S. 361, 374 (1974) ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'").

CONCLUSION

The government's position that Hobby Lobby and Conestoga have no right of religious liberty is fatally incongruous. By requiring Hobby Lobby and Conestoga to betray their faith convictions is substantially burdensome on the religious exercise that consists in how they operate their businesses. By requiring them (and Westminster) to violate their faith convictions the Mandate not only substantially burdens their religious exercise but threatens their very existence.

The Mandate furthers no compelling government objective, and, even if it did, it is hardly the least restrictive way on Westminster's (and Hobby Lobby and Conestoga's) religious exercise of going about it. The Mandate is predicated on twisted and unrealistic assumptions, and the exemption scheme it incorporates is irrational. Under RFRA's requirements, to say nothing of First and Fifth Amendment rights, the Mandate should not be enforced against Hobby Lobby, Conestoga or Westminster.

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In the Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL., *Petitioners*
v.
HOBBY LOBBY STORES, INC., ET AL., *Respondents*

CONESTOGA WOOD SPECIALTIES CORP., ET AL., *Petitioners*
v.
KATHLEEN SEBELIUS, ET AL., *Respondents*

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE TENTH AND THIRD CIRCUITS

BRIEF OF *AMICUS CURIAE* WOMEN SPEAK FOR THEMSELVES IN SUPPORT OF HOBBY LOBBY STORES, INC. AND CONESTOGA WOOD SPECIALTIES, ET AL.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Women Speak for Themselves is a project of the Chiaroscuro Institute and a membership organization of more than 41,000 American women who have signed an "open letter" opposing the contraception and emergency contraception mandate ("the Mandate")[2] issued by the Department of Health and Human Services ("HHS") because the Mandate threatens religious freedom and proposes a reductionist and harmful understanding of women's freedom. Members of Women Speak for Themselves bring fact-based and nonpartisan arguments about women's freedom and about religious freedom to their local communities, and to the federal government.

SUMMARY OF THE ARGUMENT

I. HHS[3] has not demonstrated a "compelling state interest" sufficient to permit the government to burden the Free Exercise rights of individuals or institutions under either the First Amendment to the Constitution or the Religious Freedom Restoration Act,[4] by forcing them to obtain insurance coverage of contraception and emergency contraceptives ("ECs"). HHS has not demonstrated that the Mandate will improve women's health or their equal access to health services. Granting the requested exemption does not threaten the federal government's ability to uniformly administer a national program. Nonbeneficiaries of the requested exemption are not impermissibly burdened. The numerous exemptions to the Mandate indicate that HHS is not seeking to accomplish an interest it regards as of the highest order.

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[1] No counsel for a party authored this brief in whole or in part. Printing costs for this brief were provided by the members of Women Speak for Themselves. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

[2] 45 C.F.R. 147.130(a)(1)(iv) (2013) (HHS); 29 C.F.R. 2590.715-2713(a)(1)(iv) (2013) (Labor); 26 C.F.R. 54.9815-2713(a)(1)(iv) (2013).

[3] For simplicity, "HHS" refers to all Defendants in this action: Secretary Kathleen Sebelius, the U.S. Dept. of Health and Human Services, Secretary Hilda Solis, the U.S. Dept. of Labor, Timothy Geithner, and the U.S. Dept. of the Treasury.

II. HHS argues that the Mandate primarily serves the health of children in the womb and after birth, by preventing the health damages it claims children suffer as a result of unintended or too-closely spaced pregnancies. The Affordable Care Act ("ACA"),[5] however, authorized HHS to formulate guidelines on preventive services promoting women's health. Furthermore, drugs and devices preventing children's existence or destroying children at the embryonic stage of their lives, do not promote children's health.

III. HHS cannot demonstrate that the Mandate furthers governmental interests in women's health or assuring women equal access to health services. HHS simply assumes that what contraception can do on an individual scale – prevent conception or implantation of a child – it can do on a social scale; but the pertinent data indicates otherwise. The sources upon which HHS relies do not support any link in the chain of causation HHS must demonstrate. Other sources confirm this failure. To wit, HHS does not show that: the Mandate will cause an increase in the *usage* of contraceptives and ECs; that increased usage will cause lower rates of unintended pregnancy, abortion or contraindicated pregnancies; or that unintended pregnancy causes identified health problems for women. Nor does HHS demonstrate that any incidental health benefits contraception might offer outweigh acknowledged health risks some contraceptives pose to some women.

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[4] Religious Freedom Restoration Act, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified in scattered sections of 5 and 42 U.S.C.).

[5] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152).

IV. HHS claims that the Mandate promotes gender equality respecting health expenses, but its sources do not show that contraceptives account for differential health costs between men and women. Furthermore, this Court should refrain from affirming HHS' argument that women's fertility and childrearing prevent their advancement and integration in American society. This argument harms the causes of women's equality and freedom.

ARGUMENT

I. HHS HAS FAILED TO DEMONSTRATE THAT THE MANDATE SERVES A "COMPELLING STATE INTEREST" ACCORDING TO THIS COURT'S DECISIONS.

The Religious Freedom Restoration Act ("RFRA") forbids the federal government from substantially burdening the exercise of religion unless the burden furthers a compelling governmental interest.[6] This requirement obtains even if the "burden results from a rule of general applicability."[7] Under the First Amendment, the state must demonstrate a compelling governmental interest in a federal or state law burdening free exercise if the law is not a "neutral law of general applicability."[8] This brief does not take up the matter of the Mandate's substantial burden on Free Exercise, nor does it address the questions of its "neutrality" or "general applicability." It rather argues that in whatever context HHS is required to demonstrate that the Mandate serves a "compelling governmental interest," HHS has failed. Neither HHS' Brief, nor the Institute of Medicine Report on which it relies so strenuously – *Clinical Preventive Services for Women: Closing the Gap* ("IOM Report")[9] – demonstrate such an interest.

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[6] 42 U.S.C. § 2000bb-1(b) (2012).

[7] 42 U.S.C. § 2000bb-1(a) (2012).

[8] *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

[9] Inst. of Med., (2011) [hereinafter "IOM Report"].

HHS has the burden of "going forward with the evidence and of persuasion"[10] about the existence of a "paramount interest"[11] of the state. It has to show that this interest is satisfied by applying the challenged law to "the particular claimant whose sincere exercise of religion is being substantially burdened."[12] HHS must do more than express "broadly formulated interests."[13] If the challenged law contains exemptions for others, this is evidence that it does not "protect[] an interest 'of the highest order'... when it leaves appreciable damage to that supposedly vital interest unprohibited."[14]

Four aspects of this Court's "compelling state interest" jurisprudence indicate why the Mandate fails this test. First, HHS has allowed a dramatic number of exemptions to the Mandate. These are addressed fully in the Brief for Petitioners Conestoga Wood Specialties Corp.[15]

Second, HHS has not demonstrated that the Mandate actually forwards the government's declared interests, as required by *Brown v. Entertainment Merchants Association.*[16] HHS cannot demonstrate a causal connection between the Mandate and its claimed health outcomes. (See Sections II. and III.) *Brown* requires that the state "specifically identify an 'actual problem' in need of solving," and show that the burden on the constitutional right is "actually necessary" to the solution.[17] It may not make a merely "predictive judgment" about a causal link based upon competing studies.[18] It may not rely upon "ambiguous proof,"[19] but must "prove" that the matter it regulates is the "cause" of the harm it seeks to prevent. Evidence of mere "correlation" is insufficient, as are studies with "significant, admitted flaws in methodology."[20] Even if the state proves causation, evidence that the claimed effects are "small" and "indistinguishable" from effects produced by things *not* regulated, renders the legislation "underinclusive."[21] The state must show more than a "modest gap" (20% in *Brown*) between the government's goal and the current situation; "the government does not have a compelling interest in each marginal percentage point by which its goals are advanced."[22]

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[10] *Gonzales v. O Centro Esprita Beneficente Uniao de Vegetal*, 546 U.S. 418, 428 (2006) (citation omitted).

[11] *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (quotation omitted).

[12] *Gonzales*, 546 U.S. at 430-31.

[13] *Id.* at 431.

[14] *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, *supra*, at 547 (quoting *Florida Star v. B. J. F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in judgment)).

[15] *See* Brief for Petitioner at 44-45, *Conestoga Wood Specialties Corp. v. Kathleen Sebelius*, No. 13-354 (U.S. Sup. Ct., Jan. 10, 2014).

[16] *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

Under *Brown*, HHS has failed to demonstrate a compelling state interest in applying the Mandate to the religiously objecting parties. HHS uses an uncertain measure of "unintended pregnancy," and offers a merely "predictive judgment" of a causal link between free contraception and improved health for women. (See Section III.) Additionally, HHS proposes that the law predominantly assists children's health, though women's health is the Mandate's ACA-authorized goal. (See Section II.) HHS also rests its findings about women's health on a few studies which do not support its causal claims, and ignores competing studies. HHS proposes to close a relatively small (11%) gap in contraceptive usage with extensive regulations which would not likely succeed in assisting at least the following groups of women: those for whom contraceptives are medically contraindicated; those who object on religious or moral grounds; those who fear certain health risks or side effects; and those who eschew contraceptives, not because of cost, but because of the many other reasons women usually cite. In sum, contraception is virtually ubiquitous. The Mandate is directed to women already using contraception at high rates, and does not address the many reasons other than cost why a small group of women choose not to use contraception. HHS has demonstrated nothing more than the theoretical possibility that the Mandate might increase contraceptive usage. This is legally insufficient. (See Section III. A.)

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[17] *Id.* at 2738.

[18] *Id.*

[19] *Id.* at 2739.

[20] *Id.*

[21] *Id.* at 2740.

[22] *Id.* at 2741, n.9.

Even if the Mandate could increase usage among any group of women, it is not clear that this would achieve lower rates of unintended pregnancy or abortion. Contraceptive failure rates are significant. Rates of unintended pregnancy and abortion have fluctuated over the past decades in response to many different variables. Credible analyses show that "risk compensation" effects, among other reasons, have and may continue to produce higher, not lower rates of unintended pregnancy and abortions in response to changes in contraceptives' availability. (See Section III.B.)

Finally, even if HHS could show that the Mandate could increase contraceptive usage *and* reduce rates of unintended pregnancies, HHS does not demonstrate a causal relationship between unintended pregnancies and women's health. Its cited sources and others suggest mere correlation, or reverse causation, or the presence of a third factor driving both unintended pregnancies and particular health outcomes. (See Section III.C.)

In sum, HHS' argument is exactly the kind of "ambiguous proof" the *Brown* Court rejected. HHS also fails the *Brown* test of "underinclusivity" as laws addressing matters HHS leaves *unregulated* might better ameliorate women's health and health care costs. HHS could devote more resources, for example, to maternity costs – the leading driver of differential health costs between males and female of childbearing ages[23] – or children's health care costs, given women's higher rates of single parenting.[24]

To the extent that HHS intends the Mandate to further a governmental interest in reducing unintended pregnancy by moving more women to more expensive and effective long-acting reversible contraceptives ("LARCs"),[25] this plan is uncertain. The conditions under which this plan would succeed among women touched by the Mandate are unknown; it also raises moral hazards involving the government's treatment of vulnerable women. (See Section III.A.)

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[23] Ctrs. for Medicare & Medicaid Servs., *National Health Care Spending by Gender and Age, 2004 Highlights* (2004), http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/downloads/2004GenderandAgeHighlights.pdf.

[24] Jonathan Vespa et al., (U.S. Census Bureau), *America's Families and Living Arrangements: 2012*, 12, Table 4 (2013).

Third, HHS cannot claim a compelling governmental interest of the kind at issue in *United States v. Lee.*[26] Though the Internal Revenue Service ("IRS") will administer penalties for noncompliance with the Mandate, the social security and national taxation systems at issue in *Lee* are not at all analogous to the business-to-business insurance transaction the Mandate compels. HHS' granting an exemption from the Mandate is nothing like Congress or the IRS compromising the "fiscal vitality" of the "largest domestic governmental program,"– a program determined by a "complex of actuarial factors" – by allowing nonpayment.[27] Furthermore, unlike the taxation systems at issue in *Lee*, the Mandate was not legislated by Congress; it is a discretionary initiative by HHS (which relied upon the recommendations of a conspicuously ideological IOM committee[28]). There is also no likelihood of a "slippery slope," as in *Lee*. An exemption from insuring contraception is not at all analogous to absolving beneficiaries from tax liability: HHS acknowledges the near universality of contraception coverage already,[29] and claims that such coverage is cheaper for businesses and insurers than caring for born children.[30]

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[25] Defendant's Memorandum at 7, ECF 41, *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp.2d 1278 (W.D. Okla. 2012) [hereinafter "Def. Mem."].

[26] *United States v. Lee*, 455 U.S. 252 (1982).

[27] 455 U.S. at 258-59.

[28] Letter from Anna Franzonello, Ams. United for Life, to Ctrs. for Medicare and Medicaid Servs. (Sept. 29, 2011), http://www.freedom2care.org/docLib/20110929_AmericansUnitedforLifepreventiveservicescomment.pdf.

Fourth, the requested accommodation does not override nonbeneficiaries' significant interests.[31] Employees working for religious employers are more likely to share such religious commitments. Contraception is ubiquitous and relatively inexpensive.[32] Efforts to insist upon its even greater availability or lower cost are spearheaded by interest groups like Planned Parenthood, not grassroots groups of female employees. Finally, HHS has already communicated that an exemption does not significantly burden nonbeneficiaries by means of the volume of exemptions it already allows.

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[29] Press Release, Dep't of Health & Human Servs., *A Statement by U.S. Dept. of Health and Human Services Kathleen Sebelius* (Jan. 20, 2012), http://www.hhs.gov/news/press/2012pres/01/20120120a.html.

[30] Brief of Respondent at 7, *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-354 (U.S. Sup. Ct., Jan. 10, 2014).

[31] *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

[32] *See generally* Kimberly Palmer, *The Real Cost of Birth Control*, U.S. News & World Rep. (Mar. 5, 2012), http://money.usnews.com/money/blogs/alpha-consumer/2012/03/05/the-real-cost-of-birth-control.

II. HHS' CLAIMS THAT FREE CONTRACEPTIVES AND EMERGENCY CONTRACEPTIVES WILL IMPROVE CHILDREN'S HEALTH ARE INAPPOSITE OR NONSENSICAL.

Although HHS regularly claims that *women's* health is the primary interest underlying the Mandate, nearly every specific interest HHS relies upon involves *children's* health. To wit, HHS claims that free contraception and ECs, by reducing the number of unintended and too-closely spaced pregnancies, can prevent children's premature birth, low birth weight, and the effects upon children of mothers' delayed entry into prenatal care, and smoking and consuming alcohol during pregnancy.[33] The section of the ACA authorizing the Mandate, however, empowered HHS to delineate preventive health services for *women,* not children. Furthermore, is it nonsensical for HHS to claim that contraceptives and ECs – which prevent children's existence, or destroy their lives at the embryonic stage – constitute preventive services *for* children.

The ACA required certain health plans and health insurance issuers to cover certain preventive services for women, without a co-pay. These were to include "preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources Services Administration" (an HHS agency).[34] HHS thereafter commissioned the Institute of Medicine ("IOM") to "convene an expert committee for the "development of comprehensive *guidelines for preventive services for women."* [35] That committee recommended the provision, without cost-sharing, of "the full range of Food and Drug Administration-approved ["FDA"] contraceptive methods," including drugs taken after intercourse, "ECs."[36]

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[33] Brief for Petitioner at 47, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-356 (U.S. Sup. Ct., Jan. 10, 2014) (citing IOM Report at103) [hereinafter "Brief for Pet."].

[34] 42 U.S.C. § 300gg-13(a)(4) (2006).

As detailed above, despite Congress' charge to HHS to develop guidelines "for women," HHS asserts that its main interests underlying the Mandate concern the health of children, both in the womb and after birth. Even were children's health within the ambit of HHS' authority, however, it is nonsensical for HHS to suggest that contraception and ECs improve children's health; they act rather to prevent children's conception or their implantation into their mother's womb at their embryonic stage. HHS freely admits these drug actions. Secretary Sebelius stated regarding ECs: "These covered prescription drugs are specifically those that are designed *to prevent implantation*." [37] The Food and Drug Administration (FDA), [38] EC manufacturers, and extant scientific literature confirm this.[39] Of course when an embryo cannot implant in the mother's womb, it perishes.

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[35] IOM Report, *supra*, at 2 (emphasis added).

[36] *Id.* at 109-110.

[37] Kelly Wallace, *Health and Human Services Secretary Kathleen Sebelius Tells iVillage "Historic" New Guidelines Cover Contraception, Not Abortion*, IVILLAGE (Aug. 2, 2011), http://www.ivillage.com/kathleen-sebelius-guidelines-cover-contraception- not-abortion/4-a-369771 (alteration in original) (emphasis added).

[38] *See* How Does Plan B One-Step Work?, http:// www.planbonestep.com/faqs.aspx; Food & Drug Admin., Plan B Approved Labeling (2006), http://www.accessdata.fda. gov/drugsatfda_docs/nda/2006/021045s011_; Plan_B_Prntlbl.Pdf; Watson Pharm., Inc., Ella Labeling

Furthermore, even if HHS could argue that a mandate directed to children's health was authorized by the ACA, and even if this Court accepted that preventing children's existence or development promotes their health, the sources HHS cites for the claimed nexus between unintended pregnancy and adverse outcomes for children do not support its claim. They are either unrelated to children's health,[40] or claim only to prove "association" not causation.[41] The earlier IOM report HHS cites concerning women's smoking and drinking during unintended pregnancy also does not assert causation, and notes that even figures "associating" unintended pregnancy with mothers' smoking and

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Information (2010), http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s000lbl.pdf.

[39] Susan Wills, *New Studies Show All Emergency Contraceptives Can Cause Early Abortion*, Charlotte Lozier Inst. (Jan. 2014), http://www.lozierinstitute.org/wp-content/uploads/2014/01/On-Point-Wills-Emergency-Contraception-Jan-2014-.pdf.

[40] Baiju R. Shah, et al., *Increased Risk of Cardiovascular Disease in Young Women Following Gestational Diabetes Mellitus*, 31 Diabetes Care 1668 (2008) (cited by IOM Report at 103).

[41] Agustin Conde-Agudelo et al., *Birth Spacing and Risk of Adverse Perinatal Outcomes: A Meta-Analysis*, 295 J. Am. Med. Ass'n 1809 (2006); Elena Fuentes-Afflick & N. A. Hessol, *Interpregnancy Interval and the Risk of Premature Infants*, 95 Obstetrics & Gynecology 383 (2000); Bao Ping Zhu, et al., *Effect of Interpregnancy Interval on Birth Outcomes: Findings from Three Recent U.S. Studies*, 89 Int'l J. Gynecology & Obstetrics S25, S25–S33 (2005).

drinking "drop significantly where studies control for other causes."[42] Other studies indicate possible reverse causation or a third factor – women's risk-taking preferences – accounting both for unintended pregnancy and smoking and drinking during pregnancy.[43] Finally, almost all mothers who smoke during pregnancy smoked before pregnancy.[44]

III. HHS HAS FAILED TO DEMONSTRATE A CAUSAL RELATIONSHIP BETWEEN THE MANDATE AND IMPROVED HEALTH FOR WOMEN.

HHS' Brief contends that the Mandate furthers the state's interest in promoting women's health by helping avert pregnancy among women with particular conditions contraindicating pregnancy – pulmonary hypertension, cyanotic heart disease, and Marfan Syndrome.[45] HHS also claims that some contraceptives can prevent health problems like cancers, menstrual disorders and pelvic pain,[46] as well as lower abortion rates.[47] Finally, HHS asserts that contraceptives' ability to

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[42] Inst. of Med., *The Best Intentions: Unintended Pregnancy and the Well-Being of Children and Families* (1995), 68-69, 75 [hereinafter "IOM 1995 Report"].

[43] Timothy S. Naimi et al., *Binge Drinking in the Preconception Period and the Risk of Unintended Pregnancy: Implications for Women and Their Children,* 111 Pediatrics 1136 (2003); Carolyn Westhoff et al., *Smoking and Oral Contraceptive Continuation,* 79 Contraception 375 (2009); Gregory J. Colman & Ted Joyce, *Trends in Smoking Before, During, and After Pregnancy in Ten States,* 24 Am. J. Preventive Med. 29 (2003).

[44] Colman & Joyce, *supra,* at 29-35.

[45] Brief for Pet. at 47 (citing IOM Report at 103-04).

[46] *Id.* (citing IOM Report at 107).

[47] Brief for Pet. at 47.

"reduc[e] the incidence of unintended pregnancies" on a national scale will benefit women. HHS' Brief, however, cites *no* related health benefits for women, flowing from the hoped-for reduction in unintended pregnancy;[48] the interest it states there in helping women avoid smoking and alcohol during pregnancy, is linked with avoiding harm to unborn children.[49] At the start of this litigation, HHS did claim that unintended pregnancies lead to the following negative health outcomes for women: depression, domestic violence, and consuming cigarettes and alcohol.[50] In the event this Court considers these now-missing claims, Section III.C. treats them, *infra*.

HHS relies nearly exclusively upon the IOM Report to support its claims, but this report offers remarkably few relevant sources for HHS' sweeping claims about linkages between: cost and increased usage of contraception; and increased usage and reducing unintended pregnancies and abortions. Instead, HHS is relying upon an assumption that widespread free contraception and ECs must accomplish on a national level what they are designed to do on an individual level. The subsections below will demonstrate, however, that each link in this causal chain is unsupported or contradicted by the evidence.

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[48] Brief for Pet. at 46, 48.

[49] *Id.* at 47 (citing IOM Report at 103).

[50] Def. Mem. at 8.

A. HHS does not show that the Mandate will cause increased usage of contraceptives or ECs, especially among women at risk for unintended pregnancy and abortion.

HHS claims that cost prevents many women from using contraceptives and ECs [51] and that insurance coverage without cost-sharing, is *"necessary to increase the use of these services."*[52] There are myriad problems with this contention. First, the IOM Report and its sources acknowledge that contraceptive usage is already extremely high, having been used by 99% of women who have "ever" had sex, and 89% of currently sexually-active women.[53]

Second, because the Mandate is directed to employed women and daughters of the employed, it will largely affect women who already have relatively easy access to contraception and use it. Women above 150% of the poverty line and more-educated women are more likely to use contraception than less-advantaged women.[54] Also, the IOM Report acknowledges that contraceptive coverage is already "standard practice for most private insurance," [55] with nine of ten employer-based insurance plans including coverage. [56] Guttmacher Institute testimony before the IOM committee claimed further that "almost every reversible and permanent contraceptive method available" is covered by 90% of plans.[57] On these facts, it is difficult to imagine how the Mandate could increase the usage rates of its target audience much if at all.

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[51] Pet. for Cert. at 8. (citing IOM Report at 19 and 109).

[52] *Id.* at 7-8 (citing IOM Report at 102-03) (emphasis added).

[53] IOM Report at103; and William D. Mosher & Jo Jones, U.S. Dep't of Health and Human Servs., *Use of Contraception in the U.S.: 1982-2008*, 5, 9 (2010).

[54] Mosher & Jones, *supra*, at 25.

[55] IOM Report at 108.

[56] *Id.*

The Mandate is not directed to increasing usage among the unemployed, who are disproportionately poor, young, and minority women.[58] But these groups are already amply provided free contraception through government programs. Since 1970, they have been served by the National Family Planning Program ("Title X").[59] In 2010, Title X-funded sites served more than 5 million patients – 69% at or below the poverty level and 31% above – at 4,389 service sites in all 50 states and the District of Columbia.[60] Likewise, both Title XIX of the Social Security Act (Medicaid) and Title XX of the Social Security Act[61] provide federal funds to states for pregnancy prevention services among both adolescents and adults.[62] The federal Maternal and

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[57] Testimony of Guttmacher Inst., Comm. on Preventive Servs. for Women (Jan. 12, 2011), http://www.guttmacher.org/pubs/CPSW-testimony.pdf (citing Gary Claxton, et al., *Employer Health Benefits: 2010 Annual Survey*, Kaiser Family Found. (2012), http://ehbs.kff.org/pdf/2010/8085.pdf.).

[58] IOM Report at 102.

[59] 42 U.S.C. § 300 (2006).

[60] Christina Fowler et al., *RTI Int'l, Family Planning Annual Report: 2010 National Summary*, 1, 7-8, 21 (2011), http://www.hhs.gov/opa/ pdfs/fpar-2010-national-summary.pdf.

[61] 42 U.S.C. § 1396r-1c *et seq.* (2010).

[62] *See also* Guttmacher Inst. & Kaiser Family Found., *Medicaid: A Critical Source Of Support For Family Planning In The United States* (2005),

Child Health Block Grant funds 610 school-based or school-linked health clinics.[63] In 2012, Planned Parenthood Federation of America alone received 540 million dollars of government grants and reimbursements directed largely to providing lower-cost contraception.[64]

Consequently, in order to demonstrate that the Mandate would boost usage of contraceptives and ECs, and eventually lower unintended pregnancy rates, HHS would have to demonstrate that the Mandate could affect the contraception usage of some group of women *other* than those described above – i.e. portions of the target audience who are not already using contraception at high rates, not eligible for extant government programs, not opposed to contraception due to its health risks and side effects, price-sensitive, and thus susceptible to offers of free contraceptives. But the Mandate on its face is not crafted to reach such a group.

Furthermore, evidence indicates that "cost" plays a small role in women's decisions about contraception. In Centers for Disease Control ("CDC") data cited in the IOM Report, cost does not even make the list of "frequently cited reasons for nonuse" among the 11% of sexually-active women

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http://www.kff.org/womenshealth/upload/Medicaid-A-Critical-Source-of-Support-for-Family-Planning-in-the-United-States-Issue-Brief-UPDATE. pdf.

[63] 42 U.S.C. §§ 701–710 (2010), ***amended by*** Pub. L. No. 112-240, 126 Stat. 2313 (2012).

[64] Planned Parenthood Fed'n of Am., *Annual Report: 2012-2013*, 8 (2013), http://www.plannedparenthood.org/files/AR-FY13_111213_vF_rev3_ISSUU.pdf.

not using contraception.[65] Leading reasons rather include everything from "didn't think she could get pregnant" (44%), to "worried about the side effects" (16%). Cost also did not figure into adolescents' "most frequently cited reasons for not using contraceptives" in another study.[66] In a Guttmacher source the IOM Report overlooked,[67] only 3.7% of the total sample of women seeking abortions listed cost as a barrier to contraceptive usage. The study's authors did not investigate if some of these women were eligible for state contraception programs.

In support of its claim about the nexus between free contraception and increased usage, HHS constantly cites[68] page 19 of the IOM Report. The sources cited there, however, consider cost as a factor affecting *both* men and women,[69] or preventive health care *generally*, not contraception or ECs.[70]

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[65] Mosher & Jones, *supra*, at 6, 14 (cited by IOM at 103).

[66] Catherine Stevens-Simon et al., *Why Pregnant Adolescents Say They Did Not Use Contraceptives Prior to Conception,* 19 J. Adolescent Health 48 (1996).

[67] Rachel K. Jones et al., *Contraceptive Use Among U.S. Women Having Abortions in 2000-2001,* 34 Persp. on Sexual & Reprod. Health 294, 297-98 (2002).

[68] Def. Mem. at 7; Brief for Pet. at 50; Pet. for Cert. at 5, 6.

[69] Henry J. Kaiser Family Found., *Impact Of Health Reform On Women's Access To Coverage And Care* 3 (2010), http://www.kff.org/women- shealth/upload/7987.pdf.

[70] *See* IOM Report at 19 (citing Sheila D. Rustgi et al., *Women at risk: Why many women are forgoing needed health care* (The Commonwealth Fund (2009)); Geetesh Solanki et al., *The direct and indirect effects of cost sharing on the use of preventive services,* 34 Health Services Research 1331 (2000); Amal N. Trivedi et al., *Effect of cost sharing on screening mammography in Medicare health plans,* 358 New Eng. J. of Med. 375 (2008) (considering, collectively, cancer screenings, dental exams, mammograms, and Pap smears).

The other sources cited in the IOM Report [71] regarding the nexus between cost and usage are also unavailing. The cited Hudman and O'Malley article[72] does not address contraception, and acknowledges that studies do not consistently find any link between cost-sharing and usage.

Both HHS' earlier submissions in this litigation,[73] and the IOM Report,[74] suggest that one of the Mandate's goals might be to increase usage of LARCs "especially among poor and low-income women most at risk for unintended pregnancy."[75] The Mandate is not, however, directed to these groups of women; and the economically more privileged women to whom it is targeted already use LARCs more.[76] If the HHS does intend the Mandate to incentivize LARCs among some group of lesser-income women and girls, however, two things should be noted. First, while LARCs may have a higher initial cost, over time they can be cheaper than initially-cheaper barrier methods.[77]

Second, there are moral and health hazards associated with such a scheme. These were highlighted in a study offering free LARCs to mostly poor, minority, post-abortive and less-educated women in St. Louis,[78] which study was hailed widely as evidence of the logic of the Mandate.[79] There, researchers persuaded a large number of women to adopt LARCs (moving adoption of LARCs from 5% to 75%), and contacted each woman 7 times to monitor continued usage. While the study's empirical methods have been doubted,[80] it did appear to show that persuading women at risk of unintended pregnancy to become virtually sterilized for three to ten years, reduces pregnancy and abortion rates.

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[71] IOM Report at 109.

[72] IOM Report at 109 (citing Julie Hudman & Molly O'Malley, Henry J. Kaiser Family Found., *Health Insurance Premiums and Cost-Sharing: Findings From the Research On Low-Income Populations*, 1 (2003), http://www.kff.org/medicaid/upload/Health-Insurance-Premiums-and-Cost-Sharing-Findings-from-the-Research-on-Low-Income-Populations- Policy-Brief.pdf.

[73] Def. Mem. at 7.

[74] IOM Report at 109.

[75] IOM Report at 109.

[76] Mosher & Jones, *supra*, at 35.

[77] *See The Real Costs of Birth Control*, *supra*.

But the study demonstrated the health risks and moral hazards of such a strategy too. First, LARCs are associated with various adverse health outcomes, especially IUDs,[81] and Depo-Provera: the latter is linked with doubling HIV transmission rates.[82] Second, LARCs do not protect against sexually transmitted infections ("STIs").[83] In St. Louis, STIs spiked noticeably during the study.[84] Third, women using LARCs may be more likely to believe that all relevant consequences of sex – emotional, psychological, and physical – are being managed, when they are not. These can have long-run negative impacts upon the health of girls and women.

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[78] Jeffrey F. Peipert et al., *Preventing unintended pregnancies by providing no-cost contraception*, 120 J. Obstet. Gyn. 1291 (2012), www.ncbi.nlm.nih.gov/pubmed/23168752.

[79] *See, e.g.*, Tara Culp-Ressler, *New Study Confirms Obamacare's Birth Control Mandate will Reduce Abortion Rate*, ThinkProgress (Oct. 5, 2012), http://thinkprogress.org/health/2012/10/05/966121/obamacare-birth-control-abortion/.

[80] Michael J. New, *New Study Exaggerates Benefits of No-Cost Contraception,* Nat'l Rev. Online (Oct. 10, 2012), www.nationalreview.com/corner/329898/ new-study-exaggerates-benefits-no-cost-contraception-michael-j-new.

[81] Tessa Madden, *Risk of Bacterial Vaginosis in Users of the Intrauterine Device: A Longitudinal Study*, 39 Sex. Trans. Diseases 217 (2012).

[82] Renee Heffron et al., *Use of Hormonal Contraceptives and risk of HIV-1 Transmission: A Prospective Cohort Study*, 12 Lancet Infec. Dis. 19 (2012).

B. Even if the Mandate could increase usage of contraceptives and ECs, HHS does not demonstrate that this will lead to lower rates of unintended pregnancy and abortion.

HHS asserts that "free" contraception and ECs will lead to lower rates of unintended pregnancies and abortions,[85] but offers no reliable evidence for this claim. First, the difficulty of measuring "unintended pregnancies," is well known,[86] as conceded by the 1995 IOM Report.[87] "Unintended" can mean unwanted or mistimed. Interpretation and memory can change over time. Partners can disagree. The one and only study relied upon by the IOM Report and HHS to claim a current

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[83] Planned Parenthood, *Should you Choose Long-acting Reversible Contraception?* (2014), https://www.plannedparenthood.org/ppmh/long-acting-reversible-contraception-right-you-41717.htm.

[84] Ctrs. for Disease Control, Div. of STD Prevention, *Sexually Transmitted Disease Surveillance 2010*, 93-95, 113, 119-20, 127, 129 (2011), http://www.cdc/gov/std/stats10/surv2010.pdf. [hereinafter "CDC STDs 2010"].

[85] Brief for Pet. at 47.

[86] Jessica D. Gipson, et al., *The effects of unintended pregnancy on infant, child, and parental health: a review of the literature*, 39 Studies in Family Planning 18 (2008).

[87] IOM Report 1995, *supra*, at 21-25.

49% unintended pregnancy rate[88] suffers such flaws. Its conclusion is the product of numerous questionable assumptions. To reach the sum total of "unintended pregnancies," the authors added together "unwanted" and "mistimed" pregnancies, to pregnancies toward which the woman was "indifferent." To this figure they added their own abortion estimate.

Second, the materials HHS relies upon to make this causal claim, as well as pertinent materials HHS ignores, show rising rates of unintended pregnancies and abortions over some periods of time during which contraceptive usage was rising. This is not only due to contraceptive and EC failure rates, and the wide variety of factors affecting pregnancy and abortion rates, but possibly also because of the phenomenon of risk compensation.

Concerning contraceptive failure, the CDC estimates that 12.4% of all women using contraception will become pregnant each year.[89] Thus, even if the Mandate could boost contraceptive usage, contraceptive failure will constrain reductions in pregnancy.

Also, about half of all unintended pregnancies occur among women who *are* using contraception[90];

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[88] Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and 2001*, 38 Persp. on Sexual Reprod. Health 90 (2006).

[89] Mosher & Jones, *supra*, at 4.

[90] Guttmacher Inst., *Facts on Unintended Pregnancy in the United States*, 4 (2012), www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html.

they result from method failure, or incorrect use. This dramatically limits the potential for increased usage to reduce unintended pregnancies. This potential is further limited given that unintended pregnancies are highly concentrated among women the Mandate will *not* affect: the poor. Guttmacher reports that they have six times the rate of unintended pregnancy of women at 200% or more of the poverty line.[91] The latter are the women most likely affected by the Mandate.

Fourth and finally, a significant body of literature suggests that rendering contraception and ECs more accessible can drive rates of unintended pregnancy and abortion up, not down, due to "risk compensation" effects whereby individuals who believe they are insured against risk, engage in more, not less, risky behavior. One widely cited study suggests that this helps explain how access to contraception decreases teen pregnancy in the short run, but increases it in the long run.[92] Programs promoting ECs (covered by the Mandate) to teens are disturbingly and regularly associated with increases in teen pregnancy and abortion rates.[93] In a meta-analysis of 23 studies, Princeton's Dr. Trussel (upon whom the IOM relies[94]) concluded that "*no* study has shown that increased access to [Plan B, an EC] reduces unintended pregnancy or abortion rates on a population level."[95] A study cited by the IOM Report concludes similarly.[96] Furthermore, it has been recently disclosed that well-known forms of ECs are less effective for women whose weight approximates the "average" American woman,[97] and "completely ineffective" for women weighing 11 pounds more than this.

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[91] Guttmacher Institute, *Unintended Pregnancy in the United States* (Dec. 2013), http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html.

[92] Peter Arcidiacono et al., *Habit Persistence And Teen Sex: Could Increased Access To Contraception Have Unintended Consequences For Teen Pregnancies?* (2005), http://public.econ.duke.edu/~psarcidi/addic ted13.pdf.

[93] Jose Luis Duenas et al., *Trends in the Use of Contraceptive Methods and Voluntary Interruption of Pregnancy in the Spanish Population during 1997-2007*, 83 Contraception 82 (2011) (over ten years in Spain, a 63% increase in contraceptive use was accompanied by a 108% increase in abortion rate); *see*

Regarding adults, a growing body of scholarship[98] indicates that the persistence or worsening of high rates of unintended pregnancy, abortion, STIs, and nonmarital births are the "logical" results of the new marketplace for sex and marriage made possible by increasingly available contraception and legal abortion. In perhaps the

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also David Paton, *The Economics of Family Planning and Underage Conceptions,* 21 J. Health Econ. 207 (2002).

[94] IOM Report at 108.

[95] Elizabeth G. Raymond, et al., *Population Effect of Increased Access to Emergency Contraceptive Pills: A Systematic Review,* 109 Obstetrics & Gynecology 181 (2007) (emphasis added).

[96] IOM Report at 108 (citing Debbie Postlethwaite, et al., *A comparison of contraceptive procurement pre-and post-benefit change,* 76 Contraception 360, 363 (2007)).

[97] Molly Redden, *New Warning: Morning-After Pill Doesn't Work for Women Over 176 Pounds,* Mother Jones (Nov. 25, 2013), http://www.motherjones.com/environment/2013/11/plan-b-morning-after-pill-weight-limit-pounds.

[98] John Richens et al., *Condoms and Seat Belts: the Parallels and the Lessons*, 355 The Lancet 400 (2000); Michael M. Cassell et al., *Risk compensation: the Achilles' heel of innovations in HIV prevention?*, 332 Brit. Med. J. 605 (2006), www.bmj.com/cgi/pdf_extract/332/7541/605?ct.; Timothy Reichert, *Bitter Pill,* 203 First Things 25 (2010).

most well-known paper on this subject, *An Analysis of Out-of-Wedlock Childbearing in the United States,*[99] author Janet Yellen and other economists describe women's immiseration via increased participation in nonmarital sexual relations without any expectation of marriage, as a result of the "technology shock" constituted by the increased availability of both contraception and abortion, which increase expectations that sex must constitute a part of a nonmarital romantic relationship. HHS never considers this literature.

In fact, HHS cites *no* sources in its Brief for the claim that greater usage of contraception will reduce unintended pregnancies nationally; it simply assumes this causation. In the IOM Report upon which HHS usually relies, however, two studies are cited:[100] one by Santelli and Melnikas[101] and the other by Guttmacher.[102] Neither considers the entire U.S. population for all the years in which access to contraception has expanded, but only portions of the population over selected periods of time.[103] Neither claims to demonstrate a causal link between contraceptive usage and lowered rates of unintended pregnancy. Santelli and Melnikas claim only an

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[99] George A. Akerlof, Janet L. Yellen & Michael L. Katz, *An Analysis of Out-of-Wedlock Childbearing in the United States,* 111 Q.J. Econ. 277 (1996).

[100] IOM Report at 105.

[101] John S. Santelli & Andrea J. Melnikas, *Teen Fertility in Transition: Recent and Historic Trends in the United States,* 31 Ann. Rev. Pub. Health 371 (2010).

[102] Heather D. Boonstra et al. (Guttmacher Inst.), *Abortion In Women's Lives* (2006), http://www.guttmacher.org/pubs/2006/05/04/AiWL. pdf.

[103] Santelli & Melnikas (teens from 1990s to early 2000s); Guttmacher (unmarried women, 1982 - 2002).

"association," not causation, [104] and concede that they "do *not attempt to resolve this debate" about the "causes and consequences of teen pregnancy."*[105] They also acknowledge the phenomenon of risk compensation, [106] and the many factors that may influence teen pregnancy rates. [107] They estimate that abstinence, not contraception, contributed to at least 50% of the reported decline in teen pregnancy rates. [108] (Other scholars believe the figure is higher.[109])

The cited Guttmacher study also does not show that increased contraception usage helped reduce rates of unintended pregnancy. It states rather that "the decline in unintended pregnancy in the U.S. seems to have stalled," even with "nearly universal" use of contraceptives. [110] Two other Guttmacher studies show unintended pregnancy rates rising from 44.7% in 1994[111] to 51% by 2001, and remaining flat or edging higher through 2006,[112] during the period when women's contraceptives usage *increased* from 80% to 86%.[113] A Guttmacher journal also reports that during the period from the 1970s to today — a period during which Guttmacher and the CDC agree that the percentage of women who had "ever used" contraception rose from about 90% to 99% — unintended pregnancy rates nationally rose from 35.4% to 49%.[114]

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[104] *Id.*

[105] Santelli & Melnikas, *supra*, at 373, 377–78 (emphasis added).

[106] *Id.* at 375.

[107] *Id.* at 377-79 (mentioning the economy, population composition, family dynamics, social mores, the HIV/AIDS pandemic, and the media).

[108] *Id.* at 376.

[109] Joanna K. Mohn, Lynne R. Tingle & Reginald Finger, *An Analysis of the Causes of the Decline in Non-Marital Birth and Pregnancy Rates for Teens from 1991 to 1995,* 3 Adolesc. & Fam. Health 39 (2003) (67% attributed to abstinence and reduced sexual activity).

[110] Boonstra, *supra*, at 32.

[111] Stanley K. Henshaw, *Unintended Pregnancy in the United States,* 30 Fam. Plan. Persp. 24 (1998).

[112] Lawrence B. Finer & Stanley K. Henshaw, *Disparities in Rates of Unintended Pregnancy in the United States, 1994 and*

A CDC report tracking contraception usage from 1982 to 2008 concluded that "[c]hanges in contraceptive method choice and use have not decreased the *overall* proportion of pregnancies that are unintended between 1995 and 2008."[115] Another Guttmacher report on unintended pregnancy between 2001 and 2006, reached the same conclusion,[116] despite CDC data showing that more women in the years between 2002 and 2008 were accessing "more effective" methods of contraception.[117]

2001, 38 Persp. on Sexual Reprod. Health 90 (2006); Mosher & Jones, *supra*, at 376-77.

[113] IOM Report at 105 (citing Boonstra et al., *supra*, at 18).

[114] Christopher Tietze, *Unintended Pregnancies in the United States, 1970-1972,* 11 Fam. Plan. Persp. 186, 186 n.* (1979) ("A recent report estimates that in 1972, 35.4% percent of all U.S. pregnancies were 'unwanted' or 'wanted later,' thus providing, from an independent source, an estimate very close to the one used here.").

[115] Jo Jones, William Mosher & Kimberly Daniels, *Current Contraceptive Use in the United States, 2006-2010, and Changes in Patterns of Use Since 1995,* Nat'l Health Stat. Rep., 1, 11 (Oct. 2012), http://www.cdc.gov/nchs/data/nhsr/nhsr060.pdf.

[116] Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities: 2006,* 84 Contraception 478 (2011).

[117] Mosher & Jones, *supra*, at 5.

It should also be remembered that the rise in unintended pregnancy rates from 44.7% to 51% between 1994 and 2001 — before they settled at about 49% from 2001 to 2006 — occurred during a time period when twenty-eight states passed contraceptive insurance mandates [118] for private insurance coverage.[119] There are also a wide range of influences upon rates of unintended pregnancy (e.g. poverty, cohabitation, later marriage, and the destigmatizing of nonmarital sex and parenting[120]). HHS never mentions these or asks whether the studies cited by the IOM Report controlled for them.

Other studies HHS overlooks question or contradict its claims about the national effects of increased contraception usage. IOM's 1995 report on unintended pregnancy concludes, for example, that it is a "health condition of women for which little progress in prevention has been made despite the availability of safe and effective preventive methods."[121] The 2010 Report states that: "there has been no major progress in prevention of unintended pregnancy…."[122]

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[118] IOM Report at 108.

[119] These state laws are discussed in Nat'l Conf. of State Legislatures, *Insurance Coverage for Contraception Laws*, http://www.ncsl.org/issues-re- search/health/insurance-coverage-for-contraception-state-laws.aspx.

[120] Guttmacher Inst., *Facts on Unintended Pregnancy in the United States, supra.*

[121] IOM1995 Report at 104.

[122] Inst. Of Med., *Women's Health Research: Progress, Pitfalls, And Promise* 143 (2010).

HHS' Brief also claims that free contraception and ECs will reduce abortions[123] without offering any sources. Again, this claim seems intuitively true on an individual scale, yet has not succeeded on a national scale. The IOM Report bases its claim upon one Guttmacher study[124] reporting that between 1982 and 2002 there was a 6% rise in the proportion of unmarried women using contraception, and a decline in abortion rates.[125] The study does not address population level effects but only unmarried women, and only for a 20 year period. It variously claims that increased contraceptive usage "accompanied" or "contributed" to diminished abortion rates.[126] It makes no attempt to control for the myriad factors affecting abortion rates at that time such as the economy, mores, the partial-birth abortion debate, and changes in relationship and family structures, to name just a few. This same study admits that early society-wide adoption of contraception often results in "an increase in both contraceptive use and abortion," but claims that over time abortion rates fall.[127] The data does not bear this out. The study only considered data from 1983 to 2002.[128] The chart it references omits the years 1970 to 1982, during which time access to contraception was rising via the federal Title X program, while abortion rates were *climbing* not falling – from 14 per 1,000 women in 1973 to 24 per 1,000 in 1982. It was only after this simultaneous *rise* in rates of contraception usage and abortion rates for about 23 years post-Title X, that abortion rates began to fall, although they remained fairly high, fell slowly, and never fell below their earliest 1970s rates.[129] Also, since their falling began in the early 1990s, they have occasionally ticked up during a few years between 2000 and 2010.[130]

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[123] Brief for Pet. at 47.

[124] Boonstra, *supra*, at 18.

[125] *Id.* at 18.

[126] *Id.*

[127] *Id.* at 19.

[128] *Id.* at 17.

Finally, important material concerning the relationship between contraception and abortion was not mentioned in the Report. First, as described above,[131] some of the drugs and devices covered by the Mandate can destroy human embryos. It is nonsensical to claim that a drug or device that *causes* an early abortion *prevents* abortion. Second, women who use contraception seem more, not less, abortion minded. About 54% of all women seeking abortions were using contraception during the month they became pregnant.[132]

C. Even if free contraception and ECs could lead to fewer unintended pregnancies, HHS has not shown that unintended pregnancy is causally linked with the poor health outcomes for women that HHS claims the Mandate will prevent.

While HHS' Brief does not link unintended pregnancy with negative health outcomes for women, its earlier documents in this litigation assert such a nexus. Neither HHS' arguments, however, nor the IOM Report, demonstrate this nexus. There is further the real scientific possibility, discussed above, that some contraceptives, particularly LARCS, can harm some women, and raise rates of STIs, nonmarital pregnancies and abortion. This raises the question whether the net health effects of the Mandate upon women are positive or negative.

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[129] Ctrs. for Disease Control, *Abortion Surveillance-U.S. 2000*, 52 Morbidity and Mortality Weekly Rep. No. SS-12, 17 (2003).

[130] Stephanie J. Ventura et al., (CDC), *Estimated Rates of Pregnancy Outcomes for the U.S.,1990-2008*, 9 (June 20, 2012).

[131] *See* Section I., nn 37-39.

[132] Rachel K. Jones et al. (Guttmacher Inst.), *Characteristics Of U.S. Abortion Patients: 2008*, 7-8 (2010), http://www.guttmacher.org/ pubs/US-Abortion-Patients.pdf.

Preliminarily, it should be noted that the IOM's 1995 report on unintended pregnancy acknowledges that "research is limited" on the outcomes from unintended pregnancy, [133] and that extant studies were *not* able to demonstrate "whether the effect is ***caused by*** or ***merely associated with*** unwanted pregnancy."[134] Similarly, the leading meta-analysis cited by the IOM Report[135] concluded that "existing evidence on the impact of unintended pregnancy on child and parental health outcomes is mixed and is limited by an insufficient number of studies for some outcomes and by the aforementioned measurement and analytical concerns." [136] On the specific matter of a link between unintended pregnancy and domestic violence or depression, it concluded: "*causality is difficult if not impossible to show.*"[137]

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[133] IOM 1995 Report at 103.

[134] *Id.* at 65. Although the Report insists that it is not important to sort this out, this is both irrational and not the legal standard required in connection with a compelling governmental interest. See Section I.

[135] *See* Jessica D. Gipson et al., *supra.*

[136] *Id.* at 20.

[137] *Id.* (emphasis added).

The lack of causal evidence linking unintended pregnancy with women's smoking and drinking was treated above.[138]

The IOM Report also proposes that domestic violence is a consequence of unintended pregnancy.[139] It cites the IOM's 1995 report for this proposition although that report concluded that relevant studies could *not* establish causation.[140] Furthermore, the 2011 IOM Report failed to divulge studies suggesting *reverse* causation.[141]

HHS does not devote sufficient attention to the possibility that increasing access to contraception might directly harm women's health, though its Brief does acknowledge the serious risks associated with hormonal methods, which constitute a large fraction of FDA-recommended methods.[142] The IOM Report says only that "for women with certain medical conditions or risk factors, some contraceptive methods may be contraindicated,"[143] and that there are "side effects" which are "generally considered minimal."[144] It adds an exception for "oral contraceptive users who smoke."[145] On the matter of women's health, this treatment is insufficient.

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[138] *See supra* nn. 42-44.

[139] IOM Report at 103.

[140] IOM 1995 Report at 65.

[141] Jacquelyn C. Campbell et al., *The Influence of Abuse on Pregnancy Intention*, 5 Women's Health Issues 214 (1995); Patricia M. Dietz et al., *Unintended Pregnancy Among Adult Women Exposed To Abuse Or Household Dysfunction During Their Childhood*, 282 J. Am. Med. Ass'n 1359 (1999).

[142] Brief for Pet. at 48.

[143] IOM Report at 105.

[144] *Id.*

[145] *Id.*

First, increased STI rates have been observed among women given increased pharmacy access to ECs,[146] or LARCs.[147] Second, about 18% of American women smoke.[148] Third, while HHS states that women with particular health difficulties need to avoid pregnancy,[149] it provides no information about their current contraception usage, or how the Mandate might increase it. Also and ironically, HHS fails to note that these *very women* might be at greater risk from more expensive or hormonal contraceptives, given that the medical associations devoted to their conditions recommend avoiding hormonal methods in favor of cheaper barrier or natural methods.[150]

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[146] Christine Piette Durrance, *The Effects of Increased Access to Emergency Contraception on Sexually Transmitted Disease and Abortion Rates*, Economic Inquiry (Dec. 5, 2012), http://onlinelibrary.wiley.com/doi/10.1111/j.1465-7295.2012.00498.x/ abstract.

[147] *See supra*, n. 84.

[148] Am. Lung Ass'n, *Women and Tobacco Use*, http://www.lung.org/stop- smoking/about-smoking/facts-figures/women-and-tobacco-use.html.

[149] Pet. Brief at 47.

[150] *See, e.g., Patient Information: Marfan Syndrome, Heart Disease & Pregnancy*, http://www.heartdiseaseandpregnancy.com/pat_mar_mom.htm; Amer. Congenital Heart Ass'n., *ACHA Q and A: Birth Control for Women with Congenital Heart Disease*, Heart Matters (2008), http://www.achaheart.org/Portals/0/pdf/Library%20Education/ACHA-Q-and-A-Birth-Control-for-Women-with-CHD.pdf (reporting that barrier methods are safe but risks are greater of hormonal methods, especially pills containing estrogen, and certain IUDS); Pulmonary Hypertension Ass'n, *Birth Control And Hormonal Therapy In Pah* (2002), http://www.phassociation.org/document.doc ?id=1684 (reporting that barrier methods are "safest" and that "nearly half of ... specialists did not advocate using [pills] for

Fourth, HHS and the IOM Report fail to cite the significant literature about the direct harms caused by some contraceptives. Although modern contraceptive methods are possibly safe in most cases, they injure an unknown number of women every year. While the HHS' Brief concedes serious risks associated with hormonal methods – high blood pressure, heart attacks, blood clots and strokes [151] – it fails to mention that oral contraceptives, IUDs[152] and the Ring[153] have been the subject of myriad class action lawsuits that pharmaceutical corporations have paid hundreds of millions of dollars to settle. It overlooks recent literature showing a 9.5-times greater risk of breast cancer in women using the pill, [154] or indicating that injectable LARCs can double the risk of HIV transmission.[155] It does not

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their patients, and some actively discouraged patients from doing so . . . .").

[151] Brief for Pet. at 48.

[152] *See* Howard Ankin, *Bayer Healthcare Reaches Settlement in Yaz/Yasmin Lawsuits,* Ankin Law Office L.L.C. (May 7, 2012), http://www.ankinlaw.com/blog/bayer- healthcare-reaches-settlement-in-yazyasmin-lawsuits/; *Mirena IUD Lawsuit Update: Mirena IUD Adverse Event Reports to the FDA Exceed 45,000,* SFGATE (Nov. 26, 2012), http://www.sfgate.com/business/prweb/ article/Mirena-IUD-Lawsuit-Update-Mirena-IUD-Adverse-4067514.php#ixzz2GYR9cWxp.

[153] Marie Brenner, *Danger in the Ring,* Vanity Fair (Jan. 2014), http://www.vanityfair.com/politics/2014/01/nuvaring-lethal-contraceptive-trial.

[154] Ajeet Singh Bhadoria, et al., *Reproductive factors and breast cancer: A case-control study in tertiary care hospital of North India,* 50 Ind. J. of Cancer 316 (2013).

[155] Renee Heffron et al., *Use of Hormonal Contraceptives and Risk of HIV-1 Transmission: A Prospective Cohort Study, supra.*

mention that leading cancer associations[156] and the World Health Organization ("WHO") refer to estrogen-progesterone oral contraceptives as "known carcinogens." [157] (The D.C. Court of Appeals considered the WHO finding in rejecting HHS' claim that the Mandate will certainly improve women's health. [158])

In conclusion, HHS has not shown that the Mandate will boost contraceptive usage or that increased usage will reduce rates of unintended pregnancy or abortion. It offers no evidence showing that unintended pregnancy harms women's health in the ways it claims. Even if contraceptives have the indirect beneficial effects HHS identifies, HHS does not indicate the size of these benefits, or whether they outweigh the adverse health outcomes caused by some contraceptives, or the adverse effects of the immiseration of women in a sex and marriage marketplace shaped by contraception. In other words, the "net" health losses or health benefits of the Mandate are quite uncertain, and HHS has provided no basis for claiming otherwise.

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[156] Am. Cancer Society, *Known and Probable Human Carcinogens Introduction,* http://www.cancer.org/cancer/cancercauses/othercarcinogens/generalinformationaboutcarcinogens/known-and-probable-human-carcinogens; Int'l Agency for Research on Cancer, *Monographs on the Evaluation of Carcinogenic Risks to Humans,* http://monographs.iarc.fr/ENG/Monographs/vol72/index.php.

[157] World Health Org., *Carcinogenicity of Combined Hormonal Contraceptives and Combined Menopausal Treatment* (2005), http://www.who.int/reproductivehealth/topics/ageing/cocs_hrt_statement.pdf; Steven A. Narod et al., *Oral Contraceptives and the Risk of Breast Cancer in BRCA1 and BRCA2 Mutation Carriers,* 94 J. Nat'l Cancer Inst. 1773 (2002).

[158] *Gilardi v. U.S. Dep't of Health and Hum. Servs.*, No. 13-5069, 26 (D.C. Ct. Apps. Nov. 1, 2013) (referring to the contested evidence about contraceptives' health effects as a "tug-of-war…the government has neither acknowledged nor resolved.").

IV. HHS' CLAIMS ABOUT THE MANDATE'S EFFECT ON WOMEN'S EQUAL ACCESS TO HEALTH SERVICES ARE UNPROVEN AND ITS ARGUMENT ABOUT THE MANDATE'S CONTRIBUTION TO WOMEN'S EQUALITY AND SOCIAL INTEGRATION DEMEANS WOMEN.

Citing *Roberts v. United States Jaycees,*[159] HHS argues that "free" contraception and ECs can reduce unequal access between men and women to "recommended health-care services," thereby "removing the barriers to economic advantage and political and social integration" that have "plagued certain disadvantaged groups, including women" and "assur[e] women equal access to ... goods, privileges and advantages."[160] HHS' Memorandum below argued that free contraception and ECs ensure that women are "able to contribute to the same degree as men as healthy and productive members of society."[161] Even assuming that HHS correctly calls contraception a "recommended health-care service," HHS offers no credible scientific sources to support its claim that women have less access to health services due to its costs. Instead HHS cites a U.S. Senator's unsupported statement on women's general health costs,[162] a Medicaid and Medicare Report (which actually attributes the higher health care costs of women of child-bearing years to *maternity care, not contraceptives),*[163] another Senator's unsupported statement about women delaying costly preventive services,[164] and page 19 of the IOM Report which uses sources neither addressing the costs of contraception,[165] nor women's health care costs.[166] In short, HHS provides no evidence whatsoever that the Mandate helps equalize men's and women's health care costs.

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[159] *Roberts v. U.S. Jaycees,* 468 U.S. 609, 626 (1984)).

[160] Brief for Pet. at 49 (citing *Roberts, supra*).

[161] Def. Mem. at 25-26.

Finally, in the name of women's well-being, this Court should refuse to give HHS' second stated interest the status of a "compelling governmental interest." It is demeaning to women to suggest that women's fertility and their bearing and rearing of children, are "barriers" – "plagu[ing]" women's economic, social and political integration, and women's opportunities for "equal access to ... goods, privileges and advantages,"– requiring women's usage of more contraception and ECs. Most women aspire to and do bear and rear children. They build society itself, and need and deserve social support for this important contribution, among others. To agree with HHS that contraception and ECs are indispensable to women's equality, is to deny that society could find another way to assure respect for women's innate equality while simultaneously accommodating their aspirations both to be mothers *and* to be economically and politically integrated into society. To affirm HHS' second claimed state interest is also to suggest that the infertile male, or the male without childcare responsibilities, is the norm, and that women attain equality only by conforming to this norm. This Court ought not to breathe life into such a destructive and demeaning notion.

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[162] Brief for Pet. at 49-50.

[163] Brief for Pet. at 49. *See* Ctrs. for Medicare & Medicaid Servs., ***National Health Care Spending by Gender and Age, 2004 Highlights, supra***, at 1.

[164] Brief for Pet. at 50.

[165] IOM Report at 19.

[166] Henry J. Kaiser Family Found., ***Impact of Health Reform on Women's Access to Coverage and Care*** (2010), ***supra***.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals in *Hobby Lobby Stores, Inc.*, and reverse the judgment of the court of appeals in *Conestoga Wood Specialties Corp.*

Respectfully submitted,

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In the Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL.,
Petitioners.
v.
HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,
v.
KATHLEEN SEBELIUS, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF *AMICI CURIAE* WOMEN'S PUBLIC POLICY GROUPS AND A COALITION OF FEMALE STATE LEGISLATIVE AND EXECUTIVE BRANCH OFFICIALS IN SUPPORT OF NONGOVERNMENT PARTIES

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INTEREST OF AMICI[1]

Amici are united by their concern for women's public policy issues.

In the spirit of the original suffragettes, **Susan B. Anthony List** works for the election of candidates who champion life and oppose abortion. Its members share the conviction of Alice Paul, author of the 1923 Equal Rights Amendment, that "Abortion is the ultimate exploitation of women."

Charlotte Lozier Institute is the education and policy arm of the Susan B. Anthony List. Named after a 19th century feminist physician who, like Susan B. Anthony, championed women's rights without sacrificing either equal opportunity or the lives of the unborn, the Institute studies federal and state policies and their impact on women's health and on child and family well-being.

Concerned Women for America is the nation's largest public policy women's organization. It is committed to promoting laws that reflect Biblical principles in public policy, and among these are the principles of religious liberty, that each human life—at every stage of development—is imbued with unique dignity and value, and that in a civil society, everyone is called to care for the welfare of others, including women seeking abortions.

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[1] No counsel for a party authored this brief in whole or part, and no one other than *Amici Curiae* or their members or their counsel made a monetary contribution to the preparation or submission of this brief. Respondents in Case No. 13-354 have consented to the filing of this brief. Counsel of record for all other parties to these actions have filed with the Clerk consents to the filing of *amicus curiae* briefs.

The **Coalition of State Legislative and Executive Branch Officials** is composed of female state-level legislators and one executive official. These public officials share a commitment to promoting wise public policies that advance the health and safety of women and protect the religious freedom of all people. The public officials constituting this coalition are named individually in an Appendix to this brief.

SUMMARY OF THE ARGUMENT

(1) *The Mandate is a socially reckless policy that increases the national division surrounding abortion.*

For nearly two generations, the nation has debated the "profound moral and spiritual implications," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992), of abortion on demand. Fatigued with the contentious and controversial nature of the abortion issue, many individuals would "call[] the contending sides of [this] national controversy to end their national division." *Id.* at 867.

The federal law under challenge in this case (the "Mandate") goes in precisely the opposite direction. By forcing conscientiously opposed individuals and organizations to participate in abortion, the Mandate transforms abortion culture wars into abortion conscience wars and ushers in a new and "troublesome era in the history of our Nation." *Id.* at 1001 (Scalia, J., concurring in the judgment in part and dissenting in part).

The socially reckless character of the Mandate is further demonstrated by its departure from a long- and well-established tradition of protecting abortion conscience rights in federal law.

(2) *Women are not a monolithic class of self-interested voters who universally value free abortion drugs more than religious freedom and limited government.*

The Mandate is said to be a pro-woman measure that advances women's interests. Opposition to the Mandate is often characterized as a "war on women."

Many women are offended by this "war on women" rhetoric. No one person, and certainly not the Government, speaks for the interests of all women, and the Mandate cannot be generalized as a measure that advances the interests of all women.

The Mandate advances the interests of only that subset of women who value free abortion drugs above public goods such as religious freedom and limited government. The Mandate works against the interests of those free-minded, independent women whose personal, moral, and political values lead them to support a different balance of policy considerations.

As demonstrated by the presence of female plaintiffs in nearly a third of the more than forty-five cases that have been filed against the Mandate by for-profit parties, the Mandate also works against the interests of women who wish to own or operate businesses according to their own values.

ARGUMENT

The nongovernment parties in these actions challenge a regulation (the "Mandate") promulgated under the Patient Protection and Affordable Care Act that violates their religious freedom by forcing them to participate in abortion. *See* Br. for Resp'ts on Pet. for a Writ of Cert. at 4–5, Sebelius v. Hobby Lobby Stores, Inc., No. 13-354 (U.S. Oct. 21, 2013) ("Br. For Resp'ts"); Br. for Pet'r at 3–6, Conestoga Wood Specialties Corp. v. Sebelius, No. 13-356 (U.S. Jan. 10, 2014). The nongovernment parties explain that the Mandate forces them to violate religious beliefs by covering in health insurance plans devices and drugs that can prevent an embryo from implanting in the womb. *See* Br. for Resp'ts, *supra*, at 3–6; Br. for Pet'r, *supra*, at 1–5. The nongovernment parties believe that abortion occurs when an embryo is prevented from implanting in the womb, yet federal law imposes significant financial penalties if they refuse to cover drugs and devices that can do just that. *See* Br. for Resp'ts, *supra*, at 3, 5–6; Br. for Pet'r, *supra*, at 3–6, 8.

The nongovernment parties ably explain why being forced to participate in abortion violates federal laws protecting their religious freedom. *Amici* submit this brief to bring the following two matters to the Court's attention. First, by transforming the abortion conflict into a religious freedom conflict, the Mandate heedlessly increases the national division surrounding abortion and departs from a long- and well-established national tradition of respecting abortion-related conscience rights. Second, the Mandate should not be characterized as a "pro-woman" or "gender equality" measure in any general sense of those terms. No one person speaks for all women on these issues, many women oppose the Mandate, and women have as much an interest in religious freedom as anyone else.

I. The Mandate Is a Socially Reckless Policy that Increases the National Division Surrounding Abortion.

By forcing conscientious objectors to participate in abortion, the Mandate transforms abortion "culture wars" into abortion "conscience wars." The socially reckless character of the Mandate is further demonstrated by its departure from a long- and well-established tradition of protecting abortion-related conscience rights in federal law.

A. The Mandate Transforms Abortion "Culture Wars" into Abortion "Conscience Wars".

For nearly two generations, the nation has debated the "profound moral and spiritual implications," *Planned Parenthood*, 505 U.S. at 850, of abortion on demand. Fatigued with the "contentious" and "controversial" nature of the abortion issue, *Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (O'Connor, J., concurring), many individuals would "call[] the contending sides of [this] national controversy to end their national division," *Planned Parenthood*, 505 U.S. at 867.

The Mandate goes in precisely the opposite direction. By forcing conscientiously opposed individuals and organizations to participate in abortion, the Mandate transforms abortion "culture wars" into abortion "conscience wars," Thomas M. Messner, *From Culture Wars to Conscience Wars:*

Emerging Threats to Conscience, Heritage Foundation (Apr. 13, 2011),[2] and ushers in a new and "troublesome era in the history of our Nation," *Planned Parenthood*, 505 U.S. at 1001 (Scalia, J., concurring in the judgment in part and dissenting in part).

In discussing abortion, this Court has repeatedly invoked the concept of freedom from governmental intrusion in the choices of private citizens. *See id.* at 851 (opinion of the Court) (explaining that the Court's "cases recognize the right . . . to be free from unwarranted *governmental intrusion* into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (emphasis added and internal quotation marks omitted)); *Maher v. Roe*, 432 U.S. 464, 471 (1977) (explaining that *Roe v. Wade* "[drew] on a group of disparate cases restricting *governmental intrusion*, physical coercion, and criminal prohibition of certain activities" (emphasis added)). The abortion right, as declared by this Court, is freedom from government intrusion in the choice to have an abortion. The abortion right is not a right to support for abortion from the government, *see Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511 (1989) (citing cases that "support the view that the State need not commit any resources to performing abortions"), much less a right to command support for abortion from other private citizens, *see infra* Section I.B (providing federal laws protecting conscience in abortion context).

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[2] *Available at* http://www.heritage.org/research/reports/2011/04/from-culture-wars-to-conscience-wars-emerging-threats-to-conscience.

Without adding anything to the freedom from government intrusion invoked in this Court's abortion decisions, the Mandate directly intrudes on the choice *not* to participate in abortion by imposing financial penalties on employers that refuse to provide insurance coverage that includes drugs and devices that can cause abortion. This reshuffling of interests between private citizens as well as between private citizens and the government is significant: Not even the Government has an obligation to support abortion, and federal law has long protected the choice of private citizens not to participate in abortion, yet through the Mandate the Government now forces some private citizens to support abortion for other private citizens even if doing so violates religious beliefs.

By forcing private citizens to participate in abortion, the Government transforms what this Court has declared to be a constitutional freedom from government intrusion in the choice to participate in abortion into a government-enforced right to command support for abortion from other private citizens. In so doing, the Mandate turns the abortion debate upside down and guarantees that what is already "one of the most contentious and controversial [issues] in contemporary American society," ***Stenberg***, 530 U.S. at 947 (O'Connor, J., concurring), will become only more contentious and controversial. In short, not only does the Mandate violate the religious freedom of the nongovernment parties in this case and other individuals and entities that are similarly situated, it does so in a way that recklessly increases national division and further polarizes an already very polarized society.

B. The Mandate Departs from a National Tradition of Protecting Conscience Rights in the Abortion Context.

The socially reckless character of the Mandate is further demonstrated by its departure from a long- and well-established tradition of recognizing the need for abortion-related conscience rights and protecting those rights in federal law.

In *Roe v. Wade*, for example, this Court cited abortion-related conscience protections embraced by the American Medical Association ("AMA"). *See* 410 U.S. 113, 143 & n.38 (1973). In describing the history of AMA viewpoints regarding abortion, the Court cited an AMA resolution that described abortion coldly as "'a medical procedure'" but also stated that "'[n]either physician, hospital, nor hospital personnel shall be required to perform any act violative of personally-held moral principles.'" *Id.* at 143 n.38. Similarly, in *Doe v. Bolton*, 410 U.S. 179, 197–98 (1973), the companion case to *Roe*, this Court cited abortion-related conscience protections provided by Georgia law. "These provisions obviously are in the statute," the Court wrote, "in order to afford appropriate protection to the individual and to the denominational hospital." *Id.* at 198; *see Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 312 (9th Cir. 1974) (discussing how state conscience protections factored into *Doe* decision).

Then, just months after this Court decided the *Roe* and *Doe* cases, Congress passed federal legislation commonly referred to as the Church Amendment, which protects abortion-related conscience rights of both individuals and institutions. *See* Health Programs Extension Act of 1973, § 401, Pub. L. No. 93-45, 87

Stat. 91, 95 (codified as amended at 42 U.S.C. § 300a-7 (2012)). Senator Ted Kennedy, who would become known for his vocal support of abortion rights, spoke in favor of the Church Amendment during debate in the Senate, *see* 119 Cong. Rec. 9601-02 (1973), and Members of Congress overwhelmingly supported the legislation, *see* 119 Cong. Rec. 9604 (1973) (Senate vote on Church Amendment as introduced in Senate was 92-1); 119 Cong. Rec. 17462-63(1973) (House vote on bill including generally similar but reworked conscience protection amendment was 372-1); 119 Cong. Rec. 18072 (1973) (Senate vote on House amendments to Senate bill, including amendment to conscience protection, was 94-0). In enacting the Church Amendment, "Congress quite properly sought to protect the freedom of religion of those with religious or moral scruples against . . . abortions." *Chrisman*, 506 F.2d at 312.

Since Congress passed the Church Amendment in 1973, the principle of conscientious objection has been repeatedly affirmed and, today, federal law contains several protections for rights of conscience in the context of abortion. *See* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, div. H (Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2014), tit. V (General Provisions), § 507(d)(1) (2014) (stating that "[n]one of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions"); *id.*, div. B

(Commerce, Justice, Science, and Related Agencies Appropriations Act, 2014), tit. ii (Department of Justice), § 203 (stating that "[n]one of the funds appropriated under this title shall be used to require any person to perform, or facilitate in any way the performance of, any abortion"); 42 U.S.C. § 238n(a) (1996) (establishing that neither the Federal Government nor any State or local government that receives Federal financial assistance may "subject any health care entity to discrimination" on several bases related to not participating in abortion); 20 U.S.C. § 1688 (1988) (prohibiting a federal sex discrimination provision from being "construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion"); 42 U.S.C. § 2996f(b)(8) (2010) (restricting funds made available by the Legal Services Corporation from being used "to provide legal assistance with respect to any proceeding or litigation which seeks . . . to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion, contrary to the religious beliefs or moral convictions of such individual or institution"); *see also* Mark L. Rienzi, *The Constitutional Right Not to Kill*, 62 EMORY L. J. 121, 147–52 (2012) (discussing federal abortion-related conscience protections); *Current Federal Laws Protecting Conscience Rights*, U.S. Conference of Catholic Bishops (July 2012) (providing text of several federal abortion-related conscience protections along with explanatory notes and timeline).[3]

The Mandate violates the commonsense understanding reflected by these policies that, even as the public continues to debate the issue of abortion, conscientiously opposed citizens and institutions should not be forced to violate their beliefs.

* * *

The Court should protect religious freedom for the reasons set forth in the briefs submitted by the nongovernment parties. By protecting religious freedom, the Court will uphold a long tradition of respecting abortion conscience rights and prevent abortion "culture wars" from mushrooming into abortion "conscience wars."

II. Women Are Not a Monolithic Class of Self-Interested Voters Who Universally Value Free Abortion Drugs More than Religious Freedom and Limited Government.

The Government frames the Mandate as a policy designed to advance the interests of women. *See* Coverage of Certain Preventative Services Under the Affordable Care Act, 78 Fed. Reg. 39873, 39873 (July 2, 2013) (asserting regulatory interests in "public health" and "gender equity").[4] Indeed, opposition to the

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[3] *Available at* http://www.usccb.org/issues-and-action/religious-liberty/conscience-protection/upload/Federal-Conscience-Laws.pdf.

[4] *Available at* http://www.gpo.gov/fdsys/pkg/FR-2013-07-02/pdf/2013-15866.pdf.

Mandate has sometimes been characterized as a "war on women."

However, many women are offended by the "war on women" rhetoric because it suggests all women think the same way on these issues. Many women oppose the Mandate. In addition, as demonstrated concretely by the many female plaintiffs challenging the Mandate in federal courts, women have just as much an interest in religious freedom as anyone else.

A. Many Women Are Offended by the "War on Women" Rhetoric Used to Describe Opposition to the Mandate.

The "war on women" rhetoric used to describe opposition to the Mandate "belittle[s] women's intellectual freedom to make up our own minds on the merits of ideas," Jennifer A. Marshall, *'War on women?' Beware the liberal hyperbole*, TwinCities.com (Mar. 29, 2012),[5] and is offensive to the many women "who do not want to be treated as a lump category whose thinking stops at our reproductive organs," Asma T. Uddin and Ashley McGuire, *It's about religious liberty, not birth control*, On Faith (Mar. 7, 2012).[6] On issues involving reproductive health in particular, it is both inaccurate and insulting to suggest that "all women are cut from the same political cloth," Kathryn Jean Lopez, *The War*

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[5] *Available at* http://www.twincities.com/ci_20276024/jennifer-marshall-war-women-beware-liberal-hyperbole.

[6] *Available at* http://www.faithstreet.com/onfaith/2012/03/07/beyond-the-war-on-women-its-about-religious-liberty-not-birth-control/11110.

on Men, Nat'l Rev. Online (Mar. 19, 2012),[7] or that the female "gender somehow thinks and votes as a monolithic block," Uddin & McGuire, *supra*.

Indeed, the time for "stereotyped notions of women's interests," *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996), is long past. As the renowned legal scholar and women's leader Helen Alvaré has explained, "[n]o one speaks for all women" on the kinds of issues raised by the Mandate, Helen M. Alvaré and Kim Daniels, *Open Letter to President Obama, Secretary Sebelius and Members of Congress*,[8] and more than 40,000 women have signed their names agreeing with that statement, *see id.* (click on "View the more than 40,000 Signatures").

B. Women Have as Much an Interest in Religious Freedom as Anyone Else. Women Have Been Named as Plaintiffs in Nearly a Third of the More than Forty-Five "For-Profit" Cases Filed Against the Mandate.

Given the wide range of viewpoints held by women on public policy issues including those raised by the Mandate, it should come as no surprise that many women oppose the Mandate. *See* WPA Opinion Research Poll (Dec. 6, 2013) (finding that "[a] majority of women ages 18 to 54 (54%) oppose the Mandate");[9] *see also, e.g.*, Press Release, U.S. Congressman Diane Black, People Shouldn't Have to Choose Between Health Coverage and Conscience (Jan. 3, 2014);[10] Press Release, Concerned Women for America, Statement of Penny Young Nance on Justice Sonia Sotomayor's HHS Mandate Decision (Jan. 1, 2014).[11] In the words of one woman, the Mandate's attack on "the free exercise of religion . . . is a war on freedom that should concern all Americans, and particularly women." Jennifer A. Marshall, ***The War on Women's Freedom***, The Foundry (Feb. 18, 2012).[12]

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[7] *Available at* http://www.nationalreview.com/articles/293740/war-men-kathryn-jean-lopez.

[8] *Available at* http://womenspeakforthemselves.com/ (last visited Jan. 27, 2014).

Women have as much an interest in religious freedom as anyone else, *see* Asma T. Uddin, Testimony before the Judiciary Comm. of the U.S. House of Representatives (Feb. 28, 2012) (testifying that "it is just as much in women's interest to protect [the] right [to religious freedom] as it is in men's"),[13] and not just as an important public good, but also as a vital individual and institutional freedom. For those women who own or operate businesses and object to participating in abortion, the threats posed by the Mandate are concrete and real: Of the more than forty-five cases that have been filed against the Mandate by for-profit parties, *see* The Becket Fund for Religious Liberty, HHS Mandate Information Central,[14] women have been named as plaintiffs in almost a third, *see* Br. for Resp'ts on Pet. for a Writ of Cert. at 1, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 678 (2013) (No. 13-354) (stating that parties challenging the Mandate include Barbara Green, Darsee Lett, other family members, and "their family businesses"); First Am. Verified Compl. at ¶ 13, *Conestoga Wood Specialties Corp. v. Sebelius*, 917 F. Supp. 2d 394 (E.D. Pa. 2013) (No. 5:12-cv-06744-MSG) (asserting that "Plaintiff Elizabeth Hahn, is a shareholder of Plaintiff Conestoga and is a member of the Board of Directors"), *aff'd*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013); Verified Compl. for Declaratory & Injunctive Relief at ¶ 15, *Feltl & Co. v. Sebelius*, No. 0:13-cv-02635-DWF-JJK (D. Minn. Sep. 25, 2013) (asserting that Plaintiff Mary Jo Feltl "is the grantor of the Mary Joanne Feltl JCF Trust, which is a minority owner of [Plaintiff Feltl and Company, Inc.]," and is also the President of Feltl and Company, Inc.); Verified Compl. at ¶¶ 2–4, *Armstrong v. Sebelius*, No. 1:13-cv-00563-RBJ (D. Colo. Sep. 17, 2013), 2013 WL 5213640 (describing plaintiffs, including Plaintiff Dorothy A. Shanahan), *appeal filed*, No. 13-1480 (10th Cir. Nov. 15, 2013); Verified Compl. at ¶¶ 6, 11, 13, *Trijicon, Inc.*

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[9] *Available at* http://downloads.frc.org/EF/EF13K71.pdf.

[10] *Available at* http://black.house.gov/press-release/case-you-missed-it-people-shouldnt-have-choose-between-health-coverage-and-conscience.

[11] *Available at* http://www.cwfa.org/statement-of-penny-young-nance-on-justice-sonia-sotomayors-hhs-Mandate-decision/#sthash.6R78ZvCU.dpuf.

[12] *Available at* http://blog.heritage.org/2012/02/18/the-war-on-womens-freedom/.

[13] *Available at* http://www.becketfund.org/wp-content/uploads/2012/02/Testimony-Oral-Asma-EMBARGOED.pdf.

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[14] *Available at* http://www.becketfund.org/hhsinformationcentral/ (last visited Jan. 20, 2014).

v. Sebelius, No. 1:13-cv-01207-EGS (D.D.C. Aug. 5, 2013) (asserting that Plaintiffs Sharon Lycos and BethAnne Falkowski, along with other individual plaintiffs, are shareholders of Plaintiff Trijicon, Inc. and participate in the operation and management of the company); Compl. at ¶¶ 25, 31, *Mersino Mgmt. Co. v. Sebelius,* No. 2:13-cv-11296-PDB-RSW (E.D. Mich. Mar. 22, 2013) (asserting that "Plaintiff Mersino Management is [a] management company and provides the insurance for" companies including Mersino Southwest, LLC and Mersino Enterprises, Inc. and that "Plaintiff Karen A. Mersino is the owner and shareholder of . . Mersino Southwest, LLC and Mersino Enterprises, Inc."), *appeal filed*, No. 13-1944 (6th Cir. July 11, 2013); Compl. at ¶¶ 13-14, *Johnson Welded Prods., Inc. v. Sebelius*, No. 1:13-cv-00609-ESH (D.D.C. Apr. 30, 2013) (asserting that Plaintiff Lilli Johnson is "the mother of seven children," is "the President and majority owner of [Plaintiff Johnson Welded Products, Inc.]," and "makes the executive decisions governing the operations of [Plaintiff Johnson Welded Products, Inc.]"); Compl. for Declaratory & Injunctive Relief at ¶ 3, *Hartenbower v. U.S. Dep't of Health & Human Servs.*, No. 1:13-cv-02253 (N.D. Ill. Mar. 26, 2013) (asserting that Plaintiff Catherine Hartenbower and second individual plaintiff "together own a controlling interest in Plaintiff Hart Electric, LLC and Plaintiff H.I. Hart, LLC"); Compl. at ¶ 3, *Bick Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No 4:13-cv-00462-AGF (E.D. Mo. Mar. 13, 2013) (naming Mary Frances Callahan, Mary Clare Bick, Mary Patricia Davies, Mary Margaret Jonz, and Mary Sarah Alexander as plaintiffs who, along with other individual plaintiffs, "own the controlling interest" in Plaintiff Bick Holdings, Inc. and its subsidiaries);

Compl. at ¶¶ 2, 4, *Yep v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013) (asserting that Plaintiff Mary Anne Yep and another individual plaintiff "own and control the corporate plaintiff, Triune Health Group, Inc., an Illinois corporation"), *appeal filed*, No. 13-1478 (7th Cir. Mar. 5, 2013); First Am. Compl. at ¶ 3, *Geneva Coll. v. Sebelius*, 941 F. Supp. 2d 672 (W.D. Pa. May 31, 2012) (No. 2:12-cv-00207-JFC) (asserting that Plaintiff Carrie E. Kolesar and her father, along with other individuals, own Plaintiff Seneca Hardwood Lumber Company, Inc.), *appeal filed*, No. 13-2814 (3d Cir. June 17, 2013); Verified Compl. & Demand for Injunctive Relief at ¶ 18, *Autocam Corp. v. Sebelius*, No. 1:12-cv-01096-RJJ (W.D. Mich. Oct. 8, 2012), 2012 WL 6845677 (asserting that Plaintiff Margaret Kennedy is an owner of Plaintiff Autocam), *aff'd*, 730 F.3d 618 (6th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3245 (U.S. Oct. 15, 2013) (No. 13-482); First Am. Verified Compl. at ¶ 15, *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (No. 1:12-cv-1123-JLK) (asserting that Plaintiff Christine Ketterhagen "is a 25% shareholder of Plaintiff Hercules Industries, Inc." and "is one of the four members of the Board of Directors"), *aff'd*, No. 12-1380, 2013 WL 5481997 (10th Cir. Oct. 3, 2013); Compl. for Declaratory & Injunctive Relief at ¶ 3, *Korte v. U.S. Dep't of Health & Human Servs.*, 912 F. Supp. 2d 735 (S.D. Ill. 2012) (No. 3:12-CV-01072-MJR-PMF) (asserting that Plaintiff Jane E. Korte and a second individual plaintiff are "equal shareholders who together own a controlling interest in Plaintiff Korte & Luitjohan Contractors, Inc."), *rev'd sub nom.*, *Korte v. Sebelius*, 735 F.3d 654 (7th Cir. 2013); *see also* Class Action Compl. at ¶¶ 11–13, *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, No. 1:13-

cv-02611-WJM-BNB (D. Colo. Sept. 24, 2013), 2013 WL 6839900 (describing two plaintiff *non-profit* corporations that "are controlled by and associated with the Little Sisters of the Poor, an international Congregation of Catholic Sisters"), *injunction pending appeal granted* (U.S. Jan. 24, 2014) (No. 13A691).

The federal court actions brought by these women—along with opposition by women to the Mandate more generally—demonstrates the flaw in describing the Mandate as a "pro-woman" or "gender equality" measure in any general sense of those terms.

C. The Mandate Benefits only Some, Not All, Women. The Court Should Avoid Characterizing the Mandate as a "Pro-Woman" or "Gender Equality" Measure in Any General Sense of those Terms.

The Court should resist characterizing the Mandate as a "pro-woman" or "gender equality" measure in any general sense of those terms. The Mandate advances the interests of only that subset of women who value free abortion drugs above public goods such as religious freedom and limited government. The Mandate works against the interests of those free-minded, independent women whose personal, moral, religious, or political values lead them to support a different balance of policy considerations. As demonstrated by the many female plaintiffs challenging the Mandate in federal courts, *see supra* at 15–18, the Mandate also works against the interests of those women who depend upon religious freedom to own or operate businesses in a way that is consistent with their own values.

Amici strongly resist any suggestion by the Government or others that women are a monolithic class of self-interested voters who universally value free abortion drugs more than religious freedom and limited government. *Amici* respectfully urge the Court, in analyzing the interests asserted by the Government for the Mandate: to accurately describe the limited class of individuals that purportedly benefit from the Mandate; to recognize that many women oppose the Mandate and in some cases are directly harmed by it; and to remember that not all women conform or desire to conform their beliefs, values, or actions to the Government's viewpoint on abortion and religious freedom.

CONCLUSION

The Court should protect religious freedom by ruling in favor of the nongovernment parties.

Respectfully submitted,

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January 28, 2014

APPENDIX

APPENDIX

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Appendix A: List of female state-level legislators and one executive official joining brief as a Coalition of State Legislative and Executive Branch Officials . . . . . App. 1

APPENDIX A

The female state-level legislators and one executive branch official who join this brief as a Coalition of State Legislative and Executive Branch Officials include the Honorable:

Sen. Elsie Arntzen (R-MT)
Del. Kathy Afzali (R-MD)
Rep. Nancy Ballance (R-MT)
Sen. Debby Barrett (R-MT)
Sen. Nancy Barto (R-AZ)
Rep. Joanne Blyton (R-MT)
Rep. Wanda Brown (R-MO)
Sen. Dee Brown (R-MT)
Rep. Christy Clark (R-MT)
Rep. Terri Collins (R-AL)
Rep. Debra Conrad (R-NC)
Rep. Jane Cormier (R-NH)
Sen. Margaret Dayton (R-UT)
Lt. Gov. Sue Ellspermann (R-IN)
Rep. Ellie Espling (R-ME)
Sen. Jennifer Fielder (R-MT)
Rep. Diane Franklin (R-MO)
Rep. Bette Grande (R-ND)
Rep. Stacey Guerin (R-ME)
Rep. Jenna Haggar (R-SD)
Rep. Kristin Hansen (R-MT)
Rep. Pat Hurley (R-NC)

Rep. Pat Ingraham(R-MT)
Rep. Stephanie Klick (R-TX)
Sen. Joyce Krawiec (R-NC)
Sen. Shantel Krebs (R-SD)
Rep. Sarah Laszloffy (R-MT)
Rep. Jodie Laubenberg (R-TX)
Sen. Mary Lazich (R-WI)
Rep. Donna Lichtenegger (R-MO)
Asm. Alison Littell McHose (R-NJ)
Rep. Melissa Magstadt (R-SD)
Del. Susan McComas (R-MD)
Rep. Pat McElraft (R-NC)
Rep. Donna Oberlander (R-PA)
Rep. Betty Olson (R-SD)
Rep. Lenette Peterson (R-NH)
Sen. Shirley Randleman (R-NC)
Rep. Kathy Rapp (R-PA)
Rep. Courtney Rogers (R-TN)
Rep. Lori Saine (R-CO)
Rep. Jacqueline Schaffer (R-NC)
Rep. Donna Sheldon (R-GA)
Sen. Margaret Sitte (R-ND)
Del. Kathy Szeliga (R-MD)
Sen. Janna Taylor (R-MT)
Rep. Wendy Warburton (R-MT)
Sen. Kimberly Yee (R-AZ)